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CALIFORNIA REPORTER

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PACIFIC REPORTER SECOND SERIES



51 P.2d — 52 P.2d

TO BE CITED BY VOLUME AND PAGE
OF THE
PACIFIC REPORTER
SECOND SERIES

ST. PAUL, MINN.
WEST PUBLISHING CO.

1941

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Pacific Reporter, Second Series, Vol. 51, Nos. 1, 2

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Pacific Reporter, Second Series, Vol. 51, Nos. 3, 4;
Vol. 52, Nos. 1-3.

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SECOND SERIES

4 Cal.2d 589

**SVENSKA EVANGELISKA MISSIONS-
FORSAMLINGEN, AT TURLOCK, v.**

WEAVER et al.

Sac. 4971.

Supreme Court of California.

Nov. 12, 1935.

Appeal and error ⚙786

Where deed by surviving grantor, though erroneous in designation of grantee, was valid when reformed, and breach, if any, was barred by limitations, and plaintiff had title by adverse possession, defendants' appeal was frivolous and motion to affirm judgment for plaintiff was granted.

In Bank.

Appeal from Superior Court, Stanislaus County; E. N. Rector, Judge.

Action by the Svenska Evangeliska Missionsforsamlingen, at Turlock, California against Roy E. Weaver, etc., and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

L. J. Maddux and T. B. Scott, both of Modesto, for appellants.

W. Coburn Cook, of Turlock, for respondent.

PER CURIAM.

On the submission of the cause after argument, the Chief Justice announced

⚙For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

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that the motion to dismiss or affirm was granted, and that the judgment was affirmed upon all the grounds stated in the motion.

The court is convinced that the appeal is frivolous. The deed to the property in question contained no condition subsequent, and expressly contemplated possible sale of the premises. The breach, if any, was in 1903 or before, and the statute of limitations has long since barred any possible claim of defendants. The deed by the surviving grantor, though erroneous in designation of the grantee, was perfectly valid when reformed. Plaintiff has adversely possessed the premises, under color of title, for many years, and has full title by adverse possession, if nothing else.

The judgment of the lower court is affirmed.



4 Cal.2d 514

FITTS et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

GREGORY et al. v. SAME.

S. F. 15377, 14976.

Supreme Court of California.

Oct. 29, 1935.

Rehearing Denied Nov. 25, 1935.

1. Indictment and information ☞140(1)

Superior court in which motions to quash indictments were filed prior to entry of pleas thereto had jurisdiction to determine whether grand jury had been properly selected, drawn, and impaneled.

2. Prohibition ☞5(4)

Erroneous determination of whether grand jury had been properly selected, drawn, and impaneled on motions to quash indictments returned by grand jury *held* not to warrant issuance of writ of prohibition restraining court from proceeding further.

3. Prohibition ☞3(2)

Sole question presented in proceeding for writ of prohibition is one of jurisdiction, and prohibition cannot be made to subserve purposes of writ of error or be extended in corrective scope to review of errors of law committed by tribunal, corporation, board, or person having jurisdiction of proceeding (Code Civ. Proc. § 1102).

4. Indictment and information ☞137(6)

Mere irregularities in indictment returned by grand jury which acts under color of

authority, although not strictly regular in organization, as distinguished from jurisdictional defects in indictment returned by body having no semblance of authority to act, will not justify court's declaring indictment to be nullity.

5. Indictment and information ☞10

Grand jury which was selected from list which had not been prepared in compliance with statute, and which was impaneled by judges who were prejudiced as to type of person to be selected and as to method of selection, and against person subsequently indicted, and who acted out of open court in impanelment of jury, *held* de facto grand jury and indictments returned thereby were not void (Code Civ. Proc. §§ 204d, 206, 1102).

6. Grand jury ☞39

Appearance of unauthorized and ineligible person before grand jury in violation of statute, while jury was engaged solely in preliminary determination of whether appointment of special counsel was necessary, *held* not to deprive court of jurisdiction to proceed on indictment returned by such grand jury (Pen. Code, § 925; Code Civ. Proc. § 1102).

7. Grand jury ☞34

Misconduct of special counsel before grand jury *held* mere irregularity in proceedings leading to return of indictments and insufficient to invalidate indictments and deprive court of jurisdiction to proceed thereunder (Code Civ. Proc. § 1102).

8. Grand jury ☞33

Participation of judge presiding over grand jury in activities having to do with preliminary investigations, employment of investigators, and publishing of attack upon person subsequently indicted by grand jury, which was handed to members of grand jury, *held* mere irregularity in proceedings leading to return of indictments which were not invalidated thereby (Code Civ. Proc. § 1102).

In Bank.

Two original proceedings by Buron Fitts and another, and by George G. Gregory and others, for writs of prohibition against the Superior Court of the State of California in and for the County of Los Angeles.

Applications denied, and writs discharged.

Walter K. Tuller and Joseph Scott, both of Los Angeles, Roland G. Swaffield of Long Beach, Jerry Giesler, Jack Gilchrist, Harold Judson, and O'Melveny, Tuller & Myers, all of Los Angeles, Swaf-

field & Swaffield, of Long Beach, Byron C. Hanna, of Los Angeles, and H. P. Bledsoe, of Hollywood, for petitioners.

Everett W. Mattoon, Co. Counsel, S. V. O. Prichard, Deputy Co. Counsel, and Clyde C. Shoemaker, Sp. Counsel, all of Los Angeles, for respondent.

WASTE, Chief Justice.

Petitioners seek writs of prohibition, directed to the respondent superior court, to stay further proceedings therein in connection with or based upon certain indictments found and presented against them by the grand jury of Los Angeles county during the year 1934. Subsequent to the return of said indictments and prior to the entry of pleas thereto, the petitioners filed in the respondent court certain motions by which it was sought to quash and set aside the indictments. At the hearings upon these several motions an abundance of evidence was adduced by the petitioners in an effort to support their contentions that the indictments were void and of no effect because found and returned by an invalid and unconstitutionally organized grand jury. The people opposed the motions to quash and offered evidence which conflicted in many material respects with that introduced by the petitioners. Thereafter the several motions were denied by the respondent court. These proceedings in prohibition followed. Because of the many issues common to both proceedings, we have consolidated them for the purposes of this opinion. In passing upon these common points, we shall consider the full record presented thereon in each proceeding. Any issues peculiar to either of said proceedings shall, of course, receive separate consideration upon such portions of the respective records particularly applicable thereto.

The respective petitions contain the same grounds as a basis for a writ of prohibition upon which, in the respondent court, the petitioners moved to quash and set aside the indictments because of their asserted invalidity. Considered individually, or collectively, these attacks upon the indictments, though many and varied, have one main objective, namely, the establishment of the contention that they were found and returned by a body of persons styled a grand jury that was neither in law nor in fact a valid, constitutional grand jury.

At this point we shall generally state petitioners' several contentions having to do with the asserted improper impanelment of the grand jury. In support of their position that the 1934 grand jury of Los Angeles county had no valid existence and that the indictments returned by it against petitioners are void, it is urged: (a) That the grand jury list for that year was not prepared in substantial compliance with the provisions of sections 204d and 206 of the Code of Civil Procedure, in that the order establishing the same was not the act of a majority of the judges of the respondent court and that the names appended thereto were not apportioned among the several wards and townships as required by law; (b) that the judges intrusted with the duty of impaneling the grand jury were biased and prejudiced not only as to the type of person who should be selected for service upon the grand jury or excused, regardless of questions of legal qualification, disqualification, exemption, or excuse, but were also biased and prejudiced against the requirement of the law that a grand jury be selected by lot; (c) that the judges who presided over and impaneled the grand jury were biased and prejudiced against petitioners, or some of them; (d) that the grand jury was not impaneled in open court, or by the court, but was impaneled, for the most part, by the judges acting in chambers and out of court; (e) that the judges intrusted with the duty of impaneling the grand jury invited, received, and considered information out of court, in private, and without the sanction of an oath, touching upon the fitness of the persons whose names had been drawn from the grand jury box as prospective grand jurors; and (f) that as a result of the foregoing the petitioners were denied the equal protection of the laws and due process of law in violation of the state and federal constitutions.

Preliminarily it should be noted that no challenge is made to the panel or to the individual members of the grand jury. Indeed, such a challenge is not permitted since the 1911 amendment of section 995 of the Penal Code (St. 1911, p. 435). We mention in passing that petitioners expressly disclaim any contention that the members of the grand jury, individually or collectively, were lacking in the qualifications essential to the office or were biased or prejudiced toward petitioners, or any of them. The attack is launched sole-

ly at the method of their selection and impanelment. We therefore direct our attention to the contentions above outlined. Other contentions, touching upon the functioning, rather than the impaneling of the grand jury, and having to do with the asserted appearance of an unauthorized person before that body and with certain alleged prejudicial misconduct in its presence upon the part of special counsel regularly appointed to assist it, will receive consideration later in the opinion.

[1,2] At the threshold of any discussion of the several attacks upon the methods adopted for the selecting, drawing, and impaneling of the grand jury that returned the indictments against petitioners, we are confronted with the preliminary, yet fundamental, issue having to do with the propriety of the remedy of prohibition under the circumstances here presented. We cannot agree with the petitioners that prohibition is available to them in their assault upon the formation of the grand jury. There can be no dissent from the proposition that the respondent superior court, acting upon the motions presented to it by the petitioners in the causes therein pending against petitioners, had jurisdiction to determine, correctly or erroneously, on the evidence before it, whether the grand jury had been properly selected, drawn, and impaneled. If the respondent court had jurisdiction to determine these several matters, an erroneous determination thereof, even if conceded, would not serve to oust it of jurisdiction or constitute an excess of jurisdiction so as to warrant the issuance of a writ of prohibition to restrain it from proceeding further in the premises.

[3] The sole question which is presented or may be considered in a proceeding upon a writ of prohibition is one of jurisdiction. In the language of section 1102 of the Code of Civil Procedure, the office of the writ is to arrest "the proceedings of any tribunal, corporation, board, or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person." In this state, generally speaking, the rule has been strictly adhered to that neither prohibition, nor any other writ, the sole object of which is to try the question of jurisdiction, can be made to subserve the purposes of a writ of error or be extended in its corrective scope to the

review of errors of law committed by any "tribunal, corporation, board or person," in a proceeding of which such "tribunal, corporation, board or person," has jurisdiction under the law. This doctrine has been declared in numerous decisions. *Pacific States Sav. & Loan Co. v. Superior Court*, 217 Cal. 517, 521, 19 P.(2d) 977; *United Sec. Bank & Trust Co. v. Superior Court*, 205 Cal. 167, 174, 270 P. 184; *Holland v. Superior Court*, 121 Cal. App. 523, 525, 9 P.(2d) 531; *In re Hatch*, 9 Cal. App. 333, 334, 335, 99 P. 398; *Borello v. Superior Court*, 8 Cal. App. 215, 218, 96 P. 404.

[4,5] In so concluding, we are of the view that the circumstances giving rise to these proceedings are readily distinguishable from those involved in *Bruner v. Superior Court*, 92 Cal. 239, 28 P. 341, relied on by the petitioners, in that the indictments returned by the grand jury against petitioners conferred jurisdiction upon the respondent court, even though it be assumed, without deciding, that the grand jury that returned the same was selected and impaneled in the manner alleged by petitioners. We are not to be understood as condoning or approving the above-enumerated methods and practices alleged to have been resorted to in the impanelment of the grand jury. It is our view that such practices, assuming they occurred, would not affect the jurisdiction of the respondent court to try the petitioners thereon.

In *Bruner v. Superior Court*, *supra*, upon which petitioners rely, the petitioner procured a writ of prohibition restraining the Superior Court from proceeding further against him upon certain purported indictments alleged to have been returned by a body of men that had no legal existence as a grand jury. The decision in that case was by a divided court, three of the justices dissenting. We are not inclined to extend the rule of that case beyond the peculiar facts to which it was there applied. In our opinion, the *Bruner Case* presented a factual situation distinguishable from the one here involved. It was there admitted that the court charged with the duty of impaneling the grand jury had, in complete disregard of statutory provisions to the contrary, appointed an elisor to summon certain of the grand jurors, in the absence of a showing that the sheriff was disqualified to perform that duty. The elisor summoned nine persons whom the

court accepted and seated as grand jurors. Under the admitted facts of that case, it may be said that the appointment of the so-called elisor was without and in excess of the jurisdiction of the court. An elisor should not have been appointed unless and until the disqualification of the sheriff was made to appear. In effect, it was therefore held in that case by a majority of the justices that the nine persons summoned by the elisor were mere intruders and that consequently the grand jury was without semblance of authority, and any indictment returned by it was a nullity and failed to confer jurisdiction upon the superior court to try the petitioner.

A reading of the Bruner Case indicates that it was not decided upon any theory of error or irregularity in the proceedings leading to the impanelment of the grand jury, but that it was based upon the admitted total absence of an essential jurisdictional fact (a finding that the sheriff was disqualified) requisite to the organization of a valid grand jury through the instrumentality of an elisor. Had the court there charged with the duty of impaneling the grand jury found that the sheriff was disqualified, upon a consideration of facts tending but actually insufficient to support such conclusion, we are satisfied there would not have been an excess of jurisdiction warranting the issuance of a writ of prohibition. In the latter event, there would have been merely error in the procedure leading to the impanelment of the grand jury, precluding the issuance of a writ of prohibition.

Mere irregularities, as distinguished from jurisdictional defects, occurring in the formation of a grand jury, will not justify a court declaring an indictment a nullity. *People v. Murphy*, 71 Cal. App. 176, 180, 235 P. 51. The true distinction lies between the acts of a body having no semblance of authority to act, and of a body which, though not strictly regular in its organization, is, nevertheless, acting under a color of authority. In *re Gannon*, 69 Cal. 541, 11 P. 240, 243; *People v. Southwell*, 46 Cal. 141, 150; *People v. Leonard*, 106 Cal. 302, 39 P. 617; In *re Hatch*, supra, 9 Cal. App. 333, 335, 99 P. 398; *People v. Petrea*, 92 N. Y. 128.

In our opinion, the Bruner Case comes within the former category, while the present case comes within the latter. Disregarding, for the present, all conflicts in

the evidence and conceding petitioners' many assaults upon the indictments, it cannot be said that the grand jury that returned the indictments against petitioners had no semblance of authority, or acted without color of lawful right. In other words, accepting petitioners' contentions at their face value, it must be held, under the authorities last above cited, that the grand jury was at least a *de facto* grand jury. That the proceedings and acts of a *de facto* grand jury are valid and entitled to full credit is settled by the cited cases. Quoting briefly from *In re Gannon*, supra, we find it there stated that "it is therefore sufficient, to maintain the authority of a grand jury, that it has acted under color of lawful authority. An indictment found by a *de facto* grand jury is as regular as one found by a *de jure* grand jury."

Here, as distinguished from the Bruner Case, the attacks made by petitioners fail to show the absence of any essential jurisdictional fact in the organization of the grand jury. On the contrary, and even if it be conceded that the several matters of which complaint is made actually occurred in the manner contended, they would constitute but a series of irregularities or errors insufficient in character to amount to an excess of jurisdiction in the impanelment of the grand jury and insufficient to deprive the respondent court of jurisdiction to try petitioners on the indictments returned against them.

In view of what has been said, petitioners' assaults upon the methods alleged to have been employed in the selecting, drawing, and impaneling of the grand jury, even if substantiated, would not warrant the issuance of a writ of prohibition under the circumstances here involved. We do not propose to discuss the many cases cited by petitioners in support of a contrary conclusion. While many of them involved issues somewhat similar in character to those here involved, they were presented under varying factual situations.

There is nothing in *Terrill v. Superior Court*, 6 Cal. Unrep. 398, 60 P. 38, 39, opposed to our conclusion herein. In that case a demurrer to the indictment was allowed whereupon the court made an order resubmitting the matter to the same grand jury which had found the original indictment. In applying for a writ of prohibition to restrain his trial upon the

second indictment, petitioner relied upon section 1008 of the Penal Code, which then provided that if a demurrer be allowed it is a bar to another prosecution, unless the court "directs the case to be submitted to another grand jury." It was correctly held in that case that the order allowing the demurrer was a bar to another prosecution by the same grand jury. In other words, the same grand jury was clearly without jurisdiction to reindict the petitioner. This jurisdictional defect brought the case within the rule of the Bruner Case, to which reference was there made. However, it is significant to note that the decision in the Terrill Case, *supra*, recognizes the rule applied in the present case. The opinion declares, in part: "This is not a case where a grand jury, irregularly impaneled, acting under the semblance of right and lawful authority, but in the procedure affording every advantage to the accused he would have enjoyed had the proceedings been regular, has presented an accusation to a court having jurisdiction to try him. * * * Nor is it an irregular assemblage of men legally qualified to act, and who do act, under the control of the proper court. Here the grand jury had no authority to act at all in the matter. The jurors were not qualified to act, and that fact was a matter of record." The decision in that case is placed upon the correct principle that the body of men that found the indictment, under the provisions of the statute, had no power to act. That is not the present case.

[6] Nor do we think the contentions touching upon the functioning rather than the impaneling of the grand jury, even if presently conceded to have merit, would warrant the issuance of a writ of prohibition. In this connection it is urged that while the grand jury was in session determining whether charges should be filed against petitioners, or some of them, it permitted an unauthorized and ineligible person to appear before it and make certain unsworn statements regarding such inquiry, in violation of section 925 of the Penal Code. The present case is distinguishable from the case of *Husband v. Superior Court*, 128 Cal. App. 444, 17 P.(2d) 764, relied on by petitioners. In the cited case an unauthorized person was present before the grand jury during the taking of evidence which resulted in

the indictment there assailed. The record in the present case indicates that the grand jury was not engaged in the actual investigation of the office of the district attorney and did not receive any evidence or engage in any deliberations in the presence of the asserted unauthorized person, but was, at the time of which complaint is made, concerned solely with the preliminary matter of determining whether the appointment of special counsel was advisable or necessary. However, aside from the factual distinction that exists between the present case and the *Husband Case*, *supra*, we have grave doubts as to the propriety of the holding in that case which permits the issuance of a writ of mandate to compel the dismissal of an indictment upon the ground that an unauthorized person appeared before the grand jury, in violation of section 925, *supra*, during the hearings on the charges leading to the indictment. Since the denial of a hearing in the *Husband Case*, we have had this identical question before us in the application of *Haight and Kemp v. Superior Court* (S. F. 14921),¹ wherein we denied an application for a writ of mandate to compel the dismissal of an indictment because of the alleged improper appearance of unauthorized persons before the grand jury. We were then of the opinion, which we still maintain, that it would be a dangerous precedent, under such circumstances, to allow a writ of mandate, or other prerogative writ, to be used to inquire into the regularity of every indictment returned by a grand jury. This reasoning is in line with the holding of this court in *People v. Delhantie*, 163 Cal. 461, 465, 125 P. 1066, 1068, wherein it is declared: "The jurisdiction of the superior court was not dependent upon compliance with the provisions of section 925, Penal Code. It obtained jurisdiction of the cause for all purposes by reason of the presentation by the grand jury of the indictment charging defendant with the crime of murder, alleged to have been committed in Marin county."

[7] It is next urged that special counsel in summing up the evidence for the grand jury before the return of the indictments against petitioners, or some of them, resorted to inflammatory arguments and demanded that indictments be returned. His conduct is condemned as

¹ No opinion filed.

constituting an illegal influence that served to invalidate the indictments. Misconduct on the part of special counsel, even if conceded to exist, would not present anything of a jurisdictional character warranting the issuance of a writ of prohibition. At the most, it would constitute but an irregularity in the proceedings leading to the return of the indictments and would not invalidate the same.

[8] What has been said under the preceding point applies equally to the contention that the judge who presided over the grand jury had participated in certain "activities" having to do with preliminary investigations, the employment of investigators, the publishing of an asserted vicious and scurrilous document attacking the petitioner Fitts, which is said to have been handed to the members of the grand jury, and other matters too numerous to mention.

The foregoing adequately disposes of the principal contentions of the petitioners. Other matters not herein specifically referred to do not call for the issuance of a writ of prohibition.

The respective applications are denied, and the alternative writs heretofore issued are, and each is, discharged.

We concur: SHENK, J.; THOMPSON, J.; LANGDON, J.

CURTIS, Justice (concurring).

I concur in the judgment with the greatest reluctance. I am satisfied, in view of the provisions of our codes and the decisions of this and our appellate courts relative to the selection and impanelment of grand juries, no different result could be reached from that which is set forth in the opinion signed by a majority of this court. It is apparent from the authorities cited that prohibition will not lie to restrain the trial of the petitioners upon the indictments found by the grand jury, as the members thereof were regularly summoned into court, after their names had been drawn from the grand jury box, where they had been deposited in pursuance of the law governing the selection and returning of grand jurors. Code Civ. Proc. §§ 204 to 211. The jury, therefore, was lawfully drawn and all members thereof were eligible to act, provided they met the qualifications fixed by law.

The method employed by the trial court in the selection and impanelment of the grand jury, which found the indictment against petitioners, was so unusual and unprecedented and so fraught with gravest dangers that it is a matter of regret with me that there is not to be found some legal authority whereby the courts might declare all acts of a jury so selected absolutely void, including the indictment against petitioners. There is no dispute as to the manner in which said grand jury was selected and impaneled. In response to an order of the trial court directing a grand jury to be drawn for the year 1934, twenty-eight prospective jurors appeared in court at the time and place fixed by the court for the impanelment of said jury. These prospective jurors were sworn in open court to answer questions as to their qualifications to act as such jurors, whereupon the court declared a recess and the trial judge repaired to his chambers with the court reporter where he interrogated each prospective juror behind closed doors and without the hearing of any person whatever, except himself, the reporter, and the juror under examination. The questions of the trial judge related not only to the qualifications of the juror, but they went far afield into the private life of the juror under examination and into matters entirely foreign to his qualifications to act as a juror. He was asked as to his business connections, his financial status, his political affiliations, his fraternal connections, and, in some instances, his religious beliefs. After being so examined, each juror, with the exception of four who had been excused during the examination, was told to return to court one week hence. On the day fixed the twenty-four of the panel who had not been excused returned to court. After calling the roll, the trial judge announced that he desired to interview all of them again in his chambers and that he had asked the presiding judge of the court to sit with him during said examination. Whereupon the trial judge, the presiding judge, and the court reporter repaired to the chambers of the trial judge, where each member of the panel was separately called into the judge's chambers and there again examined as before, although not as minutely or extensively yet upon the same general matters as were gone into in his previous examination. This examination was also held behind closed doors, and the only

persons present beside the juror under examination were the trial judge, the presiding judge, and the court reporter. At the conclusion of this examination the trial judge resumed his seat upon the bench and called the names of sixteen of the prospective jurors and ordered them to return to court one week from that day. At the same time he announced that those of the panel whose names had not been called were excused. Eight were thus excused. No reason whatever was given at the time by the trial judge why any of said persons was excused from service upon said jury. At this same session of court the trial judge made an order for the drawing of twelve additional jurors from the grand jury box to complete the number required for a legal grand jury of nineteen. This order was complied with and the list of persons whose names were drawn was delivered to the sheriff for service, together with an order that the persons so served appear in court one week from that day. On the day appointed the trial judge, after having those on the new panel sworn to answer questions regarding their qualifications, announced that he had asked the presiding judge of said court to sit with him during the further impaneling of the jury, and directed that each member of the new panel, one at a time, come into his chambers where the presiding judge "and myself will question and discuss the matter with you in chambers." Whereupon the trial judge announced a recess of court, and the presiding judge, the trial judge, and the court reporter repaired to the chambers of the trial judge, where the two judges examined each member of the new panel in substantially the same manner and concerning the same matters as the members of the original panel had been examined. At the close of this examination the trial judge assumed his seat upon the bench and announced that of the sixteen persons of the original panel two had been excused. He then directed the clerk to put into the jury box the names of seven members of the new panel and to withdraw therefrom five names. This was done, and an order was made that the fourteen persons from the original panel and five from the new panel constitute the grand jury of said county for the year 1934.

In criticizing the method of selecting and impaneling the grand jury employed by the trial judge, I do not wish to be put in the

position of impugning the motives or questioning the integrity of either the presiding or trial judge. They may have been, and I believe were, actuated by the best intentions and purest motives, and their sole object in pursuing the method employed by them was to secure an impartial and fearless body of men as a grand jury who would meet and handle a serious situation which these judges evidently believed to have existed within their county. But the method employed in the selection of this jury in the hands of a less scrupulous official would make it possible for him to hand pick a jury, and one which might do his bidding either in punishing enemies or protecting friends, or both. He could exclude from the jury all friends of any particular person, and impanel a jury of his adversaries. And when we venture into the realm of business rivalry, political entanglements, and religious controversies, there is no limit to which our imaginations would carry us respecting the injustice and wrongs that may be wrought by an unscrupulous judge in following the method employed by the trial judge in selecting and impaneling the jury in the present instance. It is not what has been done in following this method, but what may be done thereunder, that renders it dangerous and obnoxious to our sense of justice.

I am satisfied that the remedy of prohibition will not reach the dangerous method followed in this instance, and therefore have concurred in the judgment. The question as to what remedy is applicable is not before us. It may be that the law is such that no relief may be had under any of the remedial provisions of our statutes. If such is the case the situation is much more serious and calls for earnest thought and grave concern on the part of those who are concerned in the administration of justice. Our opinion expressly refrains from approving the methods and practices of the trial judge, and impliedly condemns the same as irregular and improper.

SEAWELL, Justice (concurring).

I concur in the conclusion reached by the main opinion. I am also in accord with the positive and enlarged views expressed by Mr. Justice CURTIS as to the dangers that may obtain in the organization of grand juries, if the method adopted in the instant matter should grow into a precedent.

4 Cal.2d 547

**DOMESTIC & FOREIGN PETROLEUM CO.,
Limited, v. LONG et al.
L. A. 14743.**

Supreme Court of California.

Oct. 31, 1935.

1. Licenses ⇨18½

Assignments by individual lessees of undivided interests in oil and gas produced under lease, with provision that drilling operations should be limited to grantors or persons designated by them, *held* "securities," which could not lawfully be transferred without license (St. 1917, p. 675, § 3; St. 1929, pp. 1251, 1252, §§ 2(a), 3, 6, 7).

[Ed. Note.—For other definitions of "Security," see Words & Phrases.]

2. Licenses ⇨18½

Individuals owning oil and gas lease, who in private transactions transferred interests in oil and gas to be produced therefrom, without offering interest to the public, *held* nevertheless subject to regulation as "issuers" of securities, since term "issue" does not imply offer to public (St. 1917, p. 675, § 3; St. 1929, pp. 1251, 1252, §§ 2(a), 3, 6, 7).

[Ed. Note.—For other definitions of "Issue," see Words & Phrases.]

3. Licenses ⇨39

Assignee of oil and gas lease was not entitled to set aside transfers by assignor of fractional interests in oil and gas produced under lease, in suit against transferees, though transfers were made without permit from Commissioner of Corporations, but transferees of fractional interests, except one who received transfer in consideration of surrendering leasehold interest, were entitled to adjudication of validity of their shares as against assignee of lease (St. 1917, p. 675, § 3; St. 1929, pp. 1251, 1252, §§ 2(a), 3, 6, 7).

4. Judgment ⇨544

Final adjudication of inferior court made within its jurisdiction is binding upon a higher court.

5. Judgment ⇨543

Where two actions involving same issue are pending simultaneously, first final judgment renders issue *res judicata* in other court.

6. Judgment ⇨543

Where judgment in one suit becomes final while appeal is pending from judgment in another action involving same issue, first final judgment may be relied on as *res judicata* in reviewing court.

7. Judgment ⇨948(1)

Plea of *res judicata* may be waived, and party intending to rely thereon must produce evidence of former adjudication (Code Civ. Proc. § 1962, subd. 6).

8. Judgment ⇨956(5)

Other parts of record in addition to certified copy of judgment, and in some cases evidence outside record, may be required to establish scope of prior adjudication (Code Civ. Proc. § 1905).

9. Appeal and error ⇨179(1)

Plea of *res judicata* asserted on appeal *held* waived where no proof of prior judgment was made aside from unverified statement as to rendition and effect of judgment, and particular defendants bound by judgment were not named (Code Civ. Proc. §§ 1905, 1962, subd. 6).

10. Mines and minerals ⇨74

Transferees of undivided interests in oil and gas produced under lease, whose units contained no provision making their interests subject to charge for maintenance, and who had no notice of provision in contract between lessees and drillers requiring such a charge, could not be charged with maintenance deduction, but owners of leasehold must bear burden resulting from omission.

11. Mines and minerals ⇨74

Purchasers of some of units representing undivided interests in oil and gas produced under lease and providing for deduction of maintenance charge were not thereby placed on notice that other units, which provided for carrying on operations without liability to grantees, should also have provided for deduction.

In Bank.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by the Domestic & Foreign Petroleum Company, Limited, against James I. Long and others. From the judgment, plaintiff appeals.

Reversed as to defendant E. Earl Parish, and affirmed as to the other defendants.

Prior opinion, 42 P.(2d) 1085.

George E. Cryer and R. Alston Jones, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Ralph O. Marron, Deputy Atty. Gen., amici curiæ.

Newby & Newby, Earl A. Everett, and James I. Long, all of Los Angeles (Robert E. Austin and Charles R. Newby, both

of Los Angeles, of counsel), for respondents.

SEAWELL, Justice.

Plaintiff Domestic & Foreign Petroleum Company, Limited, appeals from a judgment for defendant in this action for declaratory relief. Said plaintiff is the assignee of an oil and gas lease covering property in Los Angeles county, and is now producing oil from a well on the premises. Its predecessors in the ownership of the leasehold estate assigned percentages of the oil and gas to be produced during the lease without procuring a permit to make such assignments from the Commissioner of Corporations. The plaintiff was not a party to these transfers, but acquired the leasehold some time after they were completed. It contends that said transfers were void by reason of having been made without a permit, and that the transferees have no rights in oil produced from the property, or in the proceeds from the sale thereof. The defendants are the owners of the percentage interests transferred by plaintiff's predecessors without a permit. They pray that the interests assigned to them be declared valid and binding on plaintiff. The trial court gave judgment for defendants on the theory that in so far as the Corporate Securities Act (St. 1917, p. 673, as amended) attempted to require an individual lessee to obtain a permit to make assignments such as those under which defendants claim, it was unconstitutional.

The plaintiff's predecessors in ownership of the oil lease made other transfers under permit from the Corporation Commissioner. The interests transferred under permit all provided that they should "be subject to a charge of not more than \$8.-00 per 1/100 undivided interest per month for the maintenance of said well. * * *" The assignments executed without a permit contained no such provision. Plaintiff also prayed that in the event the court upheld the validity of the interests transferred without permit, it determine that these interests in the circumstances shown were subject to the same charge as the interests sold under permit. The court ruled against this contention, except as to defendants Lewis Chester and Jennie Chester.

Owners of the interests assigned under permit intervened in the action. They prayed that the court adjudge the inter-

ests sold without permit to be invalid, on the theory that if they were invalid the percentages represented thereby could be retained or resold by plaintiff subject to a deduction to create a maintenance fund, which would redound to their benefit. The interveners filed a notice of appeal, but did not perfect their appeal by payment of the required fee.

The provisions of the Corporate Securities Act as amended in 1929 apply to the proceeding herein. Section 2 (a) 7 provides: "The word 'security' shall include any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation, certificate of interest in a profit-sharing agreement, certificate of interest in an oil, gas or mining lease * * * any transferable share, investment contract, or beneficial interest in title to property, profits or earnings or any other instrument commonly known as a security." (St. 1929, pp. 1251, 1252.) Section 3 provides that "no company shall sell * * * or offer for sale, negotiate for sale of, or take subscriptions for any security of its own issue until it shall have first applied for and secured from the commissioner a permit authorizing it so to do." St. 1917, p. 675. Individuals are brought within this prohibition by section 2 (a) 6, as follows: "The word 'individual' in so far as it is included in the definition of a 'company,' includes only persons selling, offering for sale, negotiating for the sale of or taking subscriptions for any security of their own issue." St. 1929, pp. 1251, 1252. See, also, section 2 (a) 3.

It is settled by our recent decision in *People v. Craven*, 219 Cal. 522, 27 P.(2d) 906, that oil interests such as those transferred without permit herein are "securities" within the meaning of the act, and that the individual lessee who issues such interests may constitutionally be required to obtain a permit therefor. The application of the *Craven* Case to the present appeal will be apparent from a statement of the facts of the instant case.

On September 24, 1930, Grace Thompson Bysshe, Frank A. Arbuckle, and E. Earl Parish by assignment became owners as tenants in common of an oil and gas lease. On September 27, 1930, they entered into a drilling contract with Parnell McDermott, H. R. Aten, and Charles D. Tanksley, by which these persons agreed to drill a well in consideration of cash pay-

ments of \$25,000 and an assignment of an undivided 20/100 or 1/5 interest in all oil, petroleum, gas, and other hydrocarbon substances to be produced and saved during the lease from the well drilled by said persons, and 20 per cent. of all moneys derived from the sale of such substances. The cash payment was to be raised by the lessees through the sale of oil units. The drilling contract provided that all units retained or sold by the lessees and the 20 per cent. assigned to the drillers should "be subject to a maintenance charge of Eight (\$8.00) Dollars, which sum shall be used for the maintenance of said Senator Well No. 1, including the payment of taxes." It was not contemplated by this agreement that the drillers should operate the well after bringing it to completion, but only that they should drill it.

The lessees obtained a permit from the Corporation Commissioner on October 30, 1930, to issue to the drillers twenty 1 per cent. interests, as provided in the drilling contract, and to sell to the public twenty-one 1 per cent. interests for cash. These units were issued to the drillers and sold to the public. The interests attacked in this proceeding, for a total of 10½ per cent. of the production, were assigned by the lessees without permit as follows:

(1) On or before September 30, 1930, the lessees made five separate transfers of varying percentages, totaling 4½ per cent. The assignment to James I. Long, Jr., was in payment of legal services rendered to the lessees by Nathan Newby, Jr., who directed that the transfer be made to Long. The consideration for the assignments to Henry J. Dike, Frances J. Dike, and L. A. Dickerson was services rendered by Henry J. Dike in procuring the oil leasehold and negotiating the drilling contract. The assignment of a 2 per cent. interest to B. Frances Driscoll was for cash.

(2) On or about November 14, 1930, a 2 per cent. interest was assigned to defendant E. Earl Parish in consideration of Parish transferring to the other lessees, Arbuckle and Bysshe, and to Morgan J. Quill, his interest in the leasehold estate.

(3) On November 28, 1930, a 4 per cent. interest was transferred to Arbuckle in consideration of his surrendering to Bysshe and Quill his interest in the leasehold. Arbuckle, subsequently, on December 1, 1930, assigned 2 per cent. to defendant E. Earl Parish, who, in turn, transferred one-third of 1 per cent. to defend-

ants Lewis Chester and Jennie Chester. On December 2, 1930, Arbuckle transferred the other 2 per cent. interest remaining in him to defendants Samuel A. Gaede and Kathryn B. Gaede.

The above assignments made without permit are identical in wording with the instruments executed by the lessees under permit, except that, as noted above, the nonpermit assignments contained no provision for a deduction for maintenance expenses, and with the further exception that the nonpermit assignments grant an undivided interest in all oil and other substances to be produced and saved during the existence of the lease and moneys derived from the sale thereof, while the permit assignments grant an undivided interest in oil and other substances to be produced from Senator Well No. 1 during the lease, and moneys derived from the sale thereof. It does not appear that there is any other well on the property.

[1] It is the contention of defendants that the lessees herein did not issue a security, but granted undivided interests in the leasehold estate, which leasehold is an estate in real property, or in the oil to be produced therefrom; that the instruments of transfer are entitled "grant deed," and use the words "grant" and "convey," which are appropriate to a deed rather than to a certificate of interest or a security.

The contention that the interests are not securities is fully answered by our decision in *People v. Craven*, 219 Cal. 522, 27 P. (2d) 906, 907. See notes, 23 Cal. Law Rev. 353; 22 Cal. Law Rev. 341. It is urged that the *Craven* Case merely determined the constitutionality of legislation which required the issuer of "certificate[s] of interest in an oil * * * lease" to procure a permit, without deciding that the instruments were such a security within the act, for the reason that a stipulation was made in the form of the statute that the defendant therein sold certificates of interest in an oil and gas lease. The force of our decision cannot be thus avoided. The court could scarcely consider whether the act was constitutional in so far as it required the individual issuer of a "certificate of interest in an oil * * * lease" to procure a permit without considering the nature of the instruments or assignments embraced within the definition of that term. After quoting the definition of security contained in the act of 1929 and 1925, the opinion squarely states: "Under

either of these provisions of the statute, there can be no question but that the certificates of interest sold by the defendant were securities." The court further holds: "Under these sections of the act [sec. 3 (Stats. 1917, p. 673) sec. 2 (a) 6 and 7; sec. 2 (a) 3 (Stats. 1929, p. 1251)] it is clear that an individual, as well as a company or corporation, is prohibited from selling or negotiating for the sale of any security of his own issue. The evidence in the case clearly shows that the certificates of interest in the leases which were sold by defendant were of his own issue; he having executed and delivered said certificates as completely and effectively as a corporation would issue its shares of stock." 219 Cal. 522, 524, 525, 27 P.(2d) 906. For definition of word "issue" see *Blythe v. Doheny* (C. C. A.) 73 F.(2d) 799, 803.

The decision fully sustains the constitutionality of the provisions of the Corporate Securities Act which require an individual to obtain a permit to issue securities as applied to an individual oil lessee who assigns oil interests such as those in the *Craven* Case and in the case now before us. The court distinguishes *People v. Pace*, 73 Cal. App. 548, 238 P. 1089, and *People v. Lesser*, 123 Cal. App. 489, 11 P.(2d) 668. Those cases involved sales of personally owned securities by an individual owner who was not the issuer or underwriter. Section 2 (c) 3 and (a) 10 (St. 1929, pp. 1251, 1254) recognize the rule of *People v. Pace*, supra. Our decision in *People v. Craven*, supra, further points out that when the facts upon which *Buttrick v. Seines*, 209 Cal. 567, 289 P. 616, arose, an individual issuer of securities was not required to obtain a permit by the provisions of the act.

The assignments to defendants in the instant case of percentages of oil and other substances to be produced during the lease, and money to be derived from the sale thereof, were not bare assignments of an undivided interest in the leasehold estate. It was not contemplated that the lessees and their assignees should be mere tenants in common in the rights conferred by the lease; that is, the right to go upon the land and drill for and produce oil. Both the permit and the nonpermit assignments expressly provided that the grantors or such persons as they might designate should be the only persons authorized to drill for or produce oil, and that the grantees should "not have any voice concerning

said operations." Instruments such as those in the *Craven* Case and the instant case are not issued to persons who expect to reap a profit from their own services and efforts exerted in the management and operation of oil-bearing property, but to those in the category of investors, who, for a consideration paid, stipulate for a right to share in the profits or proceeds of a business enterprise or venture to be conducted by others. The defendants herein have less voice in the control of the enterprise than stockholders in a corporation, who may vote at stockholders' meetings.

In decisions in this state and in other jurisdictions where it has been contended that a transaction under attack did not come within the Corporate Securities Act because it constituted only a sale of specific real or personal property or an interest therein, the courts have looked through form to substance and found that in fact the transaction contemplated the conduct of a business enterprise by others than the purchasers, in the profits or proceeds of which the purchasers were to share. *People v. Claggett*, 130 Cal. App. 141, 19 P. (2d) 805; *People v. Shafer*, 130 Cal. App. 74, 19 P.(2d) 861; *Gracchi v. Friedlander*, 93 Cal. App. 770, 270 P. 235; *People v. McCalla*, 63 Cal. App. 783, 220 P. 436; *O'Connell v. Union Drilling Co.*, 121 Cal. App. 302, 8 P.(2d) 867; *Black v. Solano Co.*, 114 Cal. App. 170, 299 P. 843. Cases from other jurisdictions: *Cecil B. De Mille Productions v. Woolery* (C. C. A.) 61 F.(2d) 45; *State v. Nordstrom*, 169 Minn. 214, 210 N. W. 1001; *Schmidt v. Stortz*, 208 Mo. App. 439, 236 S. W. 694; *State of North Carolina v. Heath*, 199 N. C. 135, 153 S. W. 855, 87 A. L. R. 37, with comprehensive note on *Blue Sky Laws* at page 42; *Kerst v. Nelson*, 171 Minn. 191, 213 N. W. 904, 54 A. L. R. 495; *State of Minnesota v. Swenson*, 172 Minn. 277, 215 N. W. 177, 54 A. L. R. 490; *State v. Robbins*, 185 Minn. 202, 240 N. W. 456; *Prohaska v. Hemmer-Miller Development Co.*, 256 Ill. App. 331. Such interests are generally declared to be investment contracts, which are included in the definition of "security" in the *Blue Sky Law* of this and other states, and may also be "certificates of interest or participation," or "certificates of interest in a profit sharing agreement" within the act. See, also, *People v. White*, 124 Cal. App. 548, 12 P.(2d) 1078; *People v. Oliver*, 102 Cal. App. 29, 36, 40, 282 P. 813; *People v. Leach*, 106 Cal. App. 442, 448, 449, 450,

290 P. 131; on the other hand, see *People v. Steele*, 2 Cal.App.(2d) 370, 36 P.(2d) 40, where the enterprise was to be conducted by the investor himself, and the instrument was held not to be a security.

Indeed, in the absence of any specific provision in the Corporate Securities Act expressly bringing oil interests within the definition of "security," the individual owners of an oil lease who, as in the instant case, transfer to others the right to participate in the proceeds from an oil production enterprise to be conducted by the lessees, create an investment contract, or certificate of interest or participation, as those terms are defined and explained in the cases cited in the above paragraph. The specific reference in the definition of "security" as it stood at the time of the transactions herein to "certificate of interest in an oil, gas or mining lease," and in the act as it now reads to "certificate of interest in an oil, gas or mining title or lease," may seem to bring within the definition instruments besides those which represent a right to share in the proceeds of an oil production enterprise to be conducted by others. Whether the terms have this effect, and any questions as to constitutionality which may be involved, we need not decide herein. Instruments of the class involved in the instant case are "securities" under the law.

[2] Defendants further contend that if it may be held that the instruments constitute "securities" under the act, nevertheless the lessees herein were not "issuers" of securities, for the reason that the term "issue" contemplates a series of units offered to the public. In *People v. Craven*, supra, the evidence showed that the interests were offered to the public and sales made in consequence of a public offer. The interests attacked on this appeal were not offered to the public, but created in private transactions. In 1929 instruments formerly included within the definition of "security" only when they were offered to the public (St. 1925, p. 963, § 2, subd. 7) were listed together with other securities in a single paragraph, section 2 (a) 7, with no specification in said section as to any of the instruments listed requiring an offer to the public. St. 1929, pp. 1251, 1252. Section 2 (b) 11, excepts promissory notes not offered to the public, but the act makes no other exception based on absence of a public offer. In *Reno v. American Ice Machine Co.*, 72 Cal. App.

409, 237 P. 784, it was held prior to 1929 as to corporate stock, defined as a security without reference as to whether it was offered to the public, that a corporation was required to obtain a permit to issue its shares to an employee in a private transaction with him. We are of the view that the elimination of the phrase "offered to the public" as to other securities evinced a legislative intent to define as securities all instruments listed, although disposed of in private transactions. The federal Circuit Court of Appeals thus interpreted the act in *Cecil B. De Mille Productions, Inc., v. Woolery*, 61 F.(2d) 45, which involved fractional interests in gross proceeds from oil produced.

It may be ascertained from records of the Commissioner of Corporations that a large percentage of the applications examined are for closed permits, that is, for permits to issue securities in private transactions. See article 18, Cal. Law Rev. 255. The requirement of an offer to the public is not read into the act through the use of the word "issue." *Reno v. American Ice Machine Co.*, 72 Cal. App. 409, 237 P. 784; *Michell v. Grass Valley Gold Mines Co.*, 206 Cal. 609, 275 P. 418.

The state may control the issuance of securities by corporations under its power to regulate corporations, which exist under charter from the state. Its right to regulate the individual issuer of securities presents a different problem. It is settled by our decisions in *People v. Craven*, supra, and *In re Leach*, 215 Cal. 536, 12 P.(2d) 3, that the state may require an individual who issues securities to the public to obtain a permit. See, also, *People v. White*, 124 Cal. App. 548, 12 P.(2d) 1078; *People v. Oliver*, 102 Cal. App. 29, 36, 40, 282 P. 813. We are of the view that the state may also require a permit although the individual proposes to issue securities in private transactions. *Cecil B. De Mille Productions, Inc., v. Woolery*, supra. By providing for the investigation of proposed securities before they are issued our legislation aims "to regulate and control the class and character of securities or investments that might be offered to the public." *Hayden Plan Co. v. Friedlander*, 97 Cal. App. 12, 275 P. 253. Securities originally issued in bona fide private transactions may subsequently be offered to the public. In this state, where the rule of *People v. Pace*, supra, prevails, limiting the right of the state to require an

individual who is neither the issuer nor underwriter to obtain a permit to sell personally owned securities (§ 2 (c) 3 and (a) 10), it is of special importance that the Corporation Commissioner should have authority to investigate all securities at the time of their original issuance.

[3] We conclude on this branch of the case that the lessees, predecessors of plaintiff herein, who transferred interests in oil and gas to be produced, aggregating 10½ per cent. of the production, without a permit, violated the Corporate Securities Act. Defendants, who are the owners of these interests, nevertheless do not seek to rescind nor to recover damages, but, rather, pray that the court determine the securities to be valid as to them, and binding upon plaintiff as successor in interest of the lessees by whom the securities were issued. In support of the right of the court to make such an adjudication, defendants rely on *Eberhard v. Pacific Southwest Loan & Mortgage Corporation*, 215 Cal. 226, 9 P.(2d) 302, and several cases following that decision, particularly *Western Oil & Refining Co. v. Venago Oil Corporation*, 218 Cal. 733, at page 743, 24 P.(2d) 971, 975, 88 A. L. R. 1271, where we summarize the facts and holding of the *Eberhard* Case as follows:

"In the *Eberhard* Case an action was brought to foreclose a mortgage securing a note held by plaintiff, which was one of a series of notes secured by mortgage and issued by the mortgagor. In defense of the foreclosure action the corporation mortgagor alleged that the notes and mortgages composing the series were all securities within the language of the Corporate Securities Act, and having been issued and sold without the permit of the Corporation Commissioner were void, wherefore defendant prayed judgment against plaintiffs, declaring that plaintiffs take nothing, and that said note and mortgage be declared null and void. In sustaining the judgment of the trial court ordering foreclosure of the mortgage, this court said:

"If, however, for the purposes of this opinion, the necessity for a permit be conceded, there is nothing whatsoever to show that plaintiffs are anything more than the innocent victims of appellant, which now seeks to profit by its own deliberate wrong.

"The inhibitions of the Corporate Securities Act (*Deering's Gen. Laws*, 1923, Supp. 1927, 1929, p. 3287, Act 3814) against sales of securities to the public

without permits are meant to protect the public from imposition and deception—not primarily to benefit the seller. The seller and the purchaser are therefore in no sense in *pari delicto* where this provision is violated. The fact that the transaction may be void at the behest of the purchaser, is not to allow a premium for real wrong done by the seller. The fundamental maxim that "no one can take advantage of his own wrong" (section 3517, Civ. Code), and other kindred principles, immediately recur to the mind."

Following this quotation from the *Eberhard* Case, the opinion in *Western Oil & Refining Co. v. Venago Oil Corporation* proceeds: "In the *Eberhard* Case the action was brought to foreclose the mortgage securing the note, and not solely to obtain a money judgment for the amount advanced. The action was based, and the judgment awarded, on the terms of the instruments, which it was contended had been issued in violation of the act, rather than on a rescission and disaffirmance of said instruments."

The question left undecided in the *Eberhard* Case as to whether the instruments were securities for which a permit should have been obtained was settled in *Re Leach*, 215 Cal. 536, 12 P.(2d) 3, wherein it was held that such instruments were securities.

The holding in the *Eberhard* Case was followed in *Braunstein v. Title Guarantee & Trust Co.*, 216 Cal. 780, 17 P.(2d) 104, and *Security-First National Bank v. J. G. Ruddle Properties, Inc.*, 218 Cal. 435, 23 P.(2d) 1016, and then in *Western Oil & Refining Co. v. Venago Oil Corporation*, supra, which is directly in point in the instant case. There, as in the instant case, an individual owner of an oil and gas lease transferred fractional interests in the oil and gas to be produced without a permit. The well proved successful, and the assignees did not desire to rescind or recover damages, but to rely on the assignments to them. Upon the authority of the *Eberhard* Case we upheld the right of the assignees to demand that said assignments be binding upon the lessee and its transferee of the leasehold. We further said in 218 Cal. 733, at page 745, 24 P.(2d) 971, 976, 88 A. L. R. 1271: "The Corporate Securities Act was designed to protect purchasers from worthless securities. In the case herein the units proved to be valuable, notwithstanding they were is-

sued without a permit. If the issuer of securities, or the assignee of his lease with notice, were permitted to defeat the sale of fractional interests of oil and gas to be produced, the anomalous situation would exist that the issuer of fractional interests in oil and gas to be produced who violated the law by failing to procure a permit would be in a better position than the individual who complied with the law. The owner who sold units without a permit would be enabled to retain the entire production of the well and reap a large profit, and this, although the act was enacted for the benefit of purchasers."

All the defendants are entitled to rely on the above principle except defendant E. Earl Parish, who must be held to have been in *pari delicto* with the issuers of the securities. He, together with Arbuckle and Bysshe, the other lessees, on or about September 30, 1930, issued five assignments. On November 14, 1930, he received the assignment of a 2 per cent. interest in consideration of his surrender of his interest in the leasehold. Thus, within a short period he appeared as both assignor and assignee. In this situation it must be held in the absence of evidence of special circumstances that in the transaction in which he appeared as assignee he was equally culpable with his assignors. *Randall v. California Land Buyers Syndicate*, 217 Cal. 594, 20 P.(2d) 331; *Michell v. Grass Valley Gold Mines Co.*, 206 Cal. 609, 615, 275 P. 418.

Arbuckle, another of the joint lessees, was in the same position as Parish as to the 4 per cent. assignment to him on November 28, 1930. But he has assigned his entire interest to other persons; a 2 per cent. interest to defendants Samuel A. Gaede and Kathryn B. Gaede, and the other 2 per cent. to defendant E. Earl Parish, who, in turn, assigned one-third of 1 per cent. to defendants Jennie Chester and Lewis Chester. Except for the 1½ per cent. interest retained by Parish, the interest issued to Arbuckle has now passed into the hands of persons who were not in *pari delicto* and are not shown to have had notice of the facts which placed Arbuckle and Parish in *pari delicto*, and who should be protected under the rule of *Eberhard v. Pacific Southwest Loan & Mortgage Corporation*, *supra*. The judgment must be reversed in so far as it affirms the right of Parish to share in the oil produced and proceeds from the sale thereof.

The assignment to Long of September 30 was made to him at the direction of the attorney who had rendered services for the lessees and advised them that a permit, in his opinion, was not required, and in consideration of the services of said attorney. But there is no showing that Long did not give value to said attorney or that he had notice of facts which placed him in *pari delicto*.

Plaintiff and appellant herein has attached to its opening brief an unverified typewritten statement, wherein it claims that a municipal court judgment affirmed by the superior court is *res judicata* in the action herein between plaintiff, Domestic & Foreign Petroleum Company, Limited, and "certain defendants herein, owning more than a majority of the oil well 'units' involved in this action." This statement does not even name those of the defendants herein as to whom it is claimed that said judgment is *res judicata*. According to said statement, an action was brought in the municipal court against the plaintiff herein during the pendency of the instant action with the purpose of recovering accrued royalties on the units issued to certain of the defendants herein. The municipal court judgment, rendered after judgment of the superior court in the instant case, and in accord with the theory of the superior court that the Corporate Securities Act did not apply to these units, gave judgment for recovery of accrued royalties. Thereafter, while the appeal from the superior court judgment was pending, an appeal from the municipal court judgment was taken to the superior court. A different judge heard the appeal than the one who had rendered the judgment in the instant case. The superior court reversed the municipal court and directed entry of judgment for defendant therein, denying the recovery of oil royalties. Clearly a motion for continuance of the municipal court action until final determination on appeal of the superior court action would have been proper. 1 Cal. Jur. 23, 37; *Houghton v. Superior Court*, 187 Cal. 661, 203 P. 765.

[4-6] The judgment in the action commenced in the municipal court became final upon affirmance by the superior court before decision on appeal in the instant case. A final adjudication of an inferior court made within its jurisdiction is binding and conclusive upon a higher court. *To-day*

hunter v. Smith, 219 Cal. 690, 28 P.(2d) 916; Wiese v. San Francisco Mus. Soc., 82 Cal. 645, 23 P. 212, 7 L. R. A. 577; 2 Freeman on Judgments (5th Ed.) 1336; 15 Cal. Jur. 107. Where two actions involving the same issue are pending at the same time, it is not the final judgment in the first suit, but the first final judgment, although it may be rendered in the second suit, that renders the issue *res judicata* in the other court. Williams v. Southern Pac. Co., 54 Cal. App. 571, 576, 202 P. 356; Hart Steel Co. v. Railroad Supply Co., 244 U. S. 294, 37 S. Ct. 506, 61 L. Ed. 1148; 2 Freeman on Judgments (5th Ed.) p. 1519. Where the judgment in one suit becomes final through lapse of time or affirmance on appeal while an appeal is still pending in another court from judgment in the other action, the first final judgment may be brought to the attention of the court in which an appeal is still pending and relied on as *res judicata*. Hart Steel Co. v. Railroad Supply Co., *supra*.

[7-9] But the plea of *res judicata* is one which in this state may be waived. 15 Cal. Jur., p. 214. The party intending to rely on the plea must produce evidence of the former adjudication. 15 Cal. Jur. pp. 288 and 292; section 1962, subd. 6, Code Civ. Proc. A former judgment may be proved by introduction of a properly certified copy of the original. 15 Cal. Jur. p. 292; section 1905, Code Civ. Proc. Other parts of the record, and in some cases evidence *de hors* the record, may be required to establish the scope of the prior adjudication. 15 Cal. Jur. pp. 212, 290. No proof of the prior judgment has been made in the instant case. We have only the unverified statement of appellant as to the rendition and effect of the judgment. Furthermore, appellant does not even name the defendants in this action as to whom he contends the prior final judgment is *res judicata*. This court cannot render a certain judgment as to the defendants herein based on this indefinite statement. Appellant must be deemed to have waived the plea.

[10] There remains to be considered the question whether the interests of defendant unit holders are subject to a charge for expenses incurred in operating the well. The units sold under permit from the Commissioner of Corporations contained a provision that the interests granted should be subject to a charge of not

more than \$8 per month per 1 per cent. undivided interest for maintenance of the well. This provision was in accord with the contract of September 27, 1930, between the lessees and the drillers, which provided that the one-fifth interest assigned to the drillers and all units retained or sold by the lessees should be subject to such a charge. The permit units also provided that if it should be necessary to electrically dehydrate or otherwise treat the oil to make it marketable the grantee should pay the cost of treating his portion of the oil. But the units issued without permit provided that drilling and producing operations should be carried on without any liability or cost to the grantees, except the proportionate charge to electrically dehydrate or treat the oil.

[11] The effect of the maintenance provision placed in assignments of unit interests was to make the sums payable on account of oil produced and marketed subject to a deduction; the sums thus deducted to constitute a maintenance fund. Thus a fund was provided from the production of the well itself to pay in part at least the cost of its continued operation for the benefit of all interested in its production. Had it been shown that the nonpermit holders received their units with knowledge that a provision for a maintenance deduction should have been placed in the assignments to them to conform to the contract of September 27, 1930, we should consider whether it should not be held on equitable principles that their units were subject to such a charge. Equity regards as done that which ought to be done. 10 Cal. Jur. 505. Section 3529, Civil Code, is a statutory enactment of this maxim. But in the instant case, except as to defendant Parish and defendants Lewis Chester and Jennie Chester, who hold through Parish under an assignment from him which provided for the deduction, there is no showing that any of the defendant nonpermit holders had notice of the contract of September 27, 1930. Defendants Samuel A. Gaede and Kathryn B. Gaede had purchased a unit on November 22, 1930, which provided for the charge, but this did not place them on notice that the nonpermit units which provided that drilling and producing operations should be carried on without liability or cost to the grantees, should also have provided for the deduction. The conclusion of the trial court that the unit owned by the Chesters is

subject to the charge must be affirmed. The failure to insert in certain of the assignments a provision for a maintenance deduction was a violation of the agreement for such a deduction contained in the contract of September 27, 1930. The lessees by reason of their failure to insert such a provision in certain of the assignments cannot enlarge the burden upon the holders of the units which provided for the charge, but the owners of the leasehold must bear the burden resulting from the failure to place such a provision in several of the assignments.

The judgment is affirmed as to all defendants, except defendant Parish, who was in *pari delicto*. As to Parish, the judgment is reversed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; THOMPSON, J.



4 Cal.2d 541

UNION OIL CO. OF CALIFORNIA v. RECONSTRUCTION OIL CO. et al., (PARKER et al., Interveners) (two cases).

L. A. 15050, 15381.

Supreme Court of California.

Oct. 30, 1935.

1. Appeal and error ⇐71 (3), 77 (1)

Orders authorizing plaintiff to make subsurvey of defendant's oil well to determine whether well had been "bottomed" in territory underlying surface of plaintiff's leasehold, and empowering qualified experts to make examination, and prohibiting defendants from interfering with carrying out of orders, *held* not appealable, since neither "final judgments" nor "injunctions" either mandatory or prohibitory (Code Civ. Proc. § 963, as amended by St. 1933, p. 2472).

[Ed. Note.—For other definitions of "Final Decree or Judgment," "Mandatory Injunction," and "Prohibitory Injunction," see Words & Phrases.]

2. Discovery ⇐77

Party in civil action has no privilege of refusing to testify or furnish information necessary to presentation of his opponent's case.

In Bank.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by the Union Oil Company of California against the Reconstruction Oil Company and others, wherein Louis Elmer Parker and others intervened. From adverse orders, defendants appeal.

Appeals dismissed.

Newby & Newby and Nathan Newby, all of Los Angeles, for appellants.

Andrews & Andrews, of Los Angeles, for respondents.

CURTIS, Justice.

Motions to dismiss appeals from two orders of the superior court of Los Angeles county, authorizing the making of an inspection and subsurvey of a certain oil well known as Marine Development Corporation No. 1 well, located on property at the intersection of Creston and Walnut avenues in the Signal Hill district near Long Beach, Cal., leased for oil development by defendant Reconstruction Oil Development Company. This oil well is also known as the Hines No. 1 well, and the information secured by such examination and survey was to be offered as evidence by the plaintiff in an application for an injunction against defendants to enjoin them from trespassing by means of whipstocking or "crooked-hole drilling" upon property leased by plaintiff for oil development adjacent to the Hines No. 1 well of defendants, and taking therefrom oil belonging to the plaintiff. Although the appeals from the two orders are presented separately, the same questions are involved, and we shall consider and discuss them together. The first order from which an appeal is taken was made on August 27, 1934. It was made upon application of plaintiff, properly supported by affidavits to the effect that deviational tools had been used during the drilling of the well and that the officers of the plaintiff had reason to believe that said well had been "bottomed" in territory underlying the surface of property leased to plaintiff for oil development, and that defendants were taking oil therefrom. The order authorized and directed the plaintiff to make a subsurvey of said oil well. Thereafter an appeal from said order was filed by defendants, and when plaintiff attempted to

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

make said survey it was prevented by defendants from executing said order. Thereafter on October 13, 1934, a second order was made appointing and empowering certain qualified experts to make the examination and survey under the supervision of the sheriff of said county. By certain equipment familiar to the oil industry, these experts were to determine to what extent said well deviated from the perpendicular and in what direction. The information thus obtained would obviously be of great value to the plaintiff in establishing as a fact that defendants were trespassing upon its territory and unlawfully taking oil therefrom. The execution of this second order was stayed until October 26, 1934, during which time a writ of supersedeas or prohibition to prevent the enforcement of said order was sought in this court by appellants. Said petition was denied by this court, and between November 2, 1934, and November 8, 1934, said survey was in fact made pursuant to said order. At the trial of the action upon its merits, the results of said survey were received in evidence over appellants' objections.

No question is raised on this appeal with reference to the form of the order, and no claim is made that it was not properly framed to fully protect the defendants from any possible injury. The order specifically provided that it was conditioned to become effective only upon the filing of a bond in the sum of \$2,500 as security for any damages defendants might suffer by reason of the carrying out of said order. It also provided that plaintiff should pay to defendants the reasonable value of the use of any property or equipment of the latter used in making such survey, and that defendant might designate two persons to observe the making of said survey.

[1,2] Upon the perfecting of appellants' appeals, respondent moved this court to dismiss said appeals. Said motions are based upon two grounds: (1) That said orders are not appealable orders within the meaning of section 963 of the Code of Civil Procedure of this state or of any other provisions of the laws of this state; and (2) that all of the questions involved in this appeal from said orders have become moot.

Both of these contentions are clearly correct. Section 963 of the Code of Civil Procedure, as amended by St. 1933, p. 2472,

which necessarily controls the decision of the question of whether or not such orders are appealable, enumerates the judgments and orders of the superior court from which an appeal will lie. *Sherman v. Standard Mines Co.*, 166 Cal. 524, 137 P. 249. Orders of the character of the ones herein involved are not among those enumerated. Of the categories enumerated by said section as appealable, there are only two classifications in which said orders could possibly fall: "a final judgment entered in an action, or special proceeding, commenced in a superior court, or brought into a superior court from another court," or "an order granting * * * or dissolving an injunction." Said orders for the examination and subsurvey of appellants' oil well do not fall within either of these categories.

Such an order is not a final judgment. It is true that a final judgment is not necessarily the last one in the action and the term "final judgment" is not limited to a decree finally determining all issues presented by the pleadings. Sometimes the term "final judgment" has been applied to a final determination of a collateral matter, *distinct from the general subject of litigation*, affecting only the particular parties to the controversy and finally settling the same. *Sharon v. Sharon*, 67 Cal. 185, 7 P. 456, 463, 635, 8 P. 709, and other authorities are cited by appellants in support of their claim that the instant case is such a final judgment. Said case is cited as holding that "a final judgment that is conclusive of any question in a case is final as to that question." But this quotation is of course not true in the sense that every determination which is conclusive of any question in a case is appealable. Such construction would lead to the absurdity that every ruling of a trial judge finally determining any question, even as to the admissibility or nonadmissibility of evidence, would be deemed appealable as a final judgment. The orders herein, both on their face and in their effect, are inherently different from the orders held to be final judgments in the authorities relied upon by appellants. The matters involved in the authorities cited were clearly collateral matters in that they did not go to the merits of the issues involved in the main action. In some instances they involved different parties from those named in the main action, and in all cases the determination of the issues presented affected in no degree the final

determination of the issues presented in the main action. The orders herein involved, on the contrary, are important and essential to the correct determination of the main issue, that is to say, the question of the trespass of the appellants and the misappropriation of oil from respondent's land, and were made as a necessary step to that end. They were made in the exercise of the inherent power of the court to compel the furnishing of evidence in a civil action by one adverse party upon the proper application of the other party. A party in a civil action has no privilege of refusing to testify or furnish information necessary to the presentation of his opponent's case. The taking of depositions of adverse parties, orders for the inspection of books and papers in the possession of the other party, and the issuing of subpoenas duces tecum are well recognized examples of this power. And although it has perhaps never been definitely decided whether or not bills of discovery are available to litigants in this state, there is no question that analogous methods are employed to secure, under the compulsion of the court, evidence from adverse parties deemed necessary by the other party to establish the true facts of any controversy. Such an order necessarily depends in a large measure upon the discretion of the trial court, to be exercised according to the necessities of the case, and it requires prompt execution to be of any avail. It is obvious that if the enforcement of such an interlocutory order must await the determination of an appeal therefrom, the trial of the main issue involving the question of trespass by the appellants and their misappropriation of the oil of the respondent must be indefinitely postponed, the respondent checkmated in securing redress, and the administration of justice by the court seriously hampered. This very fact clearly demonstrates that these orders are vital and essential to the correct determination of the main issue and hence utterly dissimilar to the orders involved in the authorities cited by appellants. In no sense can the question involved in said orders be said to be a collateral matter distinct from the general subject of litigation. The case of *Montana Ore Purchasing Co. et al. v. Butte & Boston Consolidated Min. Co.* (C. C. A.) 126 F. 168, definitely holds that an order of the character and nature of the instant orders is not a final judgment. In that case a writ of *supersedeas* was sought to stay the en-

forcement of an order for the survey of a certain mine. The United States Circuit Court of Appeals, Ninth Circuit, held that such an order was not final in any sense and hence not appealable. The case of *United States ex. rel. Montana Ore Purchasing Co. et al. v. Circuit Court* (C. C. A.) 126 F. 169, is to the same effect.

Neither can it be said that said orders were injunctions. Appellants construe said orders as mandatory injunctions upon the theory that said orders required the appellants to deliver up the temporary possession of its property during the period of time involved in the making of the survey and that such an order thereby disturbed the status quo of the property involved. Authorities are cited which hold that certain injunctions, which by their form purport to be prohibitory injunctions, are in reality mandatory injunctions and their execution is stayed by perfected appeals. That the orders here in controversy are not mandatory injunctions has been heretofore decided in this court by a denial without written opinion of appellants' application for a writ of prohibition or *supersedeas* to prevent the enforcement of the identical orders here involved. The writ was sought upon the specific ground that the orders for examination and survey were mandatory injunctions and therefore automatically suspended by the perfecting of appeals. In denying the application for the writs, this court necessarily decided that appellants' claim was not well grounded.

Neither can said orders be correctly construed as prohibitory injunctions. It is true that they order the appellants to refrain from interfering with the carrying out of the orders of examination and survey. But this prohibition is in reality surplusage since every order of a court by necessary implication proscribes any interference with its enforcement. Aside from this minor and subsidiary provision, the orders did not prohibit appellants from any affirmative action.

Since said orders are not final judgments, nor injunctions, either mandatory or prohibitory, there is no escape from the conclusion that said orders are not appealable orders. By reason of the fact that we have deemed it desirable to discuss in detail the question of whether or not such orders were appealable and have definitely determined that they are not appealable orders, the issue as to whether or not the

questions involved therein have become moot, by virtue of the fact that the second order has in fact been carried out, becomes immaterial, and any questions upon the merits of these orders are outside the scope of this discussion.

The appeals from said orders are hereby dismissed.

We concur: WASTE, C. J.; THOMPSON, J.; SEAWELL, J.; SHENK, J.



4 Cal.2d 565

COBB v. PACIFIC MUT. LIFE INS. CO. OF CALIFORNIA.

L. A. 15253.

Supreme Court of California.

Oct. 31, 1935.

1. Insurance ☞612(1)

Where insurer gave written notice of rescission of health policy, offering to restore all premiums with interest, and later tendered amount in court and refused to pay claim to insured who had become permanently disabled due to encephalitis, repudiation by insurer was complete as regards right of insured to maintain action on policy.

2. Appeal and error ☞1011(1)

Where issue as to alleged fraudulent procurement of health policy was determined favorably to insured, judgment would not be disturbed on appeal, where evidence was in conflict and there was sufficient evidence to support judgment.

3. Insurance ☞666

In action by insured on health policy which was repudiated by insurer after it received claim for total permanent disability, because of alleged fraudulent representations made by insured to insurer's medical examiner, doctrine of anticipatory breach held not applicable, and hence insured could recover only for payments due at time of suit and not total amount to become due measured by expectancy tables.

4. Contracts ☞313(1)

There can be no anticipatory breach of an unilateral contract.

5. Contracts ☞10(1)

Bilateral contract becomes unilateral when promisee has fully performed.

6. Insurance ☞666

Where insured was totally and permanently disabled and was exempt from further payment of dues or assessments at time insurer repudiated health policy, insured held to have fully performed his part of contract rendering contract unilateral, breach of which did not amount to anticipatory breach which would permit recovery of installments not yet due.

7. Insurance ☞645(1)

In action on health policy, where insured relied not only on election to declare breach of insurance contract, but also in one count affirmed contract and prayed for judgment thereon, insured held required to rely on contract and not entitled to recover disability installments not yet due on theory of anticipatory breach.

8. Insurance ☞666

In action on health policy, wherein insurer's liability was determined and all that remained was payment of indemnity as provided by insurance contract, contention that insurer might become hostile and force insured to sue for future installments held not to require application of rule of anticipatory breach entitling insured to recover future installments based upon alleged life expectancy.

In Bank.

Appeal from Superior Court, Santa Barbara County; Edward Henderson, Judge.

Action by Augustus M. Cobb against the Pacific Mutual Life Insurance Company of California, in which the defendant filed a cross-complaint. From the judgment, defendant appeals.

Affirmed in part and reversed in part, with directions.

Prior opinion, 40 P.(2d) 574.

Knight, Boland & Riordan and Eldred Boland, all of San Francisco, Heaney, Price & Postel and Harold A. Parma, all of Santa Barbara, and Loeb, Walker & Loeb and Herman F. Selvin, all of Los Angeles, for appellant.

Clifton Hildebrand, of San Francisco, Griffith & Thornburgh, of Santa Barbara, and Erwin P. Werner, of Los Angeles, for respondent.

SEAWELL, Justice.

Plaintiff and respondent, Augustus M. Cobb, will be referred to, when not designated by name, as the insured or respondent. The Pacific Mutual Life Insur-

ance Company, a corporation, will be referred to as the company, or as insurer, or as appellant. Respondent, Cobb, brought this action against the Pacific Mutual Life Insurance Company, corporation, upon two policies of insurance issued by said company to insured, Cobb, during the month of August, 1929. One of said policies was upon the life of the insured, and therefore it is only collaterally involved in the action. The other, No. 5603198, known as noncancelable income policy, is the policy which furnishes the bases of the action and it is brought to our attention by this appeal. By its terms the company obligated itself to pay indemnity on account of disability resulting from sickness or accidental means, at the rate of \$250 per month for the period throughout when such disability "consists of continuous, necessary and total loss of all business time."

[1] Said two policies above mentioned are in fact reissues of an original policy issued by said company to respondent, Cobb, on March 15, 1926. Said original policy was not only a life policy, but it also contained a provision known as a business, permanent total disability provision, which provided for health indemnity payment in a lump or gross sum of \$15,000 in the event the insured should become totally, continuously, and irrevocably disabled as a result of sickness. The original policy of 1926 insured against two elements of risk, to wit, death and health disability. In 1929 two separate policies were issued to take the place of the 1926 policy; one being issued solely upon the life of the insured and the other—No. 5603198, which forms the basis of the judgment herein—being issued as a noncancelable income policy, providing for the payment of health indemnity at the rate of \$250 per month "for the period throughout which disability described above [in said policy] consists of continuous, necessary and total loss of business time. * * *" The original policy was canceled upon the issuance and acceptance of the 1929 policies. The main difference between the indemnity provisions of the 1926 and 1929 policies is apparent. The earlier one provided that said policy would fully mature upon either the death of the holder or upon total and irreparable disability suffered by the insured, payable in a gross or lump sum. The policy of August, 1929, in effect at the time of breach, provided for monthly payments of \$250 so long as the insured

should remain physically disabled to the extent expressly stated therein. Two and one-half years after the 1929 indemnity policy was issued, the insured became wholly, permanently, and incurably disabled from the disease known as encephalitis or sleeping sickness. That the disabling effects of said disease has rendered the insured totally and permanently incapacitated within the terms of the policy and constitutes a continuous loss of "business time," and that its course is progressive and cannot be cured or arrested, is conclusively established by all of the medical testimony in the case, and this prognosis of the medical experts is not disputed by either of the parties to the action. This being true, the insured was entitled to receive a monthly payment of \$250 per month, provided he had made no fraudulent misrepresentations nor withheld any material information from the company's medical examiner as to the state of his health or made any statement as to facts which were not true and which, if fully and truthfully given, would have probably caused said company to reject said applicant as not being an acceptable or desirable risk. The insured became totally disabled so as to suffer the loss of all business time on March 14, 1932. Proper notice as to disability was given to the company and demand was made for monthly indemnity at the rate of \$250 per month as provided in the contract of insurance, but the company repudiated its contract by giving notice of rescission and by refusing to pay any amount thereunder, claiming fraudulent representations and the suppression of material information bearing on the state of health of the insured during a definite period of time both immediately before and on the day he was examined and interrogated by the examining physician on behalf of the company on matters affecting his health and physical condition. The company's repudiation was complete and absolute, as it was made by written notice offering to restore all the premiums it had received from the insured, with interest, which amount it afterwards deposited in court. Said repudiation was again set up by its cross-complaint, wherein it sought rescission and prayed for a cancellation of the policy on the ground that it had been fraudulently procured. Quoting from Williston on Contracts, volume 3, § 1325, citing sustaining authorities, it is said: "So denying the validity of the contract between the pat-

ties, or insisting that its meaning or legal effect are different in a material particular from the true meaning or effect, coupled with the assertion, express or implied in fact, that performance will be made only according to the erroneous interpretation," amounts to total repudiation. In the instant case the validity of the contract was vigorously assailed by the company. The contract of insurance having been repudiated, the insured filed his complaint containing three counts. The prayer of the first, as set forth in paragraph 1, asks for indemnity at the rate of \$250 per month, and paragraph 2 thereof prays for judgment in the gross sum of plaintiff's life expectancy, amounting to \$54,270. The second cause of action prays for indemnity at the rate of \$250 per month as in said policy provided, but does not make any claim for damages caused by a breach of the policy. It is a straight action on the contract. The third cause of action is grounded upon the policy of 1926, and judgment is asked at the rate of \$250 for three months, plus the aggregate gross sum of \$15,000 as provided in said 1926 policy. This policy was superseded by policy No. 5603198, issued in 1929.

Upon the trial of the case, the jury rendered a verdict in favor of the insured, and in the words of the verdict assessed "his damages in the amount of the present worth of payments of \$250 per month for a life expectancy of fifteen years." According to the American mortality tables, the life expectancy of a person in reasonably good health of the age of the insured was a fraction above eighteen years. The trial court, treating the verdict of the jury as advisory, found that the policy and contract of insurance had been repudiated by the insurer without legal cause, and adopted the terms of the policy for the payment of monthly indemnity at the rate of \$250 per month during the period of disability, and decreed that the contract had been breached and that the insured was entitled to be indemnified in damages for "the present worth of the sum of \$250 per month for the period of plaintiff's life expectancy of fifteen years and the present worth of said sum was \$30,830." Judgment was accordingly entered in said sum, together with interest thereon at the rate of 7 per centum per annum from the 19th of May, 1932, together with plaintiff's costs of suit.

The trial court in its findings reviews at some length the charges that the insured

procured said policy by fraudulent misrepresentations and by willfully suppressing material information bearing upon the health of the insured, and concludes that, while it is a fact that certain answers made by the insured as to questions bearing upon his health were not correctly given and certain facts within the scope of the medical examination were not disclosed by the insured, none of the acts or omissions complained of was "material to the acceptance of the risk and hazard assumed by defendant," and none of the erroneous answers made to questions asked or failure to give requested information was omitted with intent to deceive the insurer.

An appeal was taken from said judgment by the insurer to the District Court of Appeal, Second Appellate District, Division 2 (Scott, Justice pro tem., delivering the opinion of the court), and that portion of the judgment which applied the doctrine of anticipatory breach to the case and consequently allowed the insured a judgment for a sum equal to the present value of the monthly payments for the length of time that the insured at the time of the trial would be reasonably expected to live (fifteen years) was reversed and the insured was remitted to the amount of the accrued installments. The finding that the policy had not been fraudulently or wrongfully procured was sustained.

[2] Upon the petition of the insured a hearing was granted. The company did not request a hearing by this court on the question decided against it, to wit, the alleged fraudulent procurement of said policy, but actually opposed the petition of the insured for a hearing and asked that the decision of the District Court of Appeal, which was in part adverse to it, be held final as to both parties to the proceeding on all the issues embraced in the proceeding. The decision as to the fraudulent procurement of the policy having been rendered on conflicting evidence, the company doubtless recognized the well-established rule to the effect that the judgment of the trial court will not be disturbed upon appeal in cases where, as in the instant case, there is evidence upon which the judgment may be sustained, and presented no argument to the court in an attempt to overturn that or any portion of the judgment. We are in accord with the view expressed by the District Court of Appeal to the effect that the verdict of the jury finding against fraudulent procurement on

the part of the insured is amply supported by the evidence.

[3] The single question presented by this appeal is whether the doctrine of anticipatory breach is applicable to a policy of insurance which provides for payment of installments of indemnity for disabilities in the manner herein set forth, even though the insurer repudiates the contract on the grounds that it would not have issued the policy had the appellant given truthful answers to the medical examiner and full information germane to the condition of his health, and which, if so given, may have reasonably resulted in his rejection as an insurable risk.

The rule as accepted by this state is decisively stated in a number of decisions of this court, the most recent of which (February 20, 1935), is *Brix v. People's Mutual Life Insurance Co.*, 41 P.(2d) 537, 541. In that case the insurance company by way of cross-complaint alleged that the policy upon which the action was brought was procured by the insured by means of material false representations made by the insured, and because of such it prayed for its cancellation and rescission. The court made findings against the company on the allegations of misrepresentations; thus taking notice of the issue of repudiation. The court gave judgment for plaintiff at the rate of \$100 per month during the remainder of his life. The judgment was modified on appeal by striking therefrom the portion which gave to plaintiff \$100 per month for the remainder of his life. The decision nowhere recognizes the right of the insured to obtain judgment for future benefits either in monthly payments or for a gross sum. On this branch of the law we said:

"The books are filled with cases in which actions have been brought to recover upon insurance policies similar to the one here involved in which the insured has attempted to recover judgment not only for accrued payments, but has also sought an adjudication as to installments not yet due. While the decisions upon the right of the plaintiff in such character of actions to recover for installments which have not yet accrued are not entirely uniform, the great weight of authority is to the effect that, in such actions, recovery cannot be had for any installments falling due in the future. We cite only a few of such cases: *Robinson v. Exempt Fire Co.*, 103 Cal. 1, 36 P. 955, 24 L. R. A. 715, 42

Am. St. Rep. 93; *Atkinson v. Railroad Employees Mutual Relief Society*, 160 Tenn. 158, 22 S.W.(2d) 631; *New York Life Insurance Co. v. English*, 96 Tex. 268, 72 S. W. 58; *Bonslett v. New York Life Ins. Co.* (Mo. Sup.) 190 S. W. 870; *Commercial Casualty Ins. Co. v. Campfield*, 243 Ill. App. 453; *Metropolitan Life Ins. Co. v. Day*, 145 Ga. 425, 89 S. E. 576; *Mid-Continent Life Ins. Co. v. Christian*, 164 Okl. 161, 23 P.(2d) 672; *Metropolitan Life Ins. Co. v. Lambert*, 157 Miss. 759, 128 So. 750; *State Life Ins. Co. v. Atkins* (Tex. Civ. App.) 9 S.W.(2d) 290; *Green v. Inter-Ocean Casualty Co.*, supra, 203 N. C. 767, 167 S. E. 38, supra; *Garbush v. Order of United Commercial Travelers*, 178 Minn. 535, 228 N. W. 148; *Howard v. Benefit Ass'n of Railway Employees*, 239 Ky. 465, 39 S.W.(2d) 657, 81 A. L. R. 375; *Washington County v. Williams*, 111 F. 801 (C. C. A. 8th). In *Atkinson v. Railroad Employees Mutual Relief Society*, supra [160 Tenn. 158], 22 S.W.(2d) 631, 634, the court declared the law as follows: 'While the benefit certificate issued to complainant constitutes an entire contract, the obligation thereby cast upon the society is severable, with a right of action accruing to the holder for each benefit installment payable and in default. (Citing authorities.) So it is generally held that, in an action at law for breach of a contract of insurance, payable in weekly or periodic installments, only those installments in default at the time suit was brought may be recovered.' (Citing authorities.)"

[4-7] *Howard v. Benefit Ass'n of Railway Employees*, 239 Ky. 465, 39 S.W.(2d) 657, 81 A. L. R. 375, is directly in point. It is there held that, upon repudiation by an insurer of its obligation under a health insurance policy to make stipulated monthly payments so long as the insured shall continuously suffer total disability, the insured may not treat the entire contract as breached and sue for gross damages based upon his alleged expectancy of life. The annotation (81 A. L. R. 379) contains the statement that "the decision is supported by a substantial number of authorities holding that judgment cannot be rendered in favor of the insured for instalments of indemnity not accrued at the date of the judgment." A number of the decisions of our sister state courts supporting this doctrine are listed and a brief synopsis of said cases is set forth. We are mindful that there are many decisions which hold to the

contrary view. It would be an interminable and delicate task to attempt even to sketch the origin, development, and application of the doctrine of anticipatory damages for the breach of contracts, taking either the leading English case of *Hescher v. De La Tour*, 2 E. & B. 678, or the leading American case of *Roehm v. Horst*, 178 U. S. 1, 20 S. Ct. 780, 44 L. Ed. 953, as a guide. Both have been criticized by some very eminent law writers, but they are nevertheless accepted as firmly establishing the doctrine which awards damages for the wrongful deprivation of future benefits. The difficulty lies not so much in the elucidation of the doctrine as it does with a knowledge as to the time and things to which it should be applied. There can be no anticipatory breach of a unilateral contract. Williston on Contracts, vol. 3, § 1328. In volume 1, Restatement of Contracts, California Annotations, page 178, § 318, the rule is thus stated: "In unilateral contracts for payment in instalments after default of one or more no repudiation can amount to an anticipatory breach of the rest of the instalments not yet due"—citing a list of California decisions. It is also the law that a bilateral contract becomes unilateral when the promisee has fully performed. In the case at bar the promisee had fully performed. He was exempt from future performance so far as dues or assessments were concerned. The fact that he was required or requested to submit to reasonable future medical examinations or furnish an occasional health report is too trivial and inconsequential to be regarded as an unperformed obligation on the part of the insured. He was therefore within the exception stated in the rule which holds that no repudiation can amount to an anticipatory breach of the rest of the instalments not yet due. There is yet another obstacle in the way of plaintiff's right to recover future benefits in a gross sum, even under the theory advanced by him. He did not rely solely upon the right of election to declare a breach of the contract, but, as above noticed, in one count of his complaint he affirmed the contract and prayed for judgment in accordance therewith. This alone would be sufficient to hold him to an action on the contract.

The principle upon which the right to declare a contract at an end without a provision to do so and to sue for a breach of contract differ so fundamentally and widely from a contract of indemnity to pay

a definite fixed sum in money during health disability that doctrine of anticipatory breach would seem to be an inept and in many cases an unjust doctrine to invoke.

The action is based upon contract for the payment of money, not unlike a promissory note providing for installments or the payment of rent. The installments as they become due are but debts. Yet, if the insurer in good faith and with color of right challenges the good faith of the insured and fails to prevail in an action, he is required to pay a large gross amount, although the insured is suffering from a permanent progressive disease and will not probably live the period of expectancy that a person in normal health would live.

To apply to this case the principle contended for by the insured would, in effect, penalize the company for asserting its defense if it did not prevail in a controversial matter even if made in good faith and with color of reason, notwithstanding the fact that the insured expressly agreed that "the falsity of any statement in the application materially affecting either the acceptance of the risk or the hazard assumed * * * or made with the intent to deceive, shall bar all right to recovery under this contract." It is admitted that there is some authority for the application of this rule in cases so clearly within the doctrine of anticipatory breach that there is no room for question, but at best it is a drastic rule and should not be applied to a contract in which the parties impliedly recognize the right of contest.

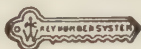
[8] The insured urges the application of the doctrine on the theory that, if the company becomes unfriendly or hostile to the insured, it may compel him to bring an action on every installment falling due, possibly for the purpose of harassing the insured, thereby causing a multiplicity of actions. It would seem that a reasonably sound business policy would of itself be a sufficient consideration to deter an insurer against practices which could not do otherwise than bring discredit to it. Besides, the law ought to be able to offer relief where compensation is willfully and contumaciously withheld. In the instant case, however, the situation cannot occur. It is admitted that the insured is totally and incurably ill with a progressive and totally incapacitative disease. The decision as to the validity of the contract has become final, and there is nothing left to be done but the payment of the indemnity

as expressly provided by the parties thereto.

The tendency of this court has consistently been opposed to the application of the doctrine of anticipatory damages to cases involving fixed installment money payments which arise in the manner set forth in the contract herein. There is ample authority in other jurisdictions which sustains our conclusion, and it is true that there are also a number of decisions holding the contrary view.

The cause is remanded to the trial court, with leave to respondent, Cobb, to file a supplemental complaint including all payments due, and interest thereon, at the time of filing the complaint herein. That portion of the judgment which allows respondent damages for breach of said contract for the present worth of the sum of \$250 per month for plaintiff's life expectancy of fifteen years, estimated to be the gross sum of \$30,830, is reversed. In all other respects the judgment is affirmed. Let proceedings be had consistent with the views expressed and conclusions reached by this decision.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; THOMPSON, J.



4 Cal.2d 594

**SUPREME GRAND LODGE OF ANCIENT
AND MYSTICAL ORDER ROSAE CRU-**

CIS v. SMITH et al.

S. F. 15061-15308.

Supreme Court of California.

Nov. 18, 1935.

1. Appeal and error — 629

Appeal held not dismissible for appellant's failure to timely institute any proceedings for record to be used on appeal where trial court settled and allowed bill of exceptions notwithstanding appellant's delay in preparation thereof.

2. Appeal and error — 800

That appellant did not file in Supreme Court bill of exceptions settled and allowed within time prescribed therefor by court rule or within period stipulated to by parties held

immaterial as respects whether appeal was dismissible for failure to timely institute any proceedings for record to be used on appeal, where bill of exceptions was on file in Supreme Court when motion to dismiss was made (Supreme Court Rules, rule 5).

In Bank.

Appeal from Superior Court, Santa Clara County; William F. James, Judge.

Action by the Supreme Grand Lodge of the Ancient and Mystical Order Rosae Crucis, a corporation, against George L. Smith and others. From a judgment, defendants appeal. On motion to dismiss appeal, for want of prosecution.

Motion denied.

Prior opinion, 50 P.(2d) 444.

Ivan G. McDaniel, of Los Angeles, for appellants.

Bohnett, Hill & Cottrell, of San Jose, for respondent.

PER CURIAM.

Motion to dismiss appeal.

In this action for damages and injunction, judgment was entered for the plaintiff on July 19, 1933. On September 18, 1933, the defendant, within the time permitted by law, filed a notice of appeal to this court. Thereafter and on December 7, 1933, the plaintiff-respondent moved to dismiss the appeal. The clerk's certificate filed in support of the motion indicates that at that time no proceedings had been instituted for the preparation of a transcript or of a bill of exceptions. The motion to dismiss undoubtedly aroused appellant to action, for on December 30, 1933, he filed a proposed bill of exceptions in the court below. Subsequently, and in response to a motion to that effect, the court below relieved appellant of his default in the preparation of the record to be used on appeal and on January 8, 1934, ordered the bill of exceptions certified and settled. Delay in procuring certain exhibits to be included therein apparently retarded the completion and settlement of the bill of exceptions. However, on August 7, 1934, the same was settled and allowed.

[1] The trial court's order settling and allowing the bill of exceptions, notwithstanding the appellant's delay in preparing the same, is a complete answer to the present motion to dismiss, grounded, as it is,

upon the failure of appellant to timely institute any proceedings for a record to be used on the appeal. That the trial court may relieve an appellant from default in the preparation of such record is now well settled. *Tobin Grocery Co. v. Spry*, 201 Cal. 152, 255 P. 791.

[2] It is immaterial that the appellant did not file in this court the bill of exceptions so settled and allowed within the time prescribed therefor in rule V, or within the period stipulated to by the parties. Said rule provides, in part, that if the record on appeal "though not filed within the time prescribed, be on file at the time such notice is given, that fact shall be sufficient answer to the motion." The present motion, as already indicated, is not addressed to the failure to file the bill of exceptions within the required time after settlement. In fact, no motion addressed to this point has ever been noticed. Since the bill of exceptions is now on file, it is obviously too late to urge the point. (Rule V.)

Pursuant to stipulation of the parties, the appellant has thirty days from and after the determination of this motion within which to file his opening brief.

The motion to dismiss is denied.



4 Cal.2d 532

**WORK et al. v. COUNTY NAT. BANK &
TRUST CO. OF SANTA BARBARA.**
L. A. 13679.

Supreme Court of California.
Oct. 29, 1935.

Rehearing Denied Nov. 25, 1935.

1. Trusts ⇨325

In action for breach of trust which required trustee taking title to land to account to owner for value as fixed in option to purchase and to retain part of land until payment of full purchase price, evidence held to support findings that conveyance to purchaser included smaller disputed tract and that trustee conveyed reserved land to purchaser before obtaining balance of purchase price, and hence owner was entitled to recover damages.

2. Trusts ⇨189

Where trust required trustee upon sale of property for price fixed in option to purchase to retain part of property until payment of full purchase price, and trustee, in violation of trust, conveyed entire property to purchaser without obtaining full purchase price, trustee held liable for agreed purchase price and not merely value of property (Civ. Code, § 2237).

3. Trusts ⇨325

In action for breach of trust which required trustee holding title to land to retain part of land until payment of full purchase price thereof, judgment roll in owner's action against purchaser for balance of purchase price held admissible to show how purchaser and owner construed option to purchase, and that trustee participated in dispute as to what land was to be conveyed to purchaser.

4. Appeal and error ⇨1170(7)

In action for breach of trust which required trustee holding title to land to retain part of land until payment of full purchase price thereof, error, if any, in admitting judgment roll in owner's action against purchaser for balance of purchase price to show how purchaser and owner construed option to purchase, held not prejudicial, where trial court could not have reached different conclusion (Const. art. 6, § 4½).

5. Limitation of actions ⇨127(2)

Amended complaint held not barred by limitations, though filed after lapse of statutory period, where amended complaint was based on same facts stated in original complaint which was filed within statutory period.

6. Action ⇨38(1)

Complaint alleging but one primary right and one wrong states only one cause of action.

In Bank.

Appeal from Superior Court, Santa Barbara County; Pat R. Parker, Judge.

Action for damages for breach of conditions of a trust by John Work and another against the County National Bank & Trust Company of Santa Barbara. From a judgment for plaintiffs, defendant appeals.

Affirmed.

Prior opinion, 41 P.(2d) 972.

Griffith & Thornburgh and William G. Griffith, all of Santa Barbara, and Flint & MacKay and William A. Bowen, all of Los Angeles, for appellant.

O'Melveny, Tuller & Myers, Homer I. Mitchell, and Lucien W. Shaw, all of Los Angeles, amici curiae.

C. F. Lacey, of Salinas, for respondents.

PER CURIAM.

Defendant trust company appeals from a judgment against it and in favor of plaintiffs in the sum of \$25,589.38, plus interest. The action is based on the theory that appellant violated the terms of a trust, to respondents' damage in the above amount.

In 1919 respondents granted to one McRae an option on certain lands then owned by respondents in Monterey and San Luis Obispo counties. McRae immediately assigned this option to the Associated Almond Growers of Paso Robles, hereafter referred to as the association. Subsequently, the lands mentioned in the option were conveyed by respondents to the predecessor in interest of appellant, in trust. Generally speaking, the duty of the trustee, as set forth in the respective declarations of trust, was to receive from the association, as buyer, the purchase price of the land and to remit the same to the respondents, as sellers. The association was subdividing the large area involved. The trust provided that, in the event the association failed to buy the entire tract, the balance should be reconveyed to respondents. The trust also provided that two certain springs located on the tract, together with certain buildings located on the area surrounding the springs, constituting in all ten acres, were to be reserved by the trustee until the association had paid the full purchase price, and to be conveyed to the association only upon the trustee receiving the full purchase price.

It is the theory of respondents that the full purchase price of the tract was \$253,305, and that, after the appellant collected from the association and paid to respondents the sum of \$227,715.62, the appellant, in violation of its trust, conveyed to the association the reserved lands, without first collecting the balance of \$25,589.38. The trial court found in respondents' favor on this theory. The respondents first sued the association for the balance claimed to be owing to them, and recovered judgment in the exact amount of the judgment in this case. The judgment against the association was affirmed on appeal. *Work v. Associated Almond Growers*, 102 Cal. App. 232, 282 P. 965. This action was then instituted against the appellant as trustee.

The judgment in this case specifically provides that upon its payment appellant shall be entitled to an assignment from respondents of the judgment against the association.

The controversy arose because of the ambiguous description of the property contained in both the option and declaration of trust. In the declaration of trust, the property is referred to as the property owned by John and Mattie Work in San Luis Obispo and Monterey counties, as set forth in the McRae option, containing "approximately six thousand acres." Under the terms of the trust agreement, the property was divided into five parcels. To prevent the purchaser from selecting only the better portions of the ranch and leaving the poorer portions, the purchaser was required to take these parcels in a particular order. Each parcel was described separately in the trust agreement. Each of the first four parcels was described as that portion "of said tract of 6,000 acres of land" owned by John and Mattie Work, lying in various directions from certain named section lines and county roads. Parcel 5 was described as "all that part of said tract of 6000 acres remaining after the selection of the foregoing described parcels."

It is conceded that at the time of the execution of the option and declaration of trust the property owned by respondents in the two counties named was considerably less than 6,000 acres, but before the option was exercised respondents acquired record title to 6,028.15 acres, all part of one tract known as Independence ranch. It is respondents' contention that this total acreage was covered by the option and trust agreements. Appellant contends that it relied on the statement of ownership found in the trust agreement and that only land then owned by respondents was included.

[1] At the time the declaration of trust was executed, the respondents had record title to but about 5,100 acres of Independence ranch, but embraced within the exterior boundary fences of the ranch, and in respondents' possession for many years, were parcels of land standing in the names of Pence, 160 acres; Collyer, 80 acres; 80 acres of unpatented government land; and 597.68 acres in the name of Robert Work, son of respondents. Shortly after the option was given to McRae, respondents perfected their title to these various parcels. As already stated, for many years prior to

the giving of the option, all of the above lands were in the possession of respondents and were included within the boundary fences of the ranch. The 597.68 acres standing in the name of Robert Work was what the parties describe as "good" land, while the other 320 acres was not good land. The evidence shows that from the very inception of the trust disputes arose between respondents, the association, and appellant as to just what land was included within the trust. The association wanted the Robert Work land, but did not want the other 320 acres. Respondents took the position that, if the 320 acres were excluded by reason of the recital of ownership, so must the 597.68 acres belonging to Robert Work, and that, if Robert Work's land was included, so must the 320 acres be included. The trust officer of appellant not only knew of this dispute but participated with the disputing parties and their attorneys in many conferences, where the matter was fully discussed. The association ultimately determined to accept the full 600 acres. That was the express holding in the case of *Work v. Associated Almond Growers*, supra. The record discloses that appellant was fully cognizant of respondents' position and was fully aware of the respective positions taken by the association and respondents. In spite of this, however, after the appellant had received from the association what, according to its figures, was the full purchase price of the tract, not including the 320 acres, it conveyed to the association the reserved lands. Immediately after the reserved lands had been conveyed to the association, it reconveyed the property involved, and other property, back to appellant to secure a \$500,000 bond issue, sold to the public. Without further recounting of the facts, we are convinced that the findings of the trial court to the effect that the association exercised its option to buy the entire tract, that as interpreted by the parties, including appellant, the lands conveyed by respondents to appellant included the disputed 320 acres, and that appellant, in violation of its trust obligations, conveyed to the association the reserved properties without first securing from the association a balance of \$25,589.38 then due and owing to respondents, are all amply supported by the record. The oral testimony, as well as the contemporaneous correspondence, amply supports those findings.

[2] The main question involved on this appeal, and the main reason that a hearing

was granted in this case, is to determine what the proper measure of damages is, under such circumstances. On this question, it is appellant's contention that it never deeded the 320 acres to the association, but violated the trust only in deeding the reserved lands, and that its only duty is to quitclaim these 320 acres back to respondents and pay them the value of the reserved properties. It is further the contention of appellant that, if it is liable for the 320 acres, the measure of damages is not the price agreed to be paid by the purchaser (which was the theory of the trial court) but the value of the land. Respondents contend that the measure of recovery is the agreed purchase price. After a thorough review of the authorities, we are of the opinion that, where a trust company holds property in trust upon its agreement to convey to a purchaser upon the payment of a designated price and, in violation of its trust, it conveys the property to the purchaser without recovering that price, it is liable in damages for the agreed price. This rule seems to us both logical and fair. For purposes of illustration, suppose an owner of land believes his property to be reasonably worth \$10,000. He enters into a contract to sell the lands to X for that sum. The owner deposits a deed in trust with the trust company, upon the latter's express agreement to hold the deed until it receives the full \$10,000. After the trust company has received \$5,000, in direct violation of the trust instructions, it conveys to X, who immediately reconveys to a bona fide purchaser. When the trust company is sued, can it be permitted to contend successfully that the land was worth but \$5,000, and that therefore the seller has not been injured by the acts of the trust company, and that the seller is relegated to an action against the purchaser for the agreed price? To state the proposition thus baldly is to refute it. Elementary principles of fair dealing require the trust company to pay the seller, under such circumstances, the damages caused by its acts. That damage can only be the agreed purchase price. Unless this is so, there would be no reason for placing deeds in trust or in escrow. *Keith v. First National Bank*, 36 N. D. 315, 162 N. W. 691, L. R. A. 1917E, 901, is squarely in point. See, also, *Muenz v. Bank of Bowdle*, 47 S. D. 342, 198 N. W. 710; *Stone v. Jarbalo State Bank*, 107 Kan. 332, 190 P. 1094. In each of these cases it was held that, where deeds are deposited in trust with a trustee, to-

gether with definite instructions concerning delivery of such deeds, and specifying the exact amount of money to be received by the trustee before he shall deliver the deeds, and the trustee delivers the deeds in violation of such instructions, without receiving the amount so specified, such trustee is liable for the purchase price as fixed in the instructions. We do not believe that section 2237 of the Civil Code, relied on by appellant, declares a different rule in this state. That section provides: "A trustee who uses or disposes of the trust property, contrary to section two thousand two hundred and twenty-nine, may, at the option of the beneficiary, be required to account for all profits so made, or to pay the value of its use, and, if he has disposed thereof, to replace it, with its fruits, or to account for its proceeds, with interest."

In the first place, both North Dakota (section 6290 [Civ. Code of North Dakota] Comp. Laws 1913) and South Dakota (section 1204 of the Compiled Laws of South Dakota, 1929 Ed.) have statutory provisions similar to the one above quoted, and yet, in the two cases above cited, the courts reached the result indicated. The alternative remedies given to the beneficiary by section 2237, *supra*, are all aimed to make the beneficiary whole, and the only way that that can be done in the present case is to permit respondents, as beneficiaries, to recover the full purchase price. The reserved properties cannot be replaced. They have been conveyed away and are now security for a bond issue sold to the public. The only way the trust properties can be "replaced" is to permit the respondents to receive what they would have received had appellant been faithful to its trust.

The California cases relied on by appellant are not in point. None of them involves a trust with definite instructions as to collection of a fixed price. Obviously, cases involving involuntary trusts, or cases where a trustee disposes of trust property in violation of an express trust where the trust agreement does not fix the value of the trust property as agreed to by the parties, are not in point. One such case relied on by appellant is *Kinley v. Thelen*, 158 Cal. 175, 110 P. 513, 516. The case arose on demurrer. The complaint alleged that plaintiff had deposited with Thelen, cashier of a bank, certain stocks, bonds, and real property, Thelen to hold the same in trust, with power of sale, for the bank, to secure an indebtedness of plaintiff to the bank. As to the stock, the agreement, as alleged,

was that Thelen was not to sell the stock "for less than nine thousand dollars." The complaint alleged that, when the stock was of the value of \$10,000, it was sold by the trustee for \$6,000. The court properly held that under such conditions, "if this sale was unauthorized, the damage was \$4,000." This seems self-evident and not at all analogous to the problem here presented. Obviously the \$9,000 provision did not mean that the trustee could sell at that price, if the market value was more than that figure. Obviously the trustee was, under the provisions of the trust, to sell the property at market value, but not less than \$9,000.

Clapp v. Vatcher, 9 Cal. App. 462, 99 P. 549, relied on by appellant, is not in point. There an insane man conveyed certain real property to defendant, who resold the same. Plaintiff brought the action as legatee of the property under the will of the testator, made while the latter was sane. Obviously, under the express provisions of section 2237, of the Civil Code, above quoted, the beneficiary of the involuntary trust had the statutory right to recover the fruits of the resale. We have read the other California cases cited by the appellant and find none of them in point. It is true that in some of the cases from other jurisdictions referred to by appellant there is to be found language indicating that in some states a rule contrary to the one here enunciated prevails. For reasons already stated, we believe that the rule herein declared is the proper one.

From what has been said, it is clear that respondents cannot be compelled to accept a quitclaim of the 320 acres from appellant, nor the value of that land, plus the value of the reserved lands. To require respondents to accept either of these alternatives would not be to make respondents whole for the damage caused by appellant's breach of its trust.

[3, 4] The next point urged by appellant is that the court erred in admitting into evidence the judgment roll in the action against the association, in which case the association was held by its actions to have interpreted its agreement as including the 320 acres. We think this was not error. Under the circumstances of this case, proving the acts of the association was one step in the proof of respondents' case. We think that the judgment roll was admissible to show how the association and respondents had interpreted the contract, and that, when this appellant was shown not

only to have known of the dispute but to have actively participated therein, the matter was sufficiently connected up. However, even if the judgment roll was improperly admitted, it would not constitute reversible error. As already pointed out, the evidence, other than the judgment roll, and other than John Work's testimony as to the acts of the association, is ample to support the basic findings above set forth. In fact, in our opinion, the other evidence is such that, even without the questioned evidence, the trial court could not, reasonably, have reached any other conclusion than the one reached by it. Under such circumstances, the beneficent provisions of article 6, § 4½, of the Constitution, are applicable.

[5] Appellant also urges that the second count of the amended complaint is barred by the statute of limitations. The original complaint, containing but one count, was filed well within the statutory period. In this count, the trust is alleged, and then it is alleged that appellant has received the full purchase price and has failed to remit a portion thereof to respondents. The amended complaint, filed, according to appellant, after the statute of limitations had run, in the first count, sets forth practically the same allegations contained in the original complaint. The second count alleges the conveyance of the reserved properties to the association, before the appellant received the full purchase price. We are of the opinion that the second count does not state a new cause of action. On this point we are in accord with the concurring opinion of former Presiding Justice Conrey, of the District Court of Appeal, Second District, Division One (41 P.(2d) 972, 974), written in this cause when it was pending before that court. We therefore adopt that opinion as part of the opinion of this court. It is as follows:

"It must be admitted that the second count of the amended complaint is different from the first complaint in some details of statement of the alleged transactions. Yet the nature of the cause of action, the foundational facts of the trust, and the failure of the trustee to perform the duties assumed by it as such trustee, are of the substance equally of both counts. The cause is of equitable jurisdiction, although the remedy happens to assume the form of a money judgment. To uphold the defendant's plea of the statute of limitations, it

would be necessary to treat the second count of the amended complaint as setting up a new and separate cause of action at law, without regard to the equitable rights involved and which at all stages of the action were an essential part thereof. But the pleadings do not justify such interpretation."

[6] To these conclusions we add the following observation: An analysis of the amended complaint makes it perfectly clear that both counts set forth but one primary right of plaintiffs that has been invaded by but one wrong on the part of defendant. The evidentiary facts under the two counts stated might be different, but that does not necessarily mean that more than one cause of action has been stated. Under the better-reasoned cases, when a complaint alleges but one primary right and one wrong, but one cause of action has been stated. *Frost v. Witter*, 132 Cal. 421, 64 P. 705, 84 Am. St. Rep. 53; *McKee v. Dodd*, 152 Cal. 637, 93 P. 854, 14 L. R. A. (N. S.) 780, 125 Am. St. Rep. 82; *Hurt v. Haering*, 190 Cal. 198, 211 P. 228.

We have examined the other points urged by appellant and find that they are without merit.

The judgment appealed from is affirmed.



4 Cal.2d 585

KENTFIELD et al. v. KENTFIELD et al.

S. F. 15509.

Supreme Court of California.

Nov. 8, 1935.

1. Appeal and error ⇐460(1)

Appeal by beneficiaries from judgment directing disposition of trust estate does not operate as statutory supersedeas as to portion of judgment directed to nonappealing trustees.

2. Appeal and error ⇐479(1)

Reviewing court should issue supersedeas to protect nonappealing trustees on appeal by beneficiaries from judgment directing trustees to pay balance of trust fund to settlor, where evidence showed that settlor was 79 years of age, was largely indebted, and was without other property.

3. Appeal and error 480

Reviewing court, on granting supersedeas to nonappealing trustees on appeal by beneficiaries from judgment directing disposition of trust estate, should not require deposit in court or bond, where money was on deposit in savings account and account of trustees had been confirmed.

In Bank.

Appeal from Superior Court, city and county of San Francisco, Michael J. Roche, Judge.

Action by Howard E. Kentfield and another, trustees, against Edward E. Kentfield and others. From the judgment, defendants Florence E. Kentfield Canon and Ethel C. Kentfield appeal, and plaintiff trustees petition for writ of supersedeas.

Writ granted.

Charles A. Wetmore, Jr., of San Francisco, for appellants.

Treadwell, Laughlin & Treadwell, Earl F. Treadwell and A. G. Goodrich, all of San Francisco, for respondents.

THOMPSON, Justice.

This is a petition for a writ of supersedeas. Howard E. Kentfield and Edward F. Treadwell, as trustees of an express trust, began this action to settle accounts, fix the compensation of the trustees, and obtain a determination and declaration of whether the balance of the trust funds in their hands should be held and applied to the support of Edward E. Kentfield or should be paid to Edward E. Kentfield as distributee in the estate of his son, John E. Kentfield. The answer of the defendant Edward E. Kentfield asks for a settlement of accounts and fixing of compensation of the trustees and an order directing the payment of the balance in the trust fund to him. The answer of the defendants Florence E. Kentfield Canon and Ethel C. Kentfield asks that the balance of the trust fund be retained by the trustees and applied by them to the support and maintenance of Edward E. Kentfield.

The trust was created by Edward E. Kentfield for the purpose of paying off his indebtednesses to his children and providing for his support during life. The trustees were Edward F. Treadwell and two sons of Edward E. Kentfield, John (since deceased) and Howard. The trus-

tees were to pay to Edward E. Kentfield sufficient sums for his support during life, and upon his death the property was to go to his children. The debts to the two daughters and Howard were completely paid off, but an indebtedness to John Kentfield in the neighborhood of \$9,000 remained unpaid at the time of his death, and the note evidencing such indebtedness was distributed to Edward E. Kentfield as his son's sole heir.

Judgment was rendered settling the accounts and fixing the compensation of the trustees and further determining that the indebtedness of Edward E. Kentfield to his son John was not extinguished by distribution of the notes to him, but that as holder thereof he was entitled to payment thereof from the trust fund so far as possible and ordering that the trustees pay to Edward E. Kentfield the balance remaining in their hands on settlement of the accounts, or the sum of \$10,221.26.

The two daughters, Florence E. Kentfield Canon and Ethel C. Kentfield, beneficiaries under the trust and defendants in the action commenced by the trustees, have appealed from that portion of the judgment adjudging the indebtedness to John was not discharged by the distribution of the notes to Edward E. Kentfield and that Edward E. Kentfield as holder is entitled to payment from the trust estate and directing the trustees to pay to him the balance in their hands.

The plaintiff trustees, who have not appealed from the judgment, are the petitioners here. They allege the perfection of the appeal by Florence E. Kentfield Canon and Ethel C. Kentfield and a stipulation that during the pendency of the appeal the defendant Edward E. Kentfield is to receive from the trust fund the sum of \$100 a month for his support, and that the trustees may pay him such additional sums as they shall deem proper for his support, maintenance, and medical care; that, notwithstanding the stipulation and payment thereunder by the trustees, Edward E. Kentfield intends to cause execution to issue; that he is largely indebted, has no property other than his interest in the trust, and, if the money is paid to him, it will become subject to his debts, and he would be entirely unable to repay the amount in case of a reversal. The trustees ask the issuance of the writ to protect them from liability to the ap-

pellants as well as to the respondent, and, in view of the stipulation, ask that the writ issue without bond, although they offer to pay the money into court to await the final determination of the appeal.

[1,2] The appeal by the beneficiaries does not operate as a statutory supersedeas as to that portion of the judgment directed to the nonappealing trustees. *Halsted v. First Savings Bank*, 173 Cal. 605, 160 P. 1075; *Cullinan v. Mercantile Trust Co.*, 193 Cal. 562, 226 P. 4. We are convinced that the circumstances are such as to warrant the issuance of the discretionary writ. It appears that the respondent is 79 years of age and largely indebted; that the purpose of the trust was in large part to provide a fund for his maintenance and support; that he has no other property; and that the trust involved in the present litigation was the second trust formed for the purpose of obtaining a more competent management of his properties so as to repay his children and provide security for the trustor. By the trust instrument the appealing defendants are released from liability for his support. It appears that there is grave danger of the dissipation of the trust money should the petitioners be compelled to pay it over pending the appeal, with corresponding serious injury to them should a reversal result. Without a stay, the appeal of the beneficiaries would be rendered less effective as a remedy since, in case of the dissipation of the funds by respondent, he would be unable to respond to the judgment, and the trustees would undoubtedly strenuously resist any attempt to impose a double liability upon them. The appeal appears to be taken in good faith and for the purpose of continuing the trust, the management of which by the present trustees was approved by the trial court, and thus providing with some degree of certainty for the future support of the respondent. *Halsted v. First Savings Bank*, *supra*; *Macario v. Macario*, 208 Cal. 601, 283 P. 291.

[3] Having concluded that the writ should issue, it becomes necessary to determine whether conditions to its issuance should be fixed. It appears from the account that the money is on deposit in a savings account drawing interest. It further appears that the account of the trustees has heretofore been approved and confirmed by the court, that all of the

parties to the litigation signed the trust agreement appointing the trustees, and there appears to be no interest in the trustees other than the due execution of their trust. Under the peculiar circumstances, there seems to be no reason why the trust estate should be compelled to lose interest by a requirement that the money should be deposited in court or that the trust estate should be put to the expense of a bond.

It is ordered that the writ of supersedeas issue as prayed.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J., CURTIS, J.; SEAWELL, J.; CONREY, J.



PEOPLE v. WILLIAMS.*

Cr. 2782.

District Court of Appeal, Second District,
Division 1, California.

Nov. 18, 1935.

Hearing Granted by Supreme Court
Dec. 17, 1935.

1. Criminal law ⇨371(1)

Evidence of commission by defendant of offenses other than one for which he is on trial is admissible to show his intent, provided such intent has become an issue.

2. Criminal law ⇨371(1)

Evidence of commission by defendant of other offenses is inadmissible if proof of commission of offense for which he is on trial carries with it conclusive implication of guilty intent, if intent is immaterial, or if defendant does not raise issue of intent.

3. Criminal law ⇨371(2)

In prosecution for grand theft in removing coin purse from woman's handbag, evidence that defendant had opened women's purses at other stores held inadmissible, since presumption of guilty intent followed as matter of law from defendant's alleged acts, where defendant did not raise issue of intent.

4. Criminal law ⇨720(8)

In prosecution for grand theft, statement by deputy district attorney to court in presence of jury that record of court showed that defendant was extradited from another state, and that she resorted to flight which might be considered by jury as indication of guilt, held

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 58 P.2d 917.

improper, since what record disclosed was for determination of jury.

5. Criminal law Ⓒ656(6)

In prosecution for grand theft, remark of trial judge, during examination of defendant, with reference to her having been placed in jail in other cities by direction of her bondsmen, that she was at such times fugitive from justice, *held* improper.

6. Criminal law Ⓒ706

In prosecution for grand theft, deputy district attorney *held* guilty of misconduct in repeated questioning of defendant in cross-examination as to whether she had not been arrested and imprisoned in another city on charge of picking pockets.

Appeal from Superior Court, Los Angeles County; Raglan Tuttle, Judge.

Mrs. Ollie Williams was convicted of grand theft from the person, and she appeals.

Reversed.

Gladys Towles Root, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

HOUSER, Presiding Justice.

Defendant appeals "from the judgment and sentence of conviction * * * and from the order denying the defendant the right to file her application for probation."

The record herein shows that the offense of which defendant was convicted was that of "grand theft from the person." According to the testimony given on the trial of the action by one of the arresting officers (in which he was largely corroborated by another police officer), the crime was committed by defendant in the following manner: "Mrs. Henig (the alleged victim) was coming east toward Broadway in this aisle, about twenty or twenty-five feet from the Broadway sidewalk and the defendant reached across in front of Mrs. Henig who was carrying her purse and some bundles slightly in front of her, she reached across and opened Mrs. Henig's bag with her left hand, and then passed her, or went on three or four steps, and then turned around and passed on Mrs. Henig's left side, and as she got even with her she reached across with her left hand and took the coin purse out

of Mrs. Henig's bag. I was directly behind the defendant. So I reached around and grabbed her wrist and hands and as I did so she dropped the coin purse to the floor. So holding her hands with one of my hands, I reached down with the other onto the floor and picked up the purse. The defendant started to scream, 'I didn't take it, I found it on the floor' or words to that effect."

The officer also testified that defendant later had made to him several damaging admissions regarding her guilt—which testimony was denied in toto by defendant.

Defendant's version of the matter was as follows: "There was a crowd of people, and I remember there was a place on one side that had drinks, and I walked on down that way, looking to see where the market stuff was, and I met this crowd of people, and I stumbled and I looked and there was a little pocket-book on the floor. I reached down to get it and this man grabbed my arm and said, 'Come on,' and I said, 'Come on for what?' I didn't know what he meant. He said, 'Come on,' and I never said anything. I looked up, and I seen the man and he said, 'Come on,' he said, 'You took that lady's pocket-book.' I said, 'No, I didn't either.' I said: 'You turn me loose. I didn't take her pocket-book.' And he pulled me through the crowd a little piece that way, and the crowd was so crowded, he turned around and come back this way, so I didn't know what lady it was until I got back through there and he stopped this lady and I looked up, and he said, 'Did you lose something?' and she said, 'Yes,' and I said, 'Well, he has got it.'"

The first point raised by appellant is that the trial court erred in admitting evidence presented by the people regarding other alleged offenses said to have been committed by defendant and not charged against her in the information. In that regard, in substance, it appears that over the objection of defendant, the arresting officer testified that in a store, other than the one in which the arrest took place, at a time about twenty minutes theretofore, he saw defendant attempt to pick the pocket of a woman. The officer stated that "she (defendant) kind of got down on her left knee and reached down and opened the lady's purse." Also, in a third store, at about the same time, "she (defendant) opened another purse

at one of the five-and-ten-cent stores. * * * She opened a lady's purse as they went into the second or third five-and-ten-cent store, after the first one—I don't know which one of the stores it was. It was so crowded there, that they crowded through, and I didn't get close enough to tell what happened. Then she turned around and came out of the store and I followed her into the Grand Central."

The only theory upon which the questioned testimony was presented to and received by the court for the consideration of the jury was that it tended to show "intent" of defendant.

[1,2] One of the exceptions to the general rule, that evidence of the commission by a defendant of offenses other than the one for which he may be on trial is inadmissible, is that it may be received to show "intent" of such defendant, provided that his "intent" originally was, or during the course of the trial has become, an issue; as where it is claimed that the act in question was free from felonious intent, or was the result of mistake, accident, or inadvertence. 8 Cal. Jur. 64. But it is also equally well-settled law that "the evidence (of the commission by the defendant of other offenses) is inadmissible if the proof of the commission of the offense carries with it a conclusive implication of guilty intent, or if intent is immaterial, or if the defendant sets up some affirmative defense and does not seek to evade responsibility on the ground of lack of intent." 8 Cal. Jur. 64. See, also, *People v. O'Brien*, 96 Cal. 171, 31 P. 45; *People v. Byrnes*, 27 Cal. App. 79, 148 P. 944; *People v. Dial*, 28 Cal. App. 704, 153 P. 970; *People v. King*, 23 Cal. App. 259, 137 P. 1076; *People v. Washburn*, 104 Cal. App. 662, 286 P. 711.

[3] It is apparent that if, in the instant case, the defendant first opened Mrs. Henig's handbag, and a few seconds later abstracted her purse therefrom, a presumption, or at least an inference, would obtain that the defendant had stolen the purse, and was guilty of "grand theft from the person." In such circumstances, the presumption of guilty intent of defendant would have followed as a matter of law; and unless thereafter defendant had raised the question of intent, or had made an issue of it, there would have been no occasion for the people to strengthen that which would seem to have been its posi-

tion in that regard. Of course, for example, had defendant testified that Mrs. Henig was a friend of defendant and that defendant was only playing a joke on Mrs. Henig; or that the taking of the purse was the result of a mistake, such as that defendant had just lost her own purse and thought it was her purse that she took from Mrs. Henig's handbag; or that, as she passed Mrs. Henig, defendant slipped on the floor of the storeroom, and as she fell she just happened, inadvertently, to take hold of Mrs. Henig's purse—the issue of intent on the part of defendant might have been presented in the case. But on the trial of the action, no such situation, or anything analogous thereto, prevailed. To the contrary, without waiting for any defense testimony, the prosecution introduced all of its evidence with reference to "other offenses" of defendant as a part of its case in chief. Defendant did not admit that she had ever taken the purse from the handbag, nor by any evidence did she raise the issue of intent. As hereinbefore has been narrated, her story was to the effect that, although the purse was temporarily in her possession, its presence there was due solely to the fact that she had fallen on the floor of the storeroom, and that she had there found the purse. Considering the character of the alleged offense and the manner of its asserted commission, the admission of evidence of "other offenses" was erroneous.

[4] In effect, appellant also urges the point that at the close of the case in chief for the prosecution, the deputy district attorney in charge thereof was guilty of misconduct prejudicial to defendant, in that without either first, or ever, offering or making any reference whatsoever to any "record" as evidence against defendant, he made the following statement to the court in the presence of the jury:

"That is our last evidence. I believe the record of this court is the best record as to the flight. I would like to ask the court to advise the jury as to flight. I will submit that the record of this court will show that on the 23rd of July the case of this defendant was called for trial and that the defendant was not present—June it was—her bail was forfeited and she was extradicted from Kansas City, Missouri. After she was charged with the offense, she resorted to flight and that clearly comes within the rule that the

jury may take into consideration the element of flight as an indication of guilt.

"The Court: The record may be deemed in evidence."

It is clear that whatever the "record" may have been, it was improper for the deputy district attorney to declare that it showed "flight"; or that defendant "resorted to flight"; and that "she was extradicted from Kansas City." The deputy district attorney had not been called as a witness for the people, nor had he any authority to express an opinion with reference to what was shown by the "record." After having been properly introduced in evidence, the question as to what that "record" disclosed was one that should have been left solely to the jury for its determination; excepting only that in his argument to the jury, the deputy district attorney might then have pointed out that which he contended were inferences properly deducible from such "record." It may well be that, in the absence of any such declarations by the deputy district attorney, the jury might have believed from the evidence that defendant had a valid reason, or at least an acceptable excuse, for not being present in court at the time the action against her was called for trial.

[5] Likewise, appellant complains of misconduct by the judge of the court as appears in the redirect testimony of defendant. In that regard, the reporter's transcript of the evidence herein reveals the situation that the attorney for defendant was pursuing the examination of defendant with reference to her having been placed in jail by the direction of her bondsmen at Kansas City, at Topeka, and at Denver. Whereupon, without any apparent reason therefor, the judge of the trial court remarked: "Of course, all this time she was a fugitive from justice."

It is obvious that such a remark by the trial judge may have had a disastrous effect upon the case of defendant.

[6] Without herein setting forth the record with reference thereto, the deputy district attorney was guilty of further misconduct in gratuitously and repeatedly questioning the defendant in the course of her cross-examination as to whether, while in Kansas City, "she had not been arrested and placed in jail there on a charge of picking pockets."

Although the record fails to show that objection was made by defendant regarding many of the several foregoing instances of misconduct, it is apparent that any remonstrance which might have been made thereto in her behalf would have but emphasized the effect of the said several objectionable statements and questions. The possible effect upon the jury of the several errors, to which reference hereinbefore has been had, is admirably (and appropriately to the facts herein) set forth in the case of *People v. King*, 23 Cal. App. 259, 263, 137 P. 1076, to which attention is directed.

The judgment is reversed, and the appeal from the order to which appellant has directed attention is dismissed.

We concur: YORK, J.; DORAN, J.



10 Cal.App.2d 66

BECHTEL v. NELSON et al.

Civ. 9700.

District Court of Appeal, First District,
Division 2, California.

Nov. 7, 1935.

Hearing Denied by Supreme Court
Jan. 6, 1936.

Constitutional law ☞ 149
Mortgages ☞ 559 (7)

Statute which became effective in August, 1933, providing that deficiency judgment following sale under deed of trust must be limited to sum by which amount due exceeds fair market value of property at date of sale, held not applicable where note and deed of trust were executed in 1928, and trustee's sale was held in January, 1933, since Legislature did not declare statute to be retroactive and retroactive application would be impairment of obligations of contract (Code Civ. Proc. § 580a, as added by St. 1933, p. 1672, § 4).

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by H. H. Bechtel against J. V. Nelson and others. From an adverse judgment, the plaintiff appeals.

Judgment reversed, with directions.

Tobias J. Bricca and C. H. White, both of San Francisco, and Crozier C. Culp, of

Oakland (McKee, Tasheira & Wahrhaftig, of Oakland, of counsel), for appellant.

Marshall Rutherford, of Oakland, for respondents.

NOURSE, Presiding Justice.

This is an appeal by the plaintiff from a judgment of the superior court awarding him \$989.75 in an action to recover a deficiency due on a promissory note after a sale under a deed of trust on real property securing the note. There is no dispute as to the facts. The claims of the respective parties are: Plaintiff claims that he should have had judgment for \$7,489.75, which is the difference between the amount due on the note and the amount bid at the sale of the property; the defendants claim that they were entitled to show the fair market value of the property at the time of the sale under the provisions of section 580a of the Code of Civil Procedure and thus limit the plaintiff's recovery to the difference between the amount due under the note and such market value. The trial court, adopting the view of the defendants, found that the fair-market value of the property at the time of the sale was \$14,000, that the amount due at the time of the sale was \$14,989.75, and gave judgment for plaintiff for the difference between these figures. The property was sold at a trustee's sale under the deed of trust for the sum of \$7,500 and the difference between this sum and the amount then due represents the amount claimed by the plaintiff.

There is just one question of law presented by the appeal which requires discussion, and that is the application of section 580a of the Code of Civil Procedure to a deed of trust executed prior to, and under which a sale has been conducted prior to, the effective date of that section. The statute was enacted at the session of 1933 (St. 1933, p. 1672, § 4) and became effective on August 21, 1933. The note and deed of trust involved herein were executed on May 4, 1928, and the trustee's sale thereunder was

held on January 3, 1933. The statute in general provides that the deficiency judgment following a sale under a deed of trust must be limited to the sum by which the amount due exceeded the fair market value of the property at the date of sale.

We hold that the statute is not retroactive for two reasons: The Legislature did not so declare it, and a retroactive application would be an impairment of contractual obligations. In *Bennett v. Superior Court*, (Cal. App.) 42 P.(2d) 80, a case involving the precise question, it was held that the substantive right of the beneficiary under the trust deed to be repaid the entire amount of the indebtedness had accrued before the section became effective and that the attempt to limit recovery of a deficiency to the fair market value of the property was an impairment of the obligation of the contract. The court distinguished a case of this character from *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U. S. 398, 54 S. Ct. 231, 78 L. Ed. 413, 88 A. L. R. 1481, involving the so-called Minnesota Moratorium Act wherein the payment was deferred but not nullified. Reference was also made to *W. B. Worthen Co. v. Thomas*, 292 U. S. 426, 54 S. Ct. 816, 78 L. Ed. 1344, 93 A. L. R. 173, where the Supreme Court held that the reserve or police power of the state to defer payments during financial emergencies must be in harmony with the constitutional limitations and did not permit a state to adopt as its policy the repudiation of debts and the destruction of contracts or the denial of means to enforce them. The rule of the *Bennett* Case was followed in *Cal. Trust Co. v. Smead Inv. Co.* (Cal. App.) 44 P.(2d) 624, and in *Wilson v. Superior Court* (Cal. App.) 46 P.(2d) 993.

For these reasons the judgment is reversed, with directions to the trial court to enter judgment for the plaintiff in accord herewith.

We concur: STURTEVANT, J.; SPENCE, J.

10 Cal.App.2d 46

STAPLES v. LEGGAT.
Civ. 9854.

District Court of Appeal, First District,
Division 2, California.
Nov. 6, 1935.

Executors and administrators ⇨221(5)

In action for balance due for services rendered deceased as secretary and housekeeper, finding that deceased had not agreed to pay plaintiff any fixed amount, and that she had been fully compensated, *held* not contrary to evidence.

Appeal from Superior Court, Santa Cruz County; James L. Atteridge, Judge.

Action by Flora Dell Staples against Hazel Craig Leggat, administratrix with the will annexed of the estate of William E. S. Knowles, deceased. From an adverse judgment, the plaintiff appeals.

Judgment affirmed.

A. D. Schaffer, of San Francisco, for appellant.

Rittenhouse & Snyder, of Santa Cruz, for respondent.

SPENCE, Justice.

This action against the defendant administratrix was based upon a rejected claim in the sum of \$1,723.01. The cause was tried by the court sitting without a jury, and resulted in judgment for plaintiff in the sum of \$239.56 and no more. Plaintiff appeals from said judgment.

The judgment as rendered covered certain sums alleged to have been expended on behalf of the deceased. It denied to plaintiff any recovery for an alleged balance due for services as secretary and housekeeper for the deceased. This denial is the subject of the controversy on this appeal.

Plaintiff alleged, as set forth in her claim, that she had been employed by the deceased at an agreed compensation of \$250 per month, that she was so employed for a period of 14 months, making a total of \$3,500, and that \$2,100 has been paid leaving an unpaid balance of \$1,400. Defendant denied the existence of said agreement, and alleged that plaintiff had been fully paid and satisfied for all services rendered and all obligations of the deceased.

Upon the trial, the only evidence introduced was that offered on behalf of plain-

tiff. The only evidence showing any express agreement or understanding between plaintiff and the deceased was the codicil to the will of the deceased and certain alleged oral declarations of the deceased. Said codicil contained the following provision: "Flora Dell Staples of Iola, Wisconsin, having on the twelfth day of January, 1930, entered into my employment on the understanding that in addition to the sums that I should pay her in cash from time to time I would leave her an annuity as hereinafter set forth." The codicil then provided for a trust fund from which plaintiff was to receive the income for life. It was provided that said fund should consist of \$2,000 for each year, or fraction of a year, that plaintiff remained in his employ, and an additional sum of \$10,000 in the event that plaintiff remained in his employ until his death. Under the terms of said codicil, the total amount left in trust for plaintiff as aforesaid was the sum of \$14,000.

Plaintiff produced witnesses who testified as to certain oral declarations of the deceased. These included certain references to the "salary" of plaintiff, but only one witness, an aunt of plaintiff, testified to any specified amount. Said witness testified that deceased stated that "he had agreed to pay her \$250 a month, and out of this \$50, or around that, was to go for their food, supplies and necessities for the kitchen and the \$200 was for her salary; * * * and then he mentioned that he had created a trust fund. * * *"

The trial court found that deceased had employed plaintiff, but that he had not agreed to pay her any specified amount; that plaintiff was employed upon an understanding and agreement that plaintiff was to receive from deceased as compensation "sums of money from time to time, and the amounts of which payments, and the times at which said payments were to be made, being wholly and solely in the discretion of the said deceased, and in addition to said payments the said deceased would leave the plaintiff by his last will and testament an annuity to be determined as follows. * * *" The trial court further found that plaintiff had been fully compensated pursuant to said understanding, and that neither the sum of \$1,400 or any other sum remained unpaid to plaintiff.

Appellant makes no direct attack upon said findings, but does make an implied attack thereon when she contends that the trial court arbitrarily disregarded the un-

contradicted testimony. We find no merit in this contention. It is a sufficient answer to point out that appellant erroneously assumes that the testimony was uncontradicted. While the testimony given by the aunt of appellant did tend to prove an employment at a fixed salary, the codicil executed by the deceased and introduced in evidence by appellant tended to prove that appellant accepted employment as secretary and housekeeper solely upon the understanding that she should receive an annuity at the death of the deceased in addition to such unspecified amounts as the deceased should pay her during his lifetime. We are of the opinion that this evidence was ample to sustain the trial court's findings.

The judgment is affirmed.

We concur: **NOURSE, P. J.; STURTEVANT, J.**



10 Cal.App.2d 63

BLUMEN v. CLAYBURGH et al.

Civ. 9824.

District Court of Appeal, First District,
Division 2, California.

Nov. 7, 1935.

Hearing Denied by Supreme Court
Jan. 6, 1936.

1. Limitation of actions ⇨202(1)

Although complaint for fraud states good cause of action, duty rests first on trial court to determine whether alleged discovery was within time alleged, and trial court's determination on such question is controlling unless facts alleged show manifest abuse of discretion.

2. Limitation of actions ⇨177(3)

Complaint for fraud from sale of pledged securities held insufficient to toll statute of limitations by allegations that plaintiff did not discover alleged fraud until immediately after he had been confined in penitentiary, where no circumstances leading to alleged discovery at that time were pleaded, and plaintiff had been indicted for a bailable offense and had been confined in the county jail approximately a year before being sent to the penitentiary, during which time no reason appeared why he could not then have discovered the alleged fraud (Code Civ. Proc. § 352).

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Leopold Blumen, also known as Ludwig Busch, against Herbert E. Clayburgh and others, copartners, doing business as J. Barth & Co., and others. From a judgment for defendants after demurrer to the complaint was sustained, plaintiff appeals.

Affirmed.

Russell P. Tyler, of San Francisco, for appellant.

Thomas E. Davis, of San Francisco, for respondents.

NOURSE, Presiding Justice.

Plaintiff sued for damages for fraud arising from the sale of securities held under a pledge. The defendants' demurrer to the complaint was sustained with leave to amend, but plaintiff declined to amend and judgment was entered for the defendants.

There is one debatable question involved in the appeal not stated by either party but nevertheless determinative, and that is whether the complaint sufficiently pleads the times and circumstances under which the facts constituting the fraud were brought to plaintiff's knowledge so that the court could determine whether the complaint was filed within the period covered by the statute of limitations.

The complaint alleges that plaintiff incurred an obligation with certain defendants engaged as stockbrokers in the city and county of San Francisco through the purchase of stocks on margin, and to secure his indebtedness deposited with the brokers certain securities; that when the indebtedness amounted to about \$3,500 the brokers sold the securities for approximately \$5,800, satisfied the indebtedness and paid the balance over to the defendant Fidelity & Deposit Company; that this sale was consummated on March 25, 1926, at a time when the plaintiff was a fugitive from justice having been indicted by the San Francisco grand jury for grand theft on February 18, 1926; that on May 1, 1926, plaintiff was located in London, England, arrested, and returned to San Francisco to stand trial under this indictment; that the plaintiff arrived in San Francisco on August 11, 1926, and remained in

the county jail of that county from said date until April 29, 1927, when he was removed to the state penitentiary at San Quentin pursuant to sentence following a conviction on March 12, 1927, on that indictment; that he remained in the state penitentiary from April 29, 1927, until June 19, 1933, at which time he was released on parole. The complaint in this action was filed March 22, 1934. The foregoing facts and no more are relied on to support the bald allegation that the alleged fraud was "not known or discovered by the said plaintiff until the month of May, 1927." At this point it should be noted that plaintiff was delivered to the state penitentiary on April 29 and that the alleged discovery in "the month of May" might have occurred two days after his delivery; hence his discovery during the first days of his incarceration was a most fortuitous circumstance for him because, his action accruing at that date, he could claim a suspension of the statute of limitations during the full six years of his incarceration under the provisions of section 352 of the Code of Civil Procedure.

[1] With these facts before us, it is necessary for us to determine not whether the complaint states a cause of action in fraud, but whether it sufficiently pleads "the times and the circumstances under which the facts constituting the fraud were brought to his knowledge, so that the court may determine whether the discovery of these facts was within the time alleged." *Lady Washington C. Co. v. Wood*, 113 Cal. 482, 487, 45 P. 809, 810. To amplify, we might assume that the complaint states a good cause of action, but this is not enough; the duty rests first upon the trial court to determine whether the alleged discovery was within the time alleged, and the determination of the trial court on that question is controlling upon us unless the facts alleged are such as will show a manifest abuse of discretion.

In a case closely allied the Supreme Court, in *Consolidated R. & P. Co. v. Scarborough*, 216 Cal. 698, 703, 16 P.(2d) 268, 270, emphasized the necessity of pleading the facts and circumstances surrounding the discovery of the fraud complained of "in order that the trial court might readily determine whether or not the facts and circumstances leading to the discovery of the fraud existed for more than three years

prior to the commencement of suit." Numerous cases are there cited in support of the rule and the Supreme Court further emphasized, on the authority of *Wood v. Carpenter*, 101 U. S. 135, 140, 25 L. Ed. 807, and the California cases theretofore cited, that the means of knowledge are the equivalent of knowledge. Quoting from *Bancroft v. Woodward*, 183 Cal. 99, 108, 190 P. 445, 449, "where a party has knowledge of facts of a character which would reasonably put him upon inquiry, and such inquiry, if pursued, would have led to a discovery of the fraud or other ground for rescission, he will be charged with having discovered the fraud or other ground as of the time he should have discovered it; that is, as of the time when he would have discovered it if he had with reasonable diligence pursued the inquiry when he should have done so."

[2] In the instant case the allegations to the effect that plaintiff did not discover the alleged fraud until immediately after he had been confined in the state penitentiary is insufficient under the rule of the authorities cited. No facts nor circumstances leading to the alleged discovery at that time are pleaded. Furthermore, it must have been in the mind of the trial judge that since the plaintiff was confined in the county jail in San Francisco for approximately a year before being sent to the state penitentiary, he should have pleaded some reason why he did not discover the alleged fraud which he claimed was committed in that county where all the defendants had their respective places of business. The plaintiff had been indicted for grand theft which was a bailable offense and it is beyond comprehension that he would not have sought bail and for that purpose have made some inquiries about the securities which he alleges had been deposited with the defendants. Unlike many of the authorities herein cited where a demurrer was sustained without leave to amend, the plaintiff was granted such leave herein for the purpose of pleading these facts and circumstances, but he declined to amend. We find no error in the judgment.

Judgment affirmed.

We concur: STURTEVANT, J.;
SPENCE, J.

MacGREGOR et ux. v. PACIFIC ELECTRIC RY. CO. *
Civ. 10536.

District Court of Appeal, Second District,
Division 2, California.
Nov. 13, 1935.

Rehearing Denied Dec. 4, 1935.

Hearing Granted by Supreme Court
Jan. 10, 1936.

Carriers ⇨333(1)

Passenger on westbound street car who was carried to point some distance from pedestrian crosswalk and who on alighting walked back toward pedestrian crosswalk and after looking to rear walked with her back toward approaching eastbound street car without noticing it until too late to avoid injury *held* contributorily negligent as matter of law.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by A. J. MacGregor and wife against the Pacific Electric Railway Company. From an adverse judgment, the defendant appeals.

Judgment reversed, with directions.

Frank Karr, E. E. Morris, C. W. Cornell, and O. O. Collins, all of Los Angeles, for appellant.

Paul Blackwood, of Los Angeles, for respondent.

McCOMB, Justice pro tem.

This is an appeal by defendant from a judgment in favor of plaintiffs after a trial before a jury and denial of defendant's motion for a judgment notwithstanding the verdict.

Viewing the evidence most favorably to the plaintiffs (Ah Gett v. Carr, 3 Cal. App. 47, 48, 84 P. 458), the facts in the instant case are:

Mrs. MacGregor, wife of her coplaintiff, was a passenger on a westbound car of defendant, traveling on its private right of way parallel with San Vicente boulevard, which extends east and west. Mrs. MacGregor requested defendant to let her off at Nineteenth street, where there was a loading zone and crosswalk. The car did not stop, but carried her 105 feet west of the pedestrian crosswalk. She alighted on the north side of the track, waited until the car she had just left moved, and thereupon crossed the track to a point mid-

way between the east and westbound tracks. Here she looked to the west and did not see any eastbound car. She thereafter walked in an easterly direction for approximately 80 feet close to but south of the south rail of the westbound track. Here she stopped, looked in a westerly direction, and, not seeing any street car, proceeded to walk diagonally toward the eastbound track and the pedestrian crosswalked for about ten steps, where she was struck and injured by an eastbound car of defendant.

The sole question presented for determination on this appeal is: Was plaintiff Mrs. MacGregor guilty of contributory negligence as a matter of law?

The facts in the instant case are analogous, and the questions of law are identical, with those in the case of Trulsson v. Southern Pacific Co., 42 Cal. App. 404, 183 P. 686, where in an able opinion Mr. Justice Richards held the plaintiff guilty of contributory negligence as a matter of law.

The judgment is reversed, with directions to the trial court to enter a judgment in favor of defendant.

We concur: CRAIL, P. J.; WOOD, J.



10 Cal.App.2d 193
RAYMER v. VANDENBERGH.
Civ. 9796.

District Court of Appeal, Second District,
Division 1, California.
Nov. 14, 1935.

1. Negligence ⇨121(2)

Res ipsa loquitur doctrine merely establishes prima facie case, and does not give plaintiff absolute right to judgment.

2. Appeal and error ⇨1008(1)

Negligence of defendant who testified that on rainy night his automobile skidded for unknown reason, it appearing that automobile skidded for about a city block before striking plaintiff's automobile, *held* fact issue for court in trial without jury; defendant's testimony concerning brakes, tires, visibility, speed, etc., being evidence to be weighed against presumption arising from facts

presented by plaintiff who relied on *res ipsa loquitur* doctrine.

3. Appeal and error ⚡931(5)

Where defendant testified that his automobile skidded for unknown reason, appellate court must assume that judge in trial without jury considered circumstances antecedent to skidding as well as skidding itself and found on whole evidence that defendant was not negligent.

4. Appeal and error ⚡1010(1)

Court's finding in trial without jury that defendant was not negligent *held* controlling on appeal in view of evidentiary support therefor.

5. Appeal and error ⚡110

No appeal lies from order denying new trial.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Ralph R. Raymer against J. F. H. Vandenberg. From a judgment for defendant and an order denying a new trial, plaintiff appeals.

Appeal from order denying new trial dismissed, and judgment affirmed.

George Clark and Karl W. Marks, both of Los Angeles, for appellant.

Paul Nourse, of Los Angeles (Forrest A. Betts, of Los Angeles, of counsel), for respondent.

EDMONDS, Justice pro tem.

Plaintiff brought this action for personal injuries suffered in an automobile accident. The defendant denied that he was negligent. The court found that the collision between the automobiles in which the parties were driving was not caused by any negligence, act, or omission of the defendant. Plaintiff appeals from the judgment subsequently entered and from the order denying a new trial.

The facts are undisputed. The accident happened on a rainy night. Appellant and respondent were each driving an automobile in opposite directions on a paved highway. Appellant was traveling about 25 miles per hour; respondent at between 35 and 40 miles per hour. Appellant was traveling a short distance behind another car proceeding in the same direction, and in his own language, "the first thing I noticed was that car kind of wiggled a little bit like it was dodging something, and the next thing it

was just a bang of the car that hit mine, this other car—Mr. Vandenberg's car."

Respondent testified that as he was driving along the boulevard his car "was working in, you might say, perfect order until * * * for some reason unknown to me the car began to skid." He explained the efforts he made to steer his car out of the path of the on-coming cars and at what point he applied the brakes. His car skidded for approximately a city block before it struck the automobile driven by appellant, and it continued to skid for some distance thereafter.

[1, 2] Appellant's contention is that these facts show that the accident was caused solely by the negligence of respondent by reason of his failure to operate his automobile at a speed reasonable and proper under the circumstances, and that, applying the doctrine of *res ipsa loquitur*, the findings in favor of respondent cannot be sustained. However, the doctrine of *res ipsa loquitur* does not give a plaintiff an absolute right to judgment. It merely establishes a *prima facie* case. The subject is exhaustively discussed in *Michener v. Hutton*, 203 Cal. 604, 265 P. 238, 240, 59 A. L. R. 480, where the court said: "In *Kahn v. Triest-Rosenberg Cap Co.*, 139 Cal. 340, 345, 73 P. 164, 166, it is declared: 'The negligence could have been established by direct proof of some act which, in its nature, was negligent, or it could have been established, as it was established, *prima facie*, by the mere proof of the happening of the accident and the circumstances surrounding it, from which the presumption of negligence arose. This presumption is itself evidence in the case, and it does not change the rule as to the burden of proof. It is merely the evidence by which the plaintiffs undertook to establish the fact which they were bound to prove. It still remained the law that, upon the whole evidence, the plaintiffs must have the preponderance in order to succeed.' * * * It is apparent from these latter authorities that it is for the jury, or the court when sitting without a jury, to determine from all the evidence in the case whether the defendant has successfully met and rebutted the *prima facie* case made out by the plaintiff in an action wherein the mere proof of the happening of the accident and the circumstances surrounding it give rise to an inference of negligence. That the inference of negligence created by the application of the doctrine of *res ipsa loqui-*

tur constitutes evidence which may not be disregarded by the jury, but is to be weighed and considered as against the evidence adduced by the defendant in rebuttal thereof, has been announced in numerous cases."

The respondent in the case at bar testified in detail concerning the length of time he had been driving on the night in question; the condition of the car in general and of his brakes in particular; when his brakes had last been examined; the condition of his tires; the visibility; the rate of speed he was traveling; the condition of the highway; and other details of the condition of his car and his operation of it. This was evidence to be weighed and considered by the trial court as against the presumption arising from the facts presented by appellant. It is therefore apparent that the issue in this case is one of fact which was determined adversely by the trial court upon substantial evidence.

[3, 4] This is the conclusion which was reached in the case of *Musante v. Guerrini*, 125 Cal. App. 556, 13 P.(2d) 965, 966, upon which appellant relies and which arose out of an accident caused by skidding. The court said: "A person may not shield himself against a charge of negligence merely by showing that an automobile operated by him was temporarily beyond his control due to its skidding, if the skidding was the direct result of his own act of negligence. Respondent alleges in general terms in his complaint that appellant was negligent in the operation of her automobile, and that he was injured as a result. It was proper then to consider the circumstances antecedent to the skidding, as well as the skidding itself, to determine whether or not appellant was negligent as alleged." This court must assume that the trial judge in the case before us considered "the circumstances antecedent to the skidding as well as the skidding itself," and that he found upon the whole evidence respondent was not negligent. That determination is absolutely controlling upon this court. In *re Estate of Moore*, 162 Cal. 324, 122 P. 844; *Tucker v. City and County of San Francisco*, 111 Cal. App. 720, 296 P. 101.

[5] The judgment is affirmed, and as no appeal lies from an order denying a new trial, that appeal is dismissed.

We concur: HOUSER, P. J.; DORAN, J.

10 Cal.App.2d 76

KNOX v. PRYOR.

Civ. 5374.

District Court of Appeal, Third District,
California.

Nov. 7, 1935.

Automobiles ☞245 (24)

Motorist who traversed grade at speed in excess of speed limit fixed in South Dakota statute which made it prima facie unlawful to exceed speed limit fixed therein held not negligent as matter of law so as to authorize recovery by occupant, where there was no warning sign, motorist had seen road from similar small hills far ahead and had reduced speed after traversing crest of hill to lawful rate before striking loose gravel, and accident would not have happened had it not been for loose gravel (*Laws S. D. 1929, c. 251, tit. 2, § 4*).

Appeal from Superior Court, Sacramento County; P. J. Shields, Judge.

Action by Julia Knox against Frances Stuart Pryor. From a judgment for the defendant, the plaintiff appeals.

Affirmed.

J. Oscar Goldstein, of Chico, and W. H. Hatfield, of Sacramento, for appellant.

Butler, Van Dyke & Harris, of Sacramento, for respondent.

DEIRUP, Justice pro tem., delivered the opinion of the court.

This action was brought to recover damages for injuries sustained by plaintiff in an automobile accident in South Dakota. Plaintiff has appealed from a judgment entered in favor of defendant upon a verdict of a jury.

Plaintiff, defendant, and two others were spending their vacation touring in the United States and Canada. Defendant furnished the automobile and the other three took care of expenses for gasoline, oil, and tires. At the time of the accident, they were on their way from Pierre, S. D., to the Black Hills. The road was macadamized and straight for a long distance, going over small knolls or hills from the tops of which it could be seen for miles ahead. Approaching the top of one of the hills, defendant reduced the speed of her car from 30 to 35 miles an hour to about 26, but suddenly came upon a sharp curve to the right with the road banked

to the left. She put on her brakes slightly and succeeded in negotiating the curve, but encountered loose gravel. There was testimony to the effect that the speed of the car was then eight miles per hour. The car swerved and turned over, falling on its side in a ditch about five feet deep, injuring plaintiff seriously.

The statute of South Dakota, regulating the speed of automobiles, in force at the time of the accident (Laws S. D. 1929, c. 251, tit. 2, § 4), was similar to that of California. It required that vehicles be driven "at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway and of any other conditions then existing," and made it "prima facie lawful" to drive at speeds not exceeding those specified, and "prima facie unlawful" to exceed "any of the speed limitations." One of the limitations was 15 miles an hour "in traversing a grade upon a highway when the driver's view is obstructed within a distance of 100 feet."

It is a proven fact in this case that the defendant traversed the grade at a speed in excess of the limit. Plaintiff contends that defendant thereby committed an act which was prima facie unlawful, that she did not overcome the burden cast upon her by the statute, and that she was therefore guilty of negligence as a matter of law. It having been proved that the defendant exceeded the speed limit, plaintiff asserts that she was as guilty as she would have been if the statute had made that act definitely unlawful unless she contradicted and overcame the prima facie unlawfulness by showing, for example, that the accident would not have happened even if she had been traveling at a legal rate of speed.

The point in issue has not been adjudicated by the courts of South Dakota, but this court has held recently that driving an automobile at a rate exceeding the speed limit is not, in and of itself, a violation of the California Vehicle Act. *Ex parte Moseley* (Cal. App.) 45 P.(2d) 241, 242. In that case Moseley had been charged with driving his car at a speed in excess of 45 miles an hour; had pleaded guilty and been sentenced, and had applied for a writ of habeas corpus upon the ground that he had been illegally deprived of his liberty because the complaint had not stated that the speed at which he was

driving was greater than was reasonable or prudent. After stating the substance of the provisions of section 113 of the California Vehicle Act (St. Cal. 1923, p. 553, § 113, as amended by St. 1931, p. 2120), Mr. Justice Plummer, writing the opinion of the court, said: "The language of these subdivisions leads us to the conclusion that the Legislature intended, and could only have intended, that speeds in excess of those mentioned should not constitute, in and of themselves, substantive offenses. * * * We think the language means, and the Legislature intended, that speeds in excess, for instance, of 45 miles an hour, is prima facie evidence of a violation of the prohibitory provisions of the section, which are found only in subdivision 'a'; that is, a speed in excess of 45 miles an hour, for example, is a greater speed than is prudent, reasonable, or proper, having due regard to the traffic, surface, and width of the highway, and that such driving upon a public highway, at such speed, is to endanger the life, limb or property of some person. The section then gives the alleged offending vehicle driver an opportunity to rebut the prima facie effect of the excessive speed, and show that none of the prohibitory provisions of the section have been violated. * * * Thus, the prima facie rule protects the officer in giving a citation, and afterwards, in filing a complaint, but it does not change the fact that the court must determine from the testimony, if any is offered, as to whether the offending driver has or has not violated some one of the prohibitory provisions found in subdivision (a) of section 113, supra. In the first instance the officer has the advantage of the prima facie rule; that is, on the face of it it appears that an offense has been committed by driving in a manner prohibited by subdivision 'a', supra. As against this prima facie showing, the driver of the vehicle may introduce testimony sufficient to convince the court that the speed was proper, having regard for the traffic, surface, and width of the highway, and that the speed at which he was driving did not endanger the life, limb, or property of any person."

Inasmuch as the act of the defendant in traversing the grade at a speed in excess of the legal limit was not in itself unlawful, negligence as a matter of law cannot be predicated upon it. It was for the jury to determine from all the facts in the case,

whether the defendant was guilty of negligence. It was in evidence that she had driven for miles along a road that stretched out across rolling country like a ribbon. From the tops of the knolls she had seen it cross similar small hills far ahead. There was no warning sign. The speed of the car was reduced to about 26 miles an hour, which was not excessive. Had it not been for the loose gravel, the defendant apparently would have experienced no serious difficulty. Under these circumstances, we cannot say that she was negligent as a matter of law.

We must assume, furthermore, in support of the judgment, that the jury believed that the defendant, after traversing the crest of the hill at a speed in excess of the limit, reduced her speed to a lawful rate before she struck the loose gravel, and that at that time she was driving at a reasonable and prudent rate of speed. In that event the proximate cause of the accident was not the excessive speed at which she had been driving (if, in fact, under all the circumstances, it was excessive), but was the bad condition of the road.

In view of the foregoing, it is unnecessary to pass upon the contention of the defendant that the plaintiff was a guest of the defendant and could not recover under the law of South Dakota without showing gross negligence, even though she paid a part of the expenses incident to the operation of the automobile.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



9 Cal.App.2d 665

DABNEY v. DABNEY et al.

Civ. 5434.

District Court of Appeal, Third District,
California.

Nov. 1, 1935.

Rehearing Denied Nov. 30, 1935.

Hearing Denied by Supreme Court
Dec. 30, 1935.

1. Executors and administrators ⇨221(3)

In action against administrators on three written contracts, objection to question as to whether administrator found record of pay-

ments of \$100, as provided by first two contracts, subsequent to execution of third contract, *held* properly sustained where all money paid by deceased had been testified to, and where it had been admitted that no money had been paid on second contract after third was executed.

2. Executors and administrators ⇨221(3)

In action against administrators on three written contracts, letter written by plaintiff containing inquiry about monthly payments but not mentioning either second or third contracts *held* properly excluded since of no materiality.

3. Executors and administrators ⇨421

Where contract provided for payment by testator of \$100 per month during life of claimant, such claimant could bring equitable action to establish contingent claim against estate and have provision made for payment where claim had been rejected and estate was of sufficient value to meet annual demands of claimant (Probate Code, §§ 714, 953).

4. Executors and administrators ⇨202(2)

Contingent claim against estate showing amount that had been paid under contract, amount due each month, monthly payments claimed, and amount which claimant desired sequestered from estate of deceased to insure payment, which was presented and rejected by administrators, *held* sufficient.

5. Executors and administrators ⇨203

Contract signed by husband and wife providing that "we, each for himself or herself, hereby agree to bind ourselves" and that in case of death, agreement should be binding obligation on their estates, heirs, executors, and administrators, *held* joint and several contract which was binding on estate of deceased husband (Civ. Code, §§ 1659, 1660).

6. Executors and administrators ⇨203

Where husband and wife and their estates were bound under joint and several contract, fact that wife was making payments under contract *held* not to relieve administrators of husband from obligation under contract incurred by him during his lifetime.

7. Appeal and error ⇨909(4)

Where amount ordered sequestered from estate to insure payment of contingent contract was not claimed to be excessive, calculations of trial court must be assumed correct.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Anna W. Dabney against Louise E. Dabney and others, as administrators of the estate of Joseph B. Dabney, deceased,

and Louise E. Dabney. Judgment for plaintiff, and defendants appeal.

Affirmed.

Pease & Dolley, of Los Angeles, for appellants.

Newby & Newby, of Los Angeles, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This action was brought by the plaintiff to recover the amount due upon a certain contract in writing, and also to establish the plaintiff's right to a contingent claim against the estate of Joseph B. Dabney, deceased, and to have sequestered from the estate of Joseph B. Dabney, deceased, a sum sufficient to insure the payment of the amount of the contingent claim. Claims covering the amount alleged to be due, and also covering the contingent claim were presented to the administrators of the estate of Joseph B. Dabney, deceased, and by them rejected.

The record shows that prior to the 21st day of December, 1917, the plaintiff was a widow, and was employed by Joseph B. Dabney to care for his invalid brother, Thomas L. Dabney, and on the date just mentioned Joseph B. Dabney, for the purpose of paying the plaintiff for the care and comfort given by her to the invalid brother of the deceased, executed and delivered to the plaintiff a certain written instrument whereby he covenanted and agreed to pay the plaintiff \$100 per month during her lifetime, terminating only by conditions therein mentioned. This writing is in the words and figures following, to wit:

"December 21st, 1917

"Mrs. Anna Wartman, 2314 East 4th Street, Long Beach, California.

"My dear Mrs. Wartman: I hereby ratify and confirm oral conversation between yourself and me on December 18th, 1917, in which I agreed that in case of your marriage to my brother, Mr. Thomas L. Dabney, I will, in consideration of the kind and helpful care that you have given him, and the continuance thereof, pay you One Hundred (\$100.00) Dollars each month during his lifetime so long as you and he live together, and after his death, I will continue to pay you One Hundred (\$100.00) Dollars per month as long as you remain his widow.

"Yours very truly,

"Joseph B. Dabney.

"JBD-E"

Thereafter, following the execution of said agreement, the plaintiff and Thomas L. Dabney were married, and on the 28th day of June, 1923, Joseph B. Dabney, in lieu of the agreement hereinbefore set forth, executed and delivered to the plaintiff a certain other written instrument, as follows, to wit:

"Los Angeles, California, June 14, 1923.

"For a valuable consideration to me in hand paid, receipt whereof is hereby acknowledged, I hereby agree and bind myself, my heirs, executors and administrators to pay to Anna W. Dabney on or before the 15th day of each month, beginning with July, 1923, the sum of One Hundred Dollars (\$100.00) per month, during the entire time of her life, and I further agree that I will make provision in my will by which after my death, if it should occur before the death of Anna W. Dabney, that my estate shall pay to her the aforesaid sum of One Hundred Dollars (\$100.00) per month as long as she lives, provided that in lieu of making the aforesaid provision in my will, I may make a trust provision by which the aforesaid sum of One Hundred Dollars (\$100.00) shall be paid to her after my death as long as she lives.

"Joseph B. Dabney."

The considerations set forth in these agreements were admitted by the answer, and also, the allegation that the second agreement was executed in lieu of the first, as alleged in the complaint, was not controverted by the answer.

Under and by virtue of the two agreements just mentioned, the court found that there became due to the plaintiff the sum of \$18,200, upon which there had been paid only the sum of \$16,910, leaving the sum of \$1,290 due thereon at the date of the death of Joseph B. Dabney, which occurred on or about the 11th day of September, 1932. The court further found the amount which has become due by virtue of the contract dated June 14, 1923. The record shows that on account of the contract which we have set forth, advance payments were made in the sum of \$5,410.

On the 7th day of July, 1927, Joseph B. Dabney and Louise E. Dabney, his wife, entered into an agreement with the plaintiff for the purchase of certain real estate owned by the plaintiff, situate in the city of Long Beach, alleged to be of great value, which we do not find denied in the answer. This agreement of purchase provided for the payment to the plaintiff of the sum of

\$350 per month, and is in the words and figures following, to wit:

"Los Angeles, California, July 7th, 1927.

"This memorandum of agreement Witnesseth, that for a valuable consideration to us in hand paid, receipt whereof is hereby acknowledged, we, each for himself or herself, hereby agree and bind ourselves to pay to Anna W. Dabney, on or before the 15th day of each and every month, beginning with July 15th, 1927, during her lifetime and as long as she lives, the sum of Three Hundred and Fifty Dollars (\$350.00) per month, and in case of our death before the death of Anna W. Dabney this agreement shall be a binding obligation on our estates, and upon our heirs, executors and administrators.

"In witness whereof we, each for himself and herself, have hereunto put our hands and seals on this the 7th day of July, 1927.

"Joseph B. Dabney
"Louise E. Dabney."

All of the agreements were acknowledged before a notary public.

It is alleged in the complaint, and not denied in the answer and found by the court, that the value of the estate left by Joseph B. Dabney, deceased, was in excess of the sum of \$500,000. Upon the latter agreement the sum of \$350 per month was paid by Joseph B. Dabney until his decease. Since that time, payments have been continued to be made by Louise E. Dabney, and no judgment has been entered against her as an individual.

The court made findings in favor of the plaintiff to the effect that all of the allegations of the plaintiff's complaint are true; that plaintiff is entitled to recover the amount found due on the second agreement set forth herein; and also was entitled to have sequestered and set aside from the estate of Joseph B. Dabney, deceased, a sufficient sum of money, mentioned in the judgment, to insure the payment to the plaintiff of the amount found to be due her by reason of the contingency contained in the claims set forth herein.

By reason of the fact that only \$350 per month was paid by Joseph B. Dabney and Louise E. Dabney to the plaintiff after the execution of the contract in July, 1927, it is argued that the second contract set forth herein was canceled or abandoned by mutual consent. As against this contention, the respondent sets forth that the amount of money paid on account of the first two

contracts exceeded the monthly payments in the sum of \$5,410, and therefore the plaintiff was in no position to claim any indebtedness on account thereof until just a few months preceding the death of Joseph B. Dabney.

There is no testimony in the record showing any abandonment of the second contract providing for the payment of \$100 per month for the care and custody of the brother of Joseph B. Dabney, deceased, nor is there anything in the record showing that such care and attention was not necessary to be given to the invalid brother of Joseph B. Dabney, deceased, during all the time subsequent to July, 1927. The considerations of the contracts were entirely different. The first two contracts were both executed and delivered for the purpose of insuring proper care and attention being given to the invalid brother of the deceased. The second contract was given for the purpose of buying valuable property from the plaintiff by Joseph B. Dabney, deceased, and Louise E. Dabney, his wife. While the value of the property has not been called to our attention, the record does show that there has been paid on account of the contract relating to the purchase of said property the sum of \$23,450.

In behalf of their contention that the contracts relating to the care and attention to be given to the invalid brother were canceled and abandoned by mutual consent or conduct, the appellant calls our attention to 6 California Jurisprudence, page 304, and the case of Loomis Fruit Growers' Ass'n v. California Fruit Exchange, 128 Cal. App. 265, 16 P.(2d) 1040. Those cases are inapplicable for the simple reason that there is absolutely nothing doubtful or uncertain upon the face of either the contract executed in 1917 or 1923. Those citations establish that it is only where the terms of the contracts are ambiguous or uncertain that the court will look to the conduct of the parties in order to arrive at their intention.

The trial court found that there had been no abandonment or cancellation of the contracts, other than that the second agreement was given in lieu of the first, making provision for the giving of attention and care to the invalid brother.

In view of the fact that the plaintiff was not in any position to ask for any payment on account of said contracts by reason of the advances made by Joseph B. Dabney, deceased, until a few months before his death, it appears to us that the finding of

the trial court to such effect is supported by the testimony.

This finding is also supported by the record, showing an entirely different consideration for the respective contracts. As we have said, the considerations mentioned in the pleadings for the respective contracts were not denied in the answer filed by the appellants.

[1] We find no error in the exclusion of evidence offered by the appellants, the question asked of the witness Philleo, as to whether he found a record of any payments of \$100 to Anna Dabney after the date of the execution of the contract in 1927, being made by Joseph B. Dabney, now deceased. The court sustained an objection to this question. The record shows that all moneys that had been paid by the deceased had already been testified to, and it was admitted that no money had been paid on the second contract after the date of the execution of the contract signed by Joseph B. Dabney and Louise E. Dabney. As we have said, the record showed an overpayment of \$5,-410.

[2] The second objection to the exclusion of testimony offered by the defendants is likewise without merit. The appellants offered in testimony a letter written by Anna W. Dabney, dated December 6, 1927, addressed to a witness by the name of Stein. An examination of this letter shows that no mention was made of either the second contract or the third contract set forth herein. All the letter purports to show is an inquiry about monthly payments, whether the checks would be sent to a certain bank, as the plaintiff desired to check out something like \$1,000. The letter itself shows that it is of no materiality.

[3] The next objection propounded by the appellants is that no action will lie on the contract of 1927, to establish a claim thereunder, or for the sequestration of assets. The point is also made that there is no showing of dissipation of assets, and that payments on said contract are being made by the other obligor thereon, Louise E. Dabney. We do not need to review all the authorities cited, pro and con, on this question. All we need to do is to call attention to two cases cited by the appellants which establish beyond question that such an action will lie in addition to citing section 953 of the Probate Code.

In the case of *Sime v. Hunter*, 50 Cal. App. 629, 195 P. 935 (petition for hearing in the Supreme Court denied), we find the

following language in syllabus 1, which is supported by the decision of the court, to wit: "When a claim not yet due has been rejected by the representatives of an estate without cause, the court may, upon a showing of necessity therefor, entertain a suit in equity to establish the claim and sequester sufficient funds of the estate to meet the payment when it becomes due." After citing a number of cases where it seems to be held that such an action may not be maintained before maturity, the court in its opinion shows the following language: "However, in the case of *Miller v. Miller*, 171 Cal. 269, 152 P. 728, it is clearly intimated that, in a suit in equity setting forth the condition of the estate, the ability of the personal representatives to provide for future payments, and the necessity of creating a fund to meet the demands of the claimant, the court may, in accordance with section 1648, Code of Civil Procedure, create a fund to meet the demand if the claim is established as one absolute excepting only as to time of payment." Where the claim has been rejected and the administrators are proceeding with the administration of the estate, and unless prevented by legal proceedings, would make distribution of the estate, we can perceive no logical reason why equity may not entertain an action to establish the contingent claim and make provision for its payment, where the estate is of such value as to justify the court in making such provision. We do not very well see any logical reasoning to the effect that such a proceeding may not be maintained at any time, as under the probate law, unless an action is begun within a certain time after the rejection of a claim, it is barred. Section 714, Probate Code.

The very question which we are considering here, we think has been determined by the Supreme Court in the case of *Newman v. Burwell*, 216 Cal. 608, 15 P.(2d) 511, 513. We quote therefrom the following: "It is next urged that it cannot now definitely be determined that the child will reach her majority. Citing *Miller v. Miller*, 171 Cal. 269, 152 P. 728, 729, respondents therefore contend that the claim here sought to be established is of such a contingent nature that the court below cannot by any possibility determine what it will be in amount if established or absolute. The cited case offers no obstacle to the conclusion above reached, for the decision therein recognizes 'that the equity side of the court may be invoked to protect the owners of contingent claims which will mature after the period

within which distribution may take place.' The opinion points out that the complaint there before the court was one based solely 'upon a rejected demand for moneys not yet due' and wherein 'there is neither pleading or prayer with reference to the condition of the estate, the ability of the defendants to provide for future payments, nor the desirability of creating a fund to meet the annual demands of the plaintiffs.' The complaint in the present case, as already stated, is one in equity to establish the claim there asserted and to impound a fund with which to pay off the same as the installments thereof accrue. It contains all the necessary allegations referred to in the Miller Case, *supra*, and is therefore immune from demurrer on the ground therein considered. In this connection, see, also, *Verdier v. Roach*, 96 Cal. 467, 475-479, 31 P. 554."

[4] The record shows that the fourth objection urged by appellants, save and except as to the demand for \$1,690, that no claim was presented to the administrators, is without merit. The contingent claim was presented and rejected. It shows the amount that has been paid and the amount that is due every month. It shows the monthly payments claimed by the plaintiff, and that the amount which the plaintiff claims should be sequestered from the estate of the deceased in order to insure payments, etc.

We think the claim as presented sufficiently complies with the rule of the Supreme Court in the case of *Etchas v. Orena*, 127 Cal. 588, 60 P. 45, 47, cited by appellants, where it is said: "The executor was entitled to have the claim presented in sufficiently intelligent form to enable him to pass upon it legally." We might quote further from the opinion, but this sentence shows the foundation of the court's decision. The claim presented in this case was sufficient in form to give the administrators of the estate of Joseph B. Dabney, deceased, full information as to what was claimed. No demurrer was interposed, and our attention has not been called to any place in the record where objection was made by appellants either to the form or sufficiency of the claim as presented by the plaintiff.

[5] It is finally argued that the contract of 1927 does not bind the estate of Joseph B. Dabney, deceased, on the theory that the obligation is joint and not several. In view of the language used in the agreement, we do not very well perceive why this contention is presented. The language of the

agreement in the beginning is: "We, each for himself or herself, hereby agree to bind ourselves to pay Anna W. Dabney," etc., and concludes as follows: "In case of our death before the death of Anna W. Dabney, this agreement shall be a binding obligation on our estates, and our heirs, executors and administrators." Thus, the contract by its express terms is several as well as joint. Both obligors were benefited in the purchase of the real estate from the plaintiff, and both of them bound themselves to pay that sum. The estate of Joseph B. Dabney is bound, just as the estate of Louise E. Dabney would be bound. Section 1659 of the Civil Code reads: "Where all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several." Section 1660, *supra*, reads: "A promise, made in the singular number, but executed by several persons, is presumed to be joint and several." We may also cite the cases of *Hurlbut v. Quigley*, 180 Cal. 265, 180 P. 613, and *Gummer v. Mairs*, 140 Cal. 535, 74 P. 26.

[6] The fact that Louise E. Dabney is making payments does not in anywise relieve the representatives of Joseph B. Dabney, deceased, from the obligation incurred by Joseph B. Dabney during his lifetime. Both obligors in the 1927 contract are bound. The estates of both are bound. Whether there should be contribution between the two obligors of their estates is not material.

[7] Lastly, we find no evidence of novation in the record. No argument has been presented as to any excess in the amount ordered sequestered to insure payment upon the contingent contract, and it must be assumed that the calculations of the court are substantially correct.

We have reviewed herein but few of the large number of cases cited by the appellants, for the simple reason that the record in this case does not correspond with the record of the questions presented in the cases cited by the appellant. Their applicability to the questions presented is not questioned, but as the questions presented by the record before us do not set forth testimony justifying their application, the review of such cases would be of no practical value.

The judgment is affirmed.

We concur: THOMPSON, J.; PULLEN, P. J.

9 Cal.App.2d 598

NORTON v. CENTRAL SURETY & INS. CO.
Civ. 9895.

District Court of Appeal, First District,
Division 1, California.
Oct. 28, 1935.

Hearing Denied by Supreme Court
Dec. 26, 1935.

1. Insurance ⇨668(10)

Whether there has been lack of co-operation on part of insured sufficient to constitute breach of automobile public liability policy is question of fact (St. 1919, p. 776).

2. Insurance ⇨514½

Insured's violation of co-operation clause of automobile public liability policy is not valid defense against injured party suing insurer for amount of judgment obtained against insured unless it appears that insurer was substantially prejudiced thereby (St. 1919, p. 776).

3. Insurance ⇨646(8)

To relieve itself from liability on automobile public liability policy because of insured's breach of co-operation clause in policy, insurer has burden to show that there was breach and that breach operated to insurer's prejudice (St. 1919, p. 776).

4. Appeal and error ⇨996

Reviewing court in determining sufficiency of evidence to support findings will inquire as to whether there is any substantial evidence to sustain findings, or if evidence be conflicting, whether reasonable minds might draw different conclusions therefrom, and if inquiries are affirmatively answered, findings must be sustained.

5. Appeal and error ⇨996

In determining sufficiency of evidence to sustain findings of fact, all inferences reasonably deducible from evidence favorable to prevailing party must be indulged in by reviewing court.

6. Appeal and error ⇨907(4)

On appeal from judgment obtained against insurer on automobile public liability policy, on ground that insured breached co-operation clause, it would be presumed that evidence supported conclusions reached by jury and trial court that co-operation clause was not breached, where all of evidence considered was not in record.

7. Insurance ⇨668(10)

In action on automobile public liability policy for amount of judgment obtained against insured, wherein insurer claimed that insured breached co-operation clause of policy, whether alleged acts and omissions of insured were substantiated or were of such na-

ture as to operate to insurer's prejudice held for jury (St. 1919, p. 776).

"Co-operation" does not mean that the insured is called on to aid in presenting a sham defense, but means that he shall make a fair and plain disclosure of information reasonably demanded by the insurer to enable it to determine whether there is a genuine defense.

[Ed. Note.—For other definitions of "Co-operate; Co-operation," see Words & Phrases.]

8. Appeal and error ⇨882(3)

In action on automobile public liability policy for amount of judgment obtained against insured, insurer could not contend that insured requested plaintiff to state that insured had not been intoxicated, where insurer's attorneys in action against insured argued against theory of intoxication and in action against insurer no contrary evidence was introduced (St. 1919, p. 776).

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Bertha Norton against the Central Surety & Insurance Company. From a judgment for plaintiff, defendant appeals.

Affirmed.

Barry J. Colding, Theodore Hale, and Carroll B. Crawford, all of San Francisco, for appellant.

T. F. Peterson, of Crescent City, and Charles Reagh, of San Francisco, for respondent.

KNIGHT, Justice.

The plaintiff, Bertha Norton, sued Floyd Puter for damages in Del Norte county on account of severe personal injuries sustained by her while riding as a guest in an automobile owned and driven by Puter. The action was tried before the court sitting without a jury, and plaintiff was given judgment for \$3,500. An appeal was taken in behalf of Puter and the judgment was affirmed. *Norton v. Puter*, 138 Cal. App. 253, 32 P.(2d) 172. At the time of the accident, Puter was covered by a policy of public liability insurance issued by Central Surety & Insurance Company, the appellant herein, and its attorneys took charge of the case for Puter, defended it before the trial court, and took the appeal in his behalf. Following the affirmance

of the judgment, plaintiff was unable to collect any part thereof from Puter, and thereupon, pursuant to statutory authority (Stats. 1919, p. 776), she brought the present action in the city and county of San Francisco against appellant, as Puter's insurance carrier, to recover on said policy of insurance. At the trial the company sought to be relieved from any responsibility under the policy upon the ground that Puter had breached the so-called co-operation clause thereof; but the jury before which the action was tried found against said company on the defense so interposed, and judgment in favor of plaintiff was entered accordingly, from which said company appealed.

It appears from the opinion in *Norton v. Puter*, supra, as well as from the facts of the present case, that the accident happened a short distance south of Crescent City, just before daylight, during the month of November. Two other persons besides plaintiff were riding with Puter at the time, a young lady named Nichols, and Puter's son. As also shown by the decision in *Norton v. Puter*, supra, the action against Puter was tried upon the theory that Puter's negligence constituted willful misconduct; and on appeal it was held that the facts alleged and proved were legally sufficient to sustain a finding to that effect, the evidence proving, in this regard, that Puter was driving the automobile at a reckless and excessive rate of speed, through a rainstorm, over a slippery mountain highway, when it skidded into a ditch and turned over three times. Plaintiff's injuries included a fractured and dislocated pelvis, and numerous lacerations. All of the parties involved in the accident and the attorneys employed by plaintiff to handle her case in Del Norte county lived in and about Crescent City, which admittedly is a community of small size; and all were on friendly terms with each other. Plaintiff's leading counsel was district attorney of the county, and Puter was a searcher of records, whose place of business was located in the small building in which the district attorney maintained an office.

The grounds urged for reversal of the judgment in the present case are that the court erred in denying appellant's motions for a directed verdict in its favor, for judgment in its favor notwithstanding the verdict, and for a new trial. We find no merit in the appeal.

[1-5] The issue of whether there has been a lack of co-operation on the part of the insured sufficient to constitute a breach of the policy is one of fact [*Panhans v. Associated Indemnity Corporation* (Cal. App.) 47 P.(2d) 791; 13-14 *Huddy on Automobile Law*, § 298, p. 378, and cases cited; *Metropolitan Casualty Ins. Co. v. Blue*, 219 Ala. 37, 121 So. 25; *Finkle v. Western Automobile Ins. Co.*, 224 Mo. App. 285, 26 S. W. (2d) 843; *Coleman v. New Amsterdam Casualty Co.*, 247 N. Y. 271, 160 N. E. 367, 72 A. L. R. 1443; *Francis v. London Guarantee & Accident Co.*, 100 Vt. 425, 138 A. 780]; and it appears to be well settled that the violation by an insured of the conditions of a clause of a policy such as the one here involved is not a valid defense against the injured party unless in the particular case it appears that the insurance company was substantially prejudiced thereby [*Hynding v. Home Accident Ins. Co.*, 214 Cal. 743, 7 P.(2d) 999, 85 A. L. R. 13; *Panhans v. Associated Indemnity Corporation*, supra]. Furthermore, the burden of proving the affirmative of both of the above issues is obviously on the insurer. Therefore, in the present case, the implied adverse findings of the jury on said issues, as well as those by the trial court in ruling on the motions above mentioned, are conclusive on this appeal unless it can be held as a matter of law that the evidence in the case is without substantial conflict and the only reasonable inference to be drawn therefrom is contrary to said findings. Stated in a different way, where as here an attack is made upon findings of fact upon the ground that the evidence is legally insufficient to support them, the power of the reviewing court begins and ends with the inquiry as to whether there is any substantial evidence in the case to sustain said findings; or, if the evidence be conflicting, whether the facts and circumstances are such that reasonable minds might draw different inferences therefrom; and if these inquiries be answered in the affirmative, the findings must be sustained. Moreover, in determining these questions, all inferences reasonably deducible from the evidence favorable to the prevailing party must be indulged in by the reviewing court. 2 Cal. Jur., pp. 918-926.

[6] The alleged acts or omissions relied upon by appellant as constituting a breach of the co-operation clause of the policy are set forth in the beginning of

its brief. But apparently all of the evidence relating to the subject-matter thereof is not contained in the record before us, because much of it, it seems, consisted of the testimony given at the Puter trial, a transcript of which was introduced in evidence in the present case, but not incorporated in the record on this appeal; nor is the substance thereof set forth in appellant's brief. In that state of the record it will be presumed that the evidence supports the conclusions reached by the jury and the trial court, and an affirmance of the judgment would be justified upon that ground without making further inquiry into the sufficiency of the evidence. *Eddie v. Schumacher Wall Board Co.*, 79 Cal. App. 318, 249 P. 235; *Shepard v. Yale*, 94 Cal. App. 104, 270 P. 742; *Ross v. Burr*, 69 Cal. App. 286, 230 P. 986; *Yolland Ice & Fuel Co. v. Mulcahy*, 72 Cal. App. 722, 238 P. 119; *Runyon v. City of Los Angeles*, 40 Cal. App. 383, 180 P. 837.

[7] However, we are satisfied that the evidence appearing in the record before us is legally sufficient to support the conclusions of the jury and the trial court that the alleged acts and omissions complained of either were not substantiated, or were of such a nature as did not operate to appellant's prejudice, in preparing or defending the case, or otherwise. The failure of Puter to meet appellant's attorney as requested by letter upon his arrival in Crescent City in April following the accident, to take certain depositions, was doubtless looked upon by the jury as a matter of minor importance. He was present at the appointed time to have his deposition taken, and his failure to meet appellant's attorney upon his arrival was due, so Puter claimed, to other business engagements. Nor can it be said that appellant was prejudiced by the fact that Puter showed the letter he received to plaintiff's attorneys for the reason that a letter of similar import was sent direct to plaintiff's attorneys, except that it contained no invitation to meet the writer of the letters upon his arrival; moreover, the letter sent to Puter shows in itself that it contained nothing of a confidential nature. In this connection, too, it may be stated that appellant's attorney arrived in Crescent City by stage about noon; that all depositions were taken that afternoon as scheduled and he was able to return south on the stage, leaving about 3 o'clock the same day, in accordance with the de-

sire expressed by him in his letters. In answer to the second and third complaints made by appellant, the evidence shows that the trial of the action was set for July 5th; and appellant's attorney wrote to Puter saying he would arrive in Crescent City about noon on July 4th, and asked Puter to call at his hotel that afternoon in order that they might review the facts of the case. Puter did not call at the hotel, however, until about 5 o'clock that evening. The reason for the delay was, so he stated, that July 4th being a holiday, he had certain social engagements for that afternoon which he did not feel called upon to set aside. When he did arrive at the hotel, an altercation took place between him and appellant's attorney, which was marked by considerable unpleasantness on both sides, and the interview ended abruptly, so appellant's attorney testified, when he told Puter to be in court the next morning, to which Puter replied he would not be there, that he was too busy, that "this girl was morally entitled" to damages, and that if he were forced to come into court, his testimony would not do the insurance company any good; whereupon appellant's attorney told Puter he had violated his policy, that if judgment were given in plaintiff's favor, he, Puter, would have to pay it; and that Puter could "accept that" as his notice. Puter was not present in the courtroom at the morning session, the explanation given by him for his absence being that he was busy; but he was in and about the courthouse all morning, and therefore available if wanted; and during the afternoon session, before plaintiff closed her case, he was in attendance in the courtroom, and later was called as a witness for the defense and testified fully as to the facts of the case. Further contention is made that Puter's actions interfered with the preparation of the defense to the action; but the evidence does not so show. It appears therefrom that during the eight months which elapsed between the date of the accident and the date of the trial of the action the insurance company obtained written statements as to the facts surrounding the accident from plaintiff, her principal witness, and Puter, and, in addition, their depositions were taken three months before the trial began; and it is conceded that no application was ever made for a postponement of the trial for any purpose. Furthermore, as will be noted from the decision in the Puter Case, there was little, if any, dispute as to the

facts, the main question at issue in the case being a legal one, namely, whether the admitted facts constituted willful misconduct. It is true that in April Puter, in response to the letter written to him by appellant's attorneys, made the suggestion, among others, that plaintiff's claim be settled if possible before trial. But at that time the insurance carrier's attorneys had assumed control of the case and had notified Puter that they were acting for him; and it is not intimated that he ever communicated any such statement to any other person. It cannot be successfully maintained, therefore, in view of the admitted facts of the case, that the suggestion to his attorneys of a settlement out of court was out of order or improper. Appellant makes the further charge that Puter urged and encouraged plaintiff to take legal action against him. But the evidence does not substantiate the charge. The facts are that prior to the commencement of the action for damages Puter took plaintiff to her doctor's office two or three times for treatment, and on one of these occasions, in response to an inquiry made by her in the presence of a third party as to what he thought she should do about asking compensation for her injuries, he remarked that he did not like to advise her, but that "if she expected to get justice for her injuries she should consult an attorney and a good one." And in explanation of the remark, Puter stated that this was the only time he ever talked with her about her case, and that at the time he made the remark he realized that sooner or later he would be sued.

It is a fact also that Puter, while testifying as a witness for the defense, indicated in one of his answers that in his opinion plaintiff was entitled to damages; but as will be pointed out, appellant is not in a position to complain thereof because the opinion so expressed by Puter was elicited, unnecessarily, by appellant's counsel on redirect examination after persistent inquiry as to whether Puter was desirous that plaintiff should be awarded a judgment, and after full knowledge on the part of appellant's counsel that such was Puter's belief. Some of the questions and answers so asked and given on redirect examination were as follows:

"Q. Have you any interest in the outcome of this case? A. Absolutely none, except I want to see the young lady get a square deal.

"Q. You would like to see her get a judgment in this case? A. If the court thinks it is justice, yes.

"Q. You are the defendant? A. I am. I feel sorry every time I look at that young lady.

"Q. As a matter of fact, you have been very much interested in her getting a judgment in this case? A. Absolutely I have not. Have not seen the young lady to speak of except in the presence of other people, more than two or three times since the accident.

"Q. Have you told her you were anxious for her to get a judgment against you? A. No. Except if I mentioned it at all I hoped she would be treated fairly. Don't know if I even said that. If she said I did I presume I must have said something along that line. * * *

"Q. Still you are anxious to see her get a judgment. A. I am anxious to see that girl get justice. That is up to the evidence and up to the court. It makes no difference to me.

"Q. It makes no difference to you whether or not you have to pay the judgment in this case? A. Makes no difference to me. The main thing is to have all the evidence go before the court. Whatever the court rules is satisfactory to me. I am sorry, as I say, every time I see the young lady. She has been hurt. I don't like to admit it is my fault. She was hurt out of my car."

Finally, in response to another question by appellant's counsel as to whether Puter had discussed the case with plaintiff, Puter was allowed without protest to give a rather lengthy explanation wherein, after expressing sympathy for plaintiff's injured condition, he said: "* * * I may be wrong; I may not be wrong; but I could see and realize that sooner or later I would be sued. No question about that. If any person in the world is entitled to what is reasonable in damages she is entitled to it. If it comes out of me she is entitled to it. If the law says she is not entitled to it it is just a good break for me, that's all, and her misfortune." It is against a portion of this last answer that appellant directs its criticism. But no motion was made to strike out the answer or any part of it; and, as will be seen, appellant's counsel not only repeatedly invited and encouraged Puter to reveal his personal opinion, but the record shows also that such answer was clearly

anticipated, because in April, in a letter written to appellant's counsel, Puter said: "There is no doubt in my mind, the young lady is badly injured and is entitled to damages, from a moral standpoint at least. I am not presuming to know anything of the law in the matter. Further, I am not hiring any attorney as far as I am concerned. I am willing to take a chance;" and later, on the day the depositions were taken, and again on the evening before the trial began, Puter told appellant's counsel substantially the same thing. If, therefore, it was appellant's purpose, at the trial of the action for damages, to establish that Puter was not guilty of willful misconduct and consequently not legally responsible for plaintiff's injuries, it would seem to be an unusual method of accomplishing such purpose to ask him repeatedly, after placing him on the stand as a defense witness, to disclose his personal views in the matter; and appellant having done so with full knowledge of the nature of the answer that doubtless would be given, the law will not allow appellant afterwards to complain of the answer, nor to use it to its own advantage, in another action, as a means of defeating the statutory right of the injured party to invoke the benefits of the insurance policy. There is no evidence showing that Puter at any time withheld any fact or circumstance from appellant's attorneys which operated to appellant's disadvantage in preparing its defense to, nor in defending the Puter action, nor is any claim made that as a witness therein he did not truthfully relate the circumstances of the accident. As said in the case of *Coleman v. New Amsterdam Casualty Co.*, supra, cited by appellant, co-operation does not mean that the insured is called upon to aid in presenting a sham defense. It means that he shall make a fair and frank disclosure of information reasonably demanded by the insurer to enable it to determine whether there is a genuine defense. And in our opinion the evidence in the present case is legally sufficient to support the implied findings of the jury and the trial court that Puter did not violate the duty thus imposed upon him.

[8] Some reference has been made also to the testimony given at the present trial by plaintiff on cross-examination, to the effect that shortly after the accident happened she stated to appellant's investigator that Puter was not intoxicated, and that

Puter had previously requested her so to state, but nowhere during the course of either trial did appellant intimate that Puter was intoxicated. In fact, it took the opposite position. As shown by the opinion in *Norton v. Puter*, supra, appellant argued elaborately against such theory and at the trial of the present action no evidence whatever was introduced to prove otherwise. It must be assumed now, therefore, in the absence of any evidence shown to the contrary, that he was not intoxicated; and in that situation it cannot be successfully maintained, as appellant now contends, that Puter requested plaintiff to state something that was not true.

The remaining points, being unimportant, do not require special notice.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.



9 Cal.App.2d 555

McDOWELL v. PERRY et al.

Civ. 1917.

District Court of Appeal, Fourth District,
California.

Oct. 17, 1935.

Hearing Denied by Supreme Court
Dec. 16, 1935.

1. Mechanics' liens ⚔96

Vendee of land, under contract which required vendee to drill well, who entered into contract with third person for drilling held not "contractor" within mechanics' lien statute providing that every contractor or other person having charge of construction shall be held to be agent of owner, so as to entitle third person to recover from vendor for labor and material furnished in drilling well (Code Civ. Proc. § 1183).

[Ed. Note.—For other definitions of "Contractor," see Words & Phrases.]

2. Mechanics' liens ⚔288(2)

Whether person who orders work to be done and materials furnished is acting by authority of landowner is question of fact (Code Civ. Proc. § 1183).

3. Mechanics' liens ⚔279

Materialman furnishing labor and materials in drilling of well had burden to show that person to whom he furnished labor and material was authorized by landowner.

against whom materialman claimed lien, to contract for furnishing of labor and materials (Code Civ. Proc. §§ 1183, 1185, 1192).

4. Mechanics' liens ☞78

Materialman furnishing labor and materials in drilling of well for vendee in land contract could not claim that vendee was statutory agent for vendor so as to render vendor liable to materialman for labor and materials furnished, where evidence showed that no actual agency existed, and that materialman had knowledge of nonresponsibility notices which vendor posted in conspicuous places on premises (Code Civ. Proc. §§ 1183, 1185, 1192).

5. Mechanics' liens ☞281(3)

Evidence held to sustain finding that vendee of land under contract of sale which required vendee to drill well, who entered into contract with materialman for drilling, was not agent of vendor so as to entitle materialman to recover from vendor for labor and materials furnished in drilling of well (Code Civ. Proc. §§ 1183, 1185, 1192).

6. Mechanics' liens ☞78

Under contract for sale of land which required vendee to drill well, vendor's fee-simple estate held not subject to lien claimed by materialman for labor and material furnished in drilling well for vendee, where vendor posted nonresponsibility notices in conspicuous places on premises, and also recorded such notice (Code Civ. Proc. §§ 1183, 1185, 1192).

7. Appeal and error ☞110

Effect of order sustaining objection to hearing of motion for new trial amounted to denial of motion, as respects whether order was appealable (Code Civ. Proc. § 660, as amended by St. 1933, p. 305).

3. Appeal and error ☞110

Order denying motion for new trial is not appealable.

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action by N. D. McDowell against W. H. Perry and another. From a judgment in favor of named defendant, and from order sustaining defendants' objection to hearing of plaintiff's motion for new trial, plaintiff appeals.

Appeal from order dismissed, and judgment affirmed.

F. F. Gualano, of Monterey Park (J. B. Joujon-Roche, of Los Angeles, of counsel), for appellant.

Arthur William Green, C. H. Scharnikow, and Benjamin H. Sheldon, all of Los Angeles, for respondent.

JENNINGS, Justice.

The plaintiff instituted this action for the purpose of securing a personal judgment against the defendants Perry and France, and to foreclose a mechanic's lien for labor performed and materials furnished in connection with the drilling of a well upon land owned by Perry which he had contracted to sell to France prior to the time plaintiff commenced drilling operations. Trial of the action resulted in the entry of a judgment against defendant France, who defaulted in appearance, and in favor of Perry. From the judgment thus rendered, plaintiff appeals.

The facts pertinent to this appeal may be summarized as follows: On July 11, 1930, the respondent, who was the owner of a ranch in San Diego county, entered into a written agreement to sell a portion thereof to his codefendant France. The contract recited that the vendee had paid to the vendor a specified sum of money solely as consideration to the latter for his signature to the agreement and for the restraint imposed upon his freedom to deal with or alienate the property and not as partial consideration for the conveyance of the land or as part of the purchase price. It was, however, provided that the vendee should, on or before August 15, 1930, deposit in a bank in the city of Los Angeles the sum of \$10,000, "the purpose of said fund being to enable said France to and to assure that France will, drill a water well upon" a described parcel of the land mentioned in the contract to such depth that it would tap a source of artesian water, to case and equip the well, installing engine, pump, and tanks, to construct a pipe line from the well to another parcel of the land covered by the agreement, and to install an adequate irrigation system for irrigating a certain 40 acres of said land, and to plant said 40 acres of avocados. It was recited that the purpose of the fund was also to pay to the vendor the whole thereof on September 15, 1930, unless the actual drilling of the well should have been commenced before said date and to pay the vendor on March 1, 1931, all of the fund which had not before said date been disbursed for the purposes

described. It was specified that if the vendee had fulfilled the contract and any portion of the aforesaid sum of \$10,000 were unused, such unexpended remainder of the fund should be paid to the vendee. It was provided that bona fide bills for labor and materials furnished in the performance of the required work should be paid by checks drawn against the fund by the vendor and vendee. It was further provided that if deposit of the specified sum of \$10,000 were made on or before August 15, 1930, the vendor would place in escrow with a bank or trust company in Los Angeles a grant deed executed by himself and wife conveying the land to the vendee, and the vendee agreed that he would forthwith deposit in said escrow a promissory note executed by himself and wife in favor of the vendor in the amount of \$48,288 bearing date August 20, 1930, payable five years thereafter, with interest at 7 per cent. per annum, and a trust deed securing the payment of said note. It was further specifically provided that the grant deed to be executed by the vendor should reserve to the vendor all water under the parcel of land whereon the well would be drilled with the proviso that the grantee and his successors and assigns should have a perpetual and first right to take and use 30 miner's inches of any water developed by the well at any and all times.

The sum of \$10,000 was never deposited by the vendee as required by the agreement, but the vendor later orally agreed that he would not insist upon its deposit.

On November 15, 1930, the vendee entered into a written contract with appellant wherein it was recited that the latter was engaged in the business of drilling water wells and developing water, and appellant agreed that, immediately after the execution of the contract, he would, at the cost and expense of the vendee, drill a test hole on the land for a water well to the depth of 1,000 feet to determine whether or not water could there be produced in sufficient quantity for commercial use and if both parties agreed that it could be so developed he would ream out the test well and case it, and that he would furnish all labor and equipment necessary for the completion of the well. The vendee agreed, first, that he would pay appellant "for all labor, trucking, bits, maintenance, and any other costs pertaining to the well plus ten per cent of total cost"; second, that he

would furnish water for drilling; third, "as further compensation for services rendered" he would pay appellant "a certain per cent of profits in sale of above-described properties upon which the water is used." Reference was made to another agreement attached to the contract as fixing the percentage of such profits. The agreement to which reference was thus made provided that the vendee, France, agreed to pay appellant the total sum of \$12,500 for the completed water well, that from said sum of \$12,500 the vendee should deduct the actual cost of drilling said well plus 10 per cent. thereof which should be the amount that the vendee would owe appellant on completion of the well, and that the vendee would pay the difference between said sum of \$12,500 and the actual cost of drilling the well plus 10 per cent. thereof by giving him 10 per cent. of the net proceeds which the vendee should receive from total gross sales of the property described in the main contract of the parties.

The evidence showed that the respondent, vendor of the land, first saw appellant on the ranch in company with the vendee, France, and another man on September 10, 1930. As to what was then said by respondent to appellant the evidence is conflicting. The appellant, however, testified that respondent furnished him a tank, an engine, and a bunkhouse for his men. This testimony was not disputed by respondent. France, the vendee of the land, called as a witness by respondent, testified that in November, 1930, prior to the execution of the written agreement between vendee and appellant, he had a conversation with appellant, concerning the proposed employment of appellant to drill the well, at which time he stated to appellant that he was unable to deposit the sum of \$10,000 required by his contract with respondent, that he would attempt to arrange with respondent to waive this requirement, and felt hopeful that he would succeed in securing the waiver, that he then exhibited to appellant certain securities from which he stated that he might be able to obtain sufficient funds to meet the cost of labor and material required for drilling the well, and that, at said time, appellant stated "that he would be willing to play along with him, and that if he (France) felt that he could raise sufficient money to pay the cost of labor and materials he would en-

ter into a contract to drill the well, upon a cost plus 10 per cent basis and would agree with him (France) to enter into a further agreement for a percentage of the profits from the proposed subdivision and sale of the lands being purchased by him (France) from Mr. Perry." This witness further testified that thereafter and prior to the execution of the agreement of November 30, 1930, between himself and appellant, he notified appellant that he made arrangements with respondent, Perry, whereby the contract requirement for the deposit of the \$10,000 fund would be waived. The appellant testified that he was not informed and never knew of the vendee's failure to deposit the sum of \$10,000 as required by the terms of the contract of sale. The evidence further showed that on November 24, 1930, after appellant's well-drilling equipment had arrived on the land, the respondent caused seven notices of nonresponsibility for the construction of any wells to be posted in various conspicuous places on the property, including a well from which the workmen who were doing the work of drilling obtained water, a gate through which the workmen passed in going to and from the bunkhouse which they occupied, and a location approximately 125 feet distant from the site of the well which was being drilled. It was also shown that the respondent caused a verified copy of the notice of nonresponsibility to be recorded in the office of the county recorder of San Diego county on December 2, 1930. It further appeared that the well was not completed and that the actual cost of drilling, together with the cost of materials furnished for the work, plus 10 per cent. of such cost, amounted to \$2,823.91; that payment of this amount was demanded of the vendee, France; that no demand for the payment of the above-mentioned sum was made of respondent, Perry; and that no part of said sum was paid.

The trial court found that respondent had not entered into an agreement with appellant for the drilling of the well, that respondent had not agreed to pay for labor and materials the sum demanded by appellant or any other sum, that the contract of November 15, 1930, was entered into solely between appellant and the defendant, France, and that it was not true that the defendant, France, was acting as the agent of respondent, Perry, when he made the contract for drilling the well with appellant. The court also found that

the notice of nonresponsibility was posted and recorded in full compliance with the provisions of section 1192 of the Code of Civil Procedure. From these findings the court drew the legal conclusion that respondent, Perry, was not indebted to appellant in the amount claimed by the latter or in any amount, and that the respondent was entitled to judgment against appellant for his costs of suit. Judgment in respondent's favor was accordingly entered in conformity with the conclusions of law drawn from the court's findings.

The single contention advanced by appellant on this appeal is that the trial court's finding that the defendant France, in entering into the contract of November 15, 1930, with appellant for the drilling of the well, was not acting as the agent of respondent, Perry is not only lacking in evidentiary support, but is contrary to the evidence, and that consequently the judgment which denies to appellant a lien for the amount claimed for work performed and materials furnished in connection with the drilling of the well is erroneous and must be reversed.

The basis of this contention is that the drilling of the well was specifically required to be done by the provisions of the written contract of purchase and sale of the land entered into between respondent as vendor and France as vendee and formed an integral part of the consideration to be furnished by the vendee for the proposed conveyance of the land. It is urged that the terms of the aforesaid contract requiring the drilling of the well by the vendee made him the vendor's agent as a matter of law and subjected the vendor's interest in the land to the mechanic's lien claimed by appellant for labor and materials furnished by the latter, and that the agency thus created may not be annulled by a notice of nonresponsibility. Appellant concedes that this precise question has never been decided in California. In support of his contention he cites a number of decisions from other jurisdictions and maintains that the weight of authority in the United States sustains his position.

[1] Examination of the decisions relied upon by appellant discloses that the agency which he contends was created by the provisions of the sale contract is generally denominated "statutory agency," and that, in the final analysis, its existence

depends on judicial interpretation of the mechanic's lien statutes of the various states wherein the question arose. Since this is true, it is obvious that the only key which may properly be employed in the solution of the problem here presented must be found in the provisions of our own statutes.

The statute which confers upon various designated persons a lien upon property for labor performed and materials furnished in the improvement of such property, which lien is commonly denominated a "mechanic's lien," is section 1183 of the Code of Civil Procedure. This section provides that all persons performing labor upon or furnishing materials to be used or furnishing appliances contributing to the construction of any well shall have a lien upon the property upon which they have bestowed labor or furnished materials for the value of such labor done and materials furnished "whether at the instance of the owner, or of any other person acting by his authority or under him, as contractor or otherwise; and every contractor, subcontractor, architect, builder or other person having charge of the construction * * * of any building or other improvement as aforesaid shall be held to be the agent of the owner for the purposes of this chapter."

It must be apparent, we think, that so far as this particular statute is concerned the only language thereof which lends any support to the possibility of the existence of the statutory agency contended for by appellant is the following: "Whether at the instance of the owner, or of any other person acting by his authority or under him, as contractor or otherwise." The language which declares that "every contractor * * * or other person having charge of the construction * * * shall be held to be the agent of the owner" obviously refers to a definite class of persons who are engaged in the actual performance of the specified work. It could hardly be contended that a vendee of land under a contract of sale which specifically provided that he was required to make a designated improvement on the land and who thereupon entered into a contract with a third person for the doing of the work is a contractor in the sense in which the term is there used.

[2-4] The language "whether at the instance of the owner, or of any other person acting by his authority, or under him,"

as contractor or otherwise" is manifestly not so restricted as the language last considered. However, it is obvious that the question of whether or not a person who orders work to be done and materials furnished is acting by authority of the landowner is a question of fact to be determined by the trier of facts from the evidence adduced. The trial court has found, impliedly at least, that the vendee who was obligated by his contract to drill a well on the land was not acting by the authority of the vendor in making the particular contract which constitutes the basis of appellant's claim to a lien upon the land. This finding has ample evidentiary support. The contention that the vendee in contracting with appellant for the drilling of the well was acting by the authority of the vendor depends solely on the fact that the contract between respondent and France obligated the latter to drill a well. It is our conclusion that the basis for the contention does not fulfill the statutory requirement, and that the burden rested upon appellant to show that the person to whom he furnished labor and materials for the drilling of the well was authorized by the landowner to contract for the furnishing of the very labor and materials that were used in the drilling of the particular well for which appellant claims a lien. The circumstances of the case indicate the reasonableness of this construction. The evidence showed that appellant was fully familiar with the provisions of the contract between respondent and the defendant, France, prior to the time he did any work on the well. He was acquainted with respondent and had talked with him. He could easily have discovered whether or not France was authorized by respondent to contract for the furnishing of the labor and materials which he proposed to furnish and at the price which he proposed to charge therefor. Furthermore, the evidence showed that on the day following the arrival of appellant's well-drilling equipment on the land seven notices signed by respondent were posted at various conspicuous places on the land. These notices stated that respondent was the owner in fee of the ranch which was legally described; that he had entered into an agreement with France on July 11, 1930, whereby France agreed to purchase portions of the ranch and to drill wells thereon and otherwise to improve the property. The notices concluded with a

statement that the signer would not be responsible for the drilling of any wells or for any materials or labor of any kind furnished to France. It is neither disputed that these notices were posted on the land nor did appellant deny that he had seen them. Appellant was therefore fully apprised that France was not in fact authorized by the owner of the property to act for him in the well-drilling operations, and that the owner disclaimed responsibility for any materials furnished or work performed in the drilling of any wells. This evidence negatives appellant's contention of statutory agency by the showing that no actual agency existed and that appellant was fully advised thereof.

The case of *P. W. Wood, Inc., v. Black*, 86 Cal. App. 572, 261 P. 737, 738, is factually similar to the instant action. In the cited case the contract of lease of a building provided that the lessees should keep the premises in good repair at their own expense, without charge to the owner. The plaintiff furnished labor and materials used in repairing a boiler which formed part of the heating system of the building and being unsuccessful in collecting the price of such materials and labor from the lessees sought to impress a mechanic's lien upon the property and to foreclose the same. It appeared that the owner did not know of the repairs until some weeks after their completion. No notice of nonresponsibility was posted by the owner. The trial court found that plaintiff furnished labor and materials at the special instance of the lessee while acting as the agent of and under the authorization of the owner, and entered judgment accordingly in plaintiff's favor foreclosing the lien upon the property. On appeal the judgment was reversed, the appellate court remarking that, "in the absence, therefore, of proof of actual agency, or that the real owner of the premises had by his conduct so far concurred in such improvement as to be estopped to deny the validity of the lien, no lien can exist."

It may not be argued that the doctrine of estoppel is here applicable to fasten the claimed lien on respondent's land. The evidence is conclusive that respondent's conduct with reference to the drilling of the well for which the lien is claimed was not such as to indicate his concurrence in the improvement. On the contrary, he unequivocally manifested his nonconcur-

rence by prompt posting of numerous notices of nonresponsibility followed by recordation of a copy of the notice in the office of the county recorder in strict compliance with the provisions of section 1192 of the Code of Civil Procedure.

[5] It is therefore our conclusion that the trial court's findings that the defendant France was not the agent of respondent in entering into the contract for the drilling of the well and that the contract was entered into solely between appellant and the defendant France are fully supported by the evidence, and that appellant's objection of evidentiary insufficiency is not sustainable.

There is a further obstacle which is encountered in a consideration of appellant's contention which we deem to be insurmountable. Appellant maintains that he is entitled to a mechanic's lien not only upon the property upon which he had bestowed labor and for which he had furnished materials, but also, and, more particularly, upon the land whereon the well was drilled. That he might have been entitled, under proper circumstances, to a lien on the well itself, by virtue of the provisions of section 1183 of the Code of Civil Procedure, may be conceded. *Western W. Works, Inc., v. California F. Co.*, 60 Cal. App. 749, 214 P. 491. That he is not entitled to a lien on the land under the peculiar circumstances of the case is, we think, established by statute and by numerous adjudications of California courts.

Section 1183 of the Code of Civil Procedure provides merely for the impressment of a mechanic's lien "upon the property upon which" lien claimants "have bestowed labor or furnished materials." It does not purport to confer a right to a lien on land. There is another statute which does provide for the impressment of a mechanic's lien on land. This statute is section 1185 of the same Code whose title is "Land Subject to Lien," which provides that: "The land upon which any * * * well * * * is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment, is also subject to the lien." The impressment of the lien on the land is, however, made subject to the condition that at the time of the commencement of the work or of the furnish-

ing of materials the land shall have "belonged to the person who caused said * * * well * * * to be constructed, altered or repaired." The statute concludes with a provision that if the person who caused the improvement to be made "owned less than fee simple estate in such land, then only his interest therein is subject to such lien, except as provided in section 1192 of this code."

The undisputed evidence produced during the trial established that, at the time when the drilling of the well was commenced and when the first materials that were employed in the work were furnished, the individual who entered into the contract with appellant for the drilling of the well owned no other interest in the land than was provided by the terms of the contract of purchase which he had theretofore entered into with respondent, the owner of the land. The provisions of this contract leave no doubt that the title to the land remained in the vendor, and that the obligation of the vendor to convey the land to the vendee was made conditional upon the deposit by the latter of a fund of \$10,000 which was to be used in paying the expenses of drilling a well upon the land. It is not pretended that the fund was ever deposited. The vendee therefore did not, at any time which is material to the present inquiry, acquire the right to demand execution of a deed. It is obvious then that when the well-drilling operations were commenced and in fact during the entire time these operations continued, the vendee had no interest whatever in the land. The time within which he was expressly obligated to deposit the fund had expired prior to the commencement of drilling operations. In any event, it was only the interest of the vendee which could be made subject to appellant's lien. The vendor's fee-simple estate could only be incumbered with the claimed lien by virtue of the provisions of section 1192 of the Code of Civil Procedure.

[6] The last-mentioned statute declares that: "Every building or other improvement or work mentioned in any of the preceding sections of this chapter constructed, altered or repaired upon any land with the knowledge of the owner * * * and the work or labor done or materials furnished mentioned in any of said sections with the knowledge of the owner * * * shall be held to have been con-

structed, performed or furnished at the instance of such owner * * * and such interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this chapter, unless such owner * * * shall, within ten days after he shall have obtained knowledge of such construction * * * give notice that he will not be responsible." The remainder of the section specifically describes the manner in which the notice of nonresponsibility shall be given. The trial court expressly found that the notice of nonresponsibility given by the respondent complied in all respects with the provisions of the last-mentioned statute. This finding is not attacked. It is clear therefore that the trial court correctly decided that respondent's fee-simple estate in the land was not subject to the lien claimed by appellant. The following California decisions furnish ample justification for the court's action in this regard: *McGreary v. Osborne*, 9 Cal. 119; *Humboldt Lumber Mill Co. v. Crisp*, 146 Cal. 686, 81 P. 30, 106 Am. St. Rep. 75, 2 Ann. Cas. 811; *Harmon Lumber Co. v. Brown*, 165 Cal. 193, 131 P. 368; *English v. Olympic Auditorium*, 217 Cal. 631, 20 P.(2d) 946, 87 A. L. R. 1281; *Linck v. Meikeljohn*, 2 Cal. App. 506, 84 P. 309; *Western Electric Co., Inc., v. Colley*, 79 Cal. App. 770, 251 P. 331; *Hayward Lumber, etc., Co. v. Starley*, 124 Cal. App. 283, 12 P.(2d) 66.

[7,8] In his notice of appeal appellant states that he appeals from the judgment "and also from the order of the court sustaining defendants' objection to the hearing of plaintiff's motion for a new trial." Examination of the record discloses that the judgment was entered on November 24, 1933, and that at some subsequent date appellant filed a notice of intention to move for a new trial. This motion was noticed for hearing on January 27, 1934, at which time respondent objected to its being heard on the ground that the court had lost jurisdiction to pass upon the motion in accordance with the provisions of section 660 of the Code of Civil Procedure, as amended by St. 1933, p. 305. No contention is here advanced indicating that the court's action was erroneous. The statute provides that if a motion for new trial is not determined within a period of 60 days after service on the moving party of written notice of entry of judgment, the effect shall

be a denial of the motion without further order. The effect of the court's order sustaining respondent's objection to the hearing of the motion amounted to a denial of the motion. It is settled that no appeal lies from an order denying a motion for a new trial. The attempted appeal from the order is therefore dismissed.

For the reasons stated, the judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.



9 Cal.App.2d 726

GANTENBEIN v. CITY OF LONG BEACH
et al.*

Civ. 10511.

District Court of Appeal, Second District,
Division 2, California.

Nov. 4, 1935.

Rehearing Denied Dec. 3, 1935.

1. Mandamus ⇨163

Allegations of petition for writ of mandate were required to be deemed to be true for purposes of demurrer.

2. Mandamus ⇨107

Civil service employee properly resorted to action for writ of mandate to recover lost wages for period when he was laid off for lack of funds and person without civil service status was employed to do such work where he sought to have city officers certify necessary pay rolls, vouchers, and warrants and to be reinstated to former position.

3. Municipal corporations ⇨122(1)

City civil service employee suing to compel payment of lost wages for period when he was laid off for lack of funds and another without civil service status was employed to do his work, and for reinstatement to his former position improperly pleaded salary ordinance where he simply referred to it as "the salary ordinance" (Code Civ. Proc. § 459).

4. Mandamus ⇨13

City civil service employee suing for writ of mandate to compel payment of lost wages during period he was laid off for lack of funds and another without civil service status was employed, and for reinstatement to former position held not subject to provision of city charter relative to presenting and fil-

ing claims for damages against city, but subject to provisions laying down system of rules and procedure for payment of wages and salaries (St. 1921, pp. 2093, 2151, §§ 110, 338; pp. 2079, 2099, §§ 57, 136, as amended by St. 1925, pp. 1339, 1340).

5. Mandamus ⇨154(4)

Petition of city civil service employee for writ of mandate to compel payment to him of lost wages for period when he was laid off for lack of funds and another without civil service status was employed, and for reinstatement to former position held to state cause of action where alleged infringements of civil service regulations were set out with particularity and proper allegations were made as to readiness to work, demand for reinstatement, and payment of wages and availability of funds for payment of demand.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Mandamus proceedings by Oda J. Gantenbein against the City of Long Beach and others. From an adverse judgment, petitioner appeals.

Reversed.

Clarence P. Wallick and Robert E. Krause, both of Long Beach, for appellants.

George W. Trammel, Jr., City Atty., Harlan V. Boyer, Asst. City Atty., and Henry D. Lawrence, Deputy City Atty., all of Long Beach, for respondents.

GOULD, Justice pro tem.

Petitioner held a rating as a permanent employee in the classified civil service of the city of Long Beach as a cement finisher, his appointment having been duly certified in 1933 pursuant to the provisions of the Long Beach city charter. Compensation for the position was fixed by salary ordinance of said city at \$4.80 per day. On March 5, 1934, petitioner was laid off from work for lack of funds, and thereafter on March 16, 1934, another man, without civil service status, was employed to do petitioner's work, in alleged violation of the charter and civil service rules and regulations of said city. Petitioner was never removed from his position, nor was the position ever abolished.

All these matters are recited as facts in the application for alternative writ of mandate filed herein in the superior court by petitioner, whereby he asks that respondent

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Rehearing denied 52 P.(2d) 495.

ent city and its officers be commanded to make out the necessary vouchers and papers therefor and to pay him the sum of \$811.20 (being the amount of compensation he would have received had he been employed during the period when the non-civil service substitute worked), and that said municipality and its officers reinstate petitioner in his position as cement finisher and otherwise perform all the duties and obligations imposed upon them by law with relation thereto. Respondents' general and special demurrer to the petition was sustained without leave to amend and petitioner appeals.

Most of the points involved in this case have been determined by the Supreme Court of this state in two cases, *Rodgers v. Board of Public Works*, 208 Cal. 291, 281 P. 64, and *Powers v. Board of Public Works*, 216 Cal. 546, 15 P.(2d) 156, 157, involving similar situations under the charter and civil service rules of the city and county of San Francisco. In the latter case the court says: "The evidence clearly shows that each of the respondents, by reason of six months' continuous work as painter, had acquired the status of a permanent employee within the meaning of the city charter. * * * As such permanent employees they are entitled, in proper order, to be employed as painters whenever there is painting work to be done and money is available, for such work, and can be removed from the civil service list only for cause or by the abolishment of their positions." Judgment in favor of the employees compelling the payment of compensation for periods when other painters were employed in positions to which they were entitled was affirmed. Similarly in the *Rodgers Case* affirmance was given to the trial court's judgment ordering the board of public works to pay the permanent employee \$289.75 "lost wages" for a period when, although he did not work, he was ready, able, and willing to work and was entitled as a permanent civil service employee to do work which was given to another not entitled to such position.

[1] We have the same situation here, as disclosed by the petition for writ of mandate, and for the purposes of demurrer the allegations of the petition must be deemed to be true. Petitioner recites his status as a permanent employee, his rating as a class A cement finisher, his salary basis, the duration of his employment, the date and period of his "layoff," the employment of a

noncivil service man to do his work, petitioner's readiness at all times to do such work, and his repeated applications to the municipal officers for work. The alleged infringements of civil service regulations are set out with particularity, and there are proper allegations as to the demand for reinstatement and for the payment of the alleged "lost wages," together with an assertion that funds were and are available for payment of his demand.

[2] Respondents urge that petitioner may not maintain this action for writ of mandate because he has a plain, speedy, and adequate remedy at law by bringing a direct action against the city of Long Beach for the wages claimed. It is to be noted, however, that he is asking not only for the wages, but, as a prerequisite to that end and following the provisions of the Long Beach city charter, he is asking that certain municipal officers certify the necessary pay rolls, vouchers, and warrants. He is also asking that he be reinstated to his position as permanent employee. Whatever force there may be in respondents' contention that *mandamus* is not the proper proceeding here, we feel that the question has been determined adversely to them by the Supreme Court's approval of the almost identical *Rodgers* and *Powers Cases*, *supra*, in each of which the dissatisfied employee proceeded by mandate.

[3] In the brief on appeal respondents claim the salary ordinance of the city of Long Beach was improperly pleaded by petitioner, in that it was simply referred to as "the salary ordinance." The point is good (section 459, Code Civ. Proc.), although it was not raised in the specifications of the special demurrer. Permission should be granted to file an amendment with the proper pleading.

[4] The Long Beach city charter (Stats. 1921, p. 2054, and amendments thereto) provides in section 338 that "all claims for damages against the City of Long Beach must be presented to the city council, and filed with the city clerk within six months after the occurrence for which the damages arose." St. 1921, p. 2151. Respondents argue that the wage demand involved herein is a claim for damages within the meaning of this charter section, and that therefore no compliance having been made with the charter provision, no action can be maintained. Clearly, however, the charter in question contemplates no such procedure as that outlined in section 338 for

wage claims. Other sections, such as number 110 and numbers 57, 136, as amended by St. 1925, pp. 1339, 1340, lay down a system of rules and procedure for payment of wages and salaries and approval of demands therefor, and we believe such provisions control in this case. It is to compel the municipal officers to comply with such provisions that this action is brought.

[5] Holding, as we have indicated, that petitioner has stated facts entitling him to be heard and that he has proceeded by the proper remedy, we are of the opinion that the demurrer should have been overruled.

Judgment reversed.

We concur: CRAIL, P. J.; WOOD, J.



10 Cal.App.2d 18

HENDERSON v. WESTERN PRECIPITATING CO.
Civ. 5371.

District Court of Appeal, Third District,
California.

Nov. 5, 1935.

Hearing Denied by Supreme Court
Jan. 2, 1936.

1. Waters and water courses ⇨49

Hydraulic mining operator on water course *held* liable for damage to lower claimant on same water course caused by its opening reservoir on its property thus causing water, rocks, and debris to flow downstream and flood lower claimant's land ruining operation of his claim.

2. Negligence ⇨28

Every person must use and operate his property so as not to injure or damage property rights and interests of other persons.

3. Waters and water courses ⇨49

In action for wrongful flooding of mining claim by upstream hydraulic mining operator, plaintiff's evidence which definitely and clearly set corner and boundaries of his claim in position contained in location notice *held* to sustain finding of plaintiff's ownership.

4. Waters and water courses ⇨49

In action for wrongful flooding of mining claim by upstream hydraulic mining operator, evidence of local custom allowing such practice *held* properly excluded since no local custom could permit destruction of another's property without just compensation.

5. Waters and water courses ⇨49

\$832 for mining claimant who had performed much work on claim and whose mining operations were ruined and appliances and tools lost by wrongful flooding of mining claim by upstream hydraulic mining operator *held* not excessive.

Appeal from Superior Court, Stanislaus County; Raglan Tuttle, Judge.

Action by R. Henderson against the Western Precipitating Company. From a judgment for the plaintiff, the defendant appeals.

Judgment affirmed.

W. I. Titus, of Los Angeles, J. M. McMahon, of Downieville, and Harry M. Irwin and Everett H. Mills, both of Los Angeles, for appellant.

W. N. Mullen, of San Francisco, and Raymond McIntosh, of Downieville, for respondent.

Mr. Justice pro tem. MAXEY delivered the opinion of the court.

The plaintiff is the owner and in possession of a certain mining claim situate in Sierra county, and particularly described in plaintiff's complaint, being commonly known and located as the "Natalee Creek Mining Claim." Plaintiff's claim was located on May 7, 1926, and notice of location was duly recorded in Sierra county. The notice of claim contains the following wording: "I, the undersigned, locate said creek for the purpose of working the tailings. Said claim contains Creek."

Defendant is the owner of an hydraulic mining property that adjoins the property of plaintiff, and is situate upstream from plaintiff's claim. Defendant's property is commonly referred to as "Loftus No. 1" and "Loftus No. 2." On May 1, 1926, the defendant or its predecessor in interest located, and later constructed a tunnel on its property known as the "Dawson Tunnel," and sometimes referred to as "Howland Flat Tunnel."

Defendant constructed a reservoir on its land to be used in the mining operations on its property, and at certain times or seasons of the year washed the gravel on its property through the Dawson tunnel, through its sluices, and emptied the gravel and debris into Slate creek, which carried it down and over the claim and property of

plaintiff. Plaintiff had performed the work upon his claim which was required of him each year, and had filed his proof of labor therefor. In 1932 plaintiff was in actual possession and occupancy of said claim and had installed sluice boxes, dug trenches, and otherwise improved said claim and had recovered some minerals from the said property by running the tailings through the sluices so constructed by him.

Defendant had both constructive notice and actual knowledge of plaintiff's operations on his claim.

On October 21, 1932, defendant opened the reservoir on its property and caused a large amount of water to be run through Dawson tunnel and into Slate creek, and thence downstream on and over the property of plaintiff, causing the excavation made by plaintiff on his property to be entirely filled up with rocks, gravel, and debris, and further washing out and destroying plaintiff's sluice boxes and either washing away or covering up plaintiff's tools and implements then on the claim of plaintiff and being used by him in the operation of his claim.

It appears from the undisputed evidence that plaintiff had requested of defendant a few days' additional time in which to clean up the said tailings, run them through the sluice boxes, and recover whatever amount he could therefrom. But that the defendant refused to delay its operations, and so notified plaintiff, and at the time above mentioned turned the water onto plaintiff's land.

Judgment was entered for plaintiff in the sum of \$832, and from this judgment defendant has appealed.

[1,2] Appellant has raised four points in its brief, and we shall answer these points in the order in which they are presented: (1) An hydraulic mining operator on a water course must so conduct his operations as not to damage a lower claimant upon the same water course, by allowing water, rocks, gravel, and debris to be carried upon the said lower claimant, resulting in the damage to, or destruction of the work and materials done and placed upon the property of said lower claimant. This appears to us to be so fundamental as not to require further comment. It is a well-settled principle of law that every person must use and operate his property so as not to injure or damage the property rights and interests of other persons. Par-

ticularly is this true of adjoining owners.

The early decisions in this state may have permitted operations of this character, but with the development of the various industries and the strides that have been made in all lines of endeavor, it has long since ceased to be permitted and is now definitely prohibited. "It is well settled that the first locator on mining ground has no right, by custom or otherwise, to allow tailings to run free in the gulch and render valueless the mining claims of subsequent locators below him." *Dripps v. Allison's Mines Co.*, 45 Cal. App. 95, 187 P. 448, 450.

The injury and damage caused plaintiff by the operation of defendant's mining property renders defendant liable in damages for the consequences of its act.

[3] 2. The evidence, with reference to the ownership of the claim of plaintiff, was at most conflicting. Plaintiff testified definitely and clearly as to the corner and boundaries of his claim; he was upon the ground and knew the outline of his claim. His testimony placed the claim in the exact position contained in the location notice. The evidence is amply sufficient to warrant the conclusion of the trial court.

[4] 3. The court properly excluded evidence of local custom and practice. There could be no custom or practice that would permit a miner or any other person to injure or totally destroy the property of another without responding in damages for such injury or destruction. Another person's property may not be thus taken without just compensation. Appellant is of the mistaken impression that the owner and operator of an hydraulic mining venture is cloaked with some protective garment that renders him immune from attack and permits flagrant abuse of the property rights of others, but which cannot be shared by those engaged in other walks of life. Such a theory is entirely untenable. *Salstrom v. Orleans Bar Gold Mining Co.* 153 Cal. 551, 96 P. 292; *Dripps v. Allison's Mines Co.*, supra; *People v. Gold Run Ditch & Mining Co.*, 66 Cal. 138, 4 P. 1152, 56 Am. Rep. 80. There are many other cases in this and other jurisdictions to the same effect.

[5] 4. The measure of damages assessed was fully sustained by the evidence introduced in the trial of this action. The trial

court would undoubtedly have been justified in finding damages in addition to those therein granted. The amount thereof was no more than compensatory, and in our opinion scarcely that. The work done and performed by plaintiff was entirely lost; it represented, in addition to his own labor, computed at the actual time spent in improving his property in order to make it productive, the money paid to others in assisting him to work the claim; the materials, supplies, and tools belonging to, and paid for by plaintiff, were lost or destroyed, and plaintiff received no benefit whatever from the moneys he had expended or from the labor he had performed.

We have already determined that the wrongs inflicted upon this plaintiff are actionable, and the authorities are too numerous to need citations that plaintiff is entitled to such damages as will compensate him for the losses which he has actually sustained by reason of the wrongful acts of the defendant.

The judgment appealed from is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



PEOPLE v. JACOBS.

Cr. 2728.

District Court of Appeal, Second District,
Division 1, California.

Nov. 4, 1935.

Hearing Granted by Supreme Court
Dec. 2, 1935.

1. Criminal law ⇨741(4)

Jury need not believe that all facts stated in hypothetical question are true before giving effect to expert's opinion based thereon; weight of opinion being jury question.

2. Criminal law ⇨741(4)

It is jury's province to judge from expert's examination what facts bearing on issue form basis for opinion, and to judge from entire evidence relating thereto whether facts relied on in hypothetical question are established.

3. Criminal law ⇨1056(2)

Defendant, though not excepting when erroneous instructions were given prior to ad-

mission of experts' opinions, *held* entitled to rely on such errors, in view of exception preserved by statute (Pen. Code, § 1176).

4. Criminal law ⇨823(10)

Error in instructing jury to disregard experts' opinions unless all facts assumed in hypothetical questions were true *held* not cured by instruction that witness assumes truth of all material facts stated and that witness' opinion must be brought to test of truth of facts.

5. Criminal law ⇨808½

Instruction in statutory language entitling jury to disregard experts' opinions *held* erroneous in absence of concluding phrase requiring finding that opinions were unreasonable (Pen. Code, § 1127b).

6. Criminal law ⇨763, 764(1)

It is improper to instruct jury regarding comparative weight of different classes of evidence.

7. Criminal law ⇨823(10)

Error in giving instructions authorizing jury to disregard experts' opinions *held* not cured by instructions that jury were sole judges of facts and weight of evidence and were entitled to consider all evidence in case, giving to each part thereof such weight as jury believed it to have.

8. Criminal law ⇨470

Where defendant pleaded insanity, expert testimony that defendant knew difference between right and wrong *held* inadmissible as invading jury's province.

9. Criminal law ⇨456

Qualified witnesses, expert or nonexpert, may express opinions on question of sanity.

10. Criminal law ⇨450

Where defendant pleads insanity, whether defendant could distinguish between right and wrong when committing act is jury question.

11. Criminal law ⇨1186(4)

Evidence of insanity of defendant charged with assault and murder being substantial, appellate court could not say that erroneous admission of expert testimony that defendant could distinguish between right and wrong, and giving of erroneous instructions to disregard experts' opinions unless all facts assumed in hypothetical questions were true, and instructions authorizing jury to disregard experts' opinions, were not prejudicial, and therefore finding of sanity under such erroneous rulings and instructions constituted miscarriage of justice within Constitution authorizing reversal (Const. art. 6, § 4½).

12. Criminal law ⇨456

Whether medical treatment of defendant pleading insanity had removed parietic condition *held* exclusively one for professional opinion.

13. Criminal law ⇨311

In trial on issue of sanity of defendant in criminal case, prosecution has benefit of presumption of sanity, unless presumption is overcome.

14. Criminal law ⇨1186(4)

Where court after reviewing evidence cannot say that jury, if not improperly instructed, would probably have reached same conclusion, error may not be disregarded (Const. art. 6, § 4½).

15. Criminal law ⇨1186(4)

That evidence amply supported finding of defendant's sanity did not alone warrant affirmation, in view of erroneous instructions and admission of evidence (Const. art. 6, § 4½).

16. Criminal law ⇨485(2)

Hypothetical question relating to sanity *held* objectionable because containing such conclusions as that defendant had become increasingly irrational and abnormal, as evidenced by inconsistent acts and delusions of grandeur, and that defendant's acts were without apparent regard to his standing and reputation as citizen and physician, and that he committed acts in disregard of moral decency and sensitiveness.

17. Criminal law ⇨485(1)

Hypothetical question should consist of statement of facts and inferences of fact rather than conclusions.

18. Criminal law ⇨633(1)

Conduct of court's expert in attempting to secure unanimity among experts through conferences before trial on issue of sanity of defendant in criminal case *held* not improper in absence of any undue persuasion.

19. Criminal law ⇨486

Experts, appointed by court on issue of defendant's sanity, in forming their opinions should have considered erratic or peculiar conduct of defendant which tended to prove him insane.

Appeal from Superior Court, Santa Barbara County; Atwell Westwick, Judge.

William J. Jacobs, having been charged with murder and assault with a deadly weapon, pleaded not guilty by reason of insanity, and from a judgment finding him

sane and from an order denying a new trial, he appeals.

Reversed.

Butcher & Haines, of Santa Barbara, for appellant.

U. S. Webb, Atty. Gen., Frank W. Richards, Deputy Atty. Gen., and Percy C. Heckendorf, Dist. Atty., and Martin J. Coen, Jr., Chief Deputy Dist. Atty., both of Santa Barbara, for the People.

SHINN, Justice pro tem.

Appellant, William J. Jacobs, was accused by information of the crime of murder committed in the killing (by shooting) of one Lillian Newlon, and with the crime of assault with a deadly weapon upon one Adelaide E. Flint with intent to commit murder. To each count of the information he interposed a plea of not guilty by reason of the fact that he was insane at the time of the commission of the alleged unlawful act. Upon this defense he was tried by a jury and found to be sane. He appeals from the judgment and from an order denying his motion for a new trial.

[1] During a protracted trial, numerous lay witnesses and medical experts, including those called by the prosecution, those called by the defense, and three experts appointed by the court, expressed conflicting opinions as to the sanity of the defendant. Dr. Schurmeier, a licensed physician who qualified as an expert, was called by the defendant. He was asked a hypothetical question by the defense which recited much of the history of the defendant's life and which summarized the testimony of a number of defense witnesses who had described the defendant's conduct upon various occasions, and who characterized it as abnormal, irrational, or insane. This question was objected to by the people and the objection was overruled; whereupon the court addressed the jury as follows: "The law is pretty well settled on these hypothetical questions. The facts assumed, of course, in the hypothetical question are assumed for the purpose of the question alone, and for no other purpose, and the jury are so instructed, and you will be further instructed upon that subject to disregard the testimony of any expert witness unless you are satisfied that all of the facts upon which the question is based are true." The witness thereupon answered that defendant

was medically insane. Dr. Preuss, a medical expert called by the defense, was asked the same hypothetical question. Before he was allowed to answer it, the court again instructed the jury to disregard the testimony of expert witnesses unless satisfied that all of the facts upon which the question was based were true, stating that the jury would be further instructed upon this subject later. Dr. Preuss then gave his opinion that the defendant was insane. In the cross-examination of Dr. Brush, a medical expert testifying for the prosecution, defense counsel, after reciting the substance of the testimony of defense witnesses describing alleged irrational conduct of the defendant, asked the witness whether the defendant, exhibiting the enumerated symptoms, was suffering from paresis. The court again admonished the jury to disregard the opinion unless the assumed hypothesis was believed to be true, and the admonition that all the assumed facts must be found to be true was given when the defense hypothetical question was propounded on cross-examination to Dr. Hamilton, a witness for the prosecution.

These repeated instructions of the court did not correctly state the law. By the references to "the testimony" of the experts the court probably had in mind only the opinions given in answer to the hypothetical questions, but the jury may not have so understood the instruction. There was other material and important testimony given which was not at all dependent upon the facts assumed in the defense questions and which could not properly be disregarded. We will assume, however, notwithstanding its ambiguity, that the instruction was understood by the jury as applying, not to all of the testimony of the experts, but merely to their opinions, but so understood, it is clearly erroneous. It is not necessary that the jury believe all of the facts stated in a hypothetical question to be true before effect can be given to the opinion of an expert witness based thereon. The correct rule is stated in *Treadwell v. Nickel*, 194 Cal. 243, 228 P. 25, 34, as follows: "When the evidence is sufficient as a basis for a hypothetical question, the truth or falsity of the purported facts is a question for the jury to determine. *Coonan v. Loewenthal*, 129 Cal. 197, 203, 61 P. 940. The opinion can have little, if any, value unless the material facts assumed in such question are substantially true, and the court may properly so instruct the jury whenever there is con-

flicting evidence as to the truth of the assumed facts. Such opinion evidence does not, however, necessarily become wholly valueless because there is some variance between the facts assumed in the question and the actual facts proven. What weight should be given in such cases to the opinion of the expert witnesses is a question for the jury under proper instructions from the court. *Anderson v. Husted*, 79 Conn. 535, 538, 66 A. 7; *Madden v. Saylor Coal Co.*, 133 Iowa, 699, 704, 111 N. W. 57. An expression in *Hallawell v. Union Oil Co.*, 36 Cal. App. 672, 685, 173 P. 177, 183, that 'counsel objecting (to a hypothetical question) may have the instruction of the court to the jury to disregard the testimony of the expert unless satisfied that all of the facts upon which the question is based are true,' is mere dictum, and does not correctly state the law relating to expert testimony, and is at variance with a later statement by the same court of the correct rule. *Graves v. Union Oil Co.*, 36 Cal. App. 766, 770, 771, 173 P. 618."

[2] It is the province of the jury to judge from the direct and the cross examination of an expert witness what facts bearing upon the issue form the basis for the expert opinion, and to judge further from the entire evidence relating thereto whether the facts relied upon are established. The testimony may disclose that some of the assumed facts are regarded by the witness as material and important while others are deemed either not relevant to the issue or are regarded by the witness as unimportant in the foundation upon which the opinion is rested. The instruction that the opinion of the expert should be disregarded unless all of the assumed facts were believed by the jury to be true imposed an undue burden upon the defendant in that it improperly tended to weaken the effect of the testimony of the defense experts.

[3] It is contended by the people that the error cannot be relied upon in the absence of an exception taken at the time the instruction was given. We are cited to no case which limits the scope of the exception which is preserved by section 1176 of the Penal Code to the giving or refusal of instructions. The instruction in question was given upon the court's own motion. No proceedings were had which could be relied upon as showing acquiescence by the defendant. The court stated that the jury would be further instructed

upon the subject. We think the defendant had a right to rely upon the exception which the law preserves for him and to expect any error to be corrected when the jury was finally instructed.

[4] In another instruction given upon submission of the case, the court instructed the jury in part as follows: "A hypothetical question is a question which assumes a certain condition of things to be true, a certain number of facts proved or to be proved, and calls upon the witness to assume all the material facts stated to be true and express his opinion as to certain conditions. The witness to whom the hypothetical question is addressed assumes them to be true, and bases his answer upon the assumed case. The opinion of the witness must, therefore, be brought by you to the test of the truth of the facts in order that you may judge what weight the opinion is entitled to." It is contended by respondent that this instruction cured any error which the court may have committed in instructing the jury that it must find all the assumed facts to be true before giving effect to the expert opinion. We are unable to attribute such effect to the instruction. The erroneous statement in the instruction was clear and explicit and was neither withdrawn, qualified, nor explained by the general statement in the later instruction that the opinion of the witness must be brought to the test of the truth of the facts; nor do we believe that the statement in the latter instruction, that the witness assumes all material facts stated to be true, cured the error in the former instruction. The two instructions when read together still left the jury under the duty of disregarding the experts' opinions unless they believed the truth of all the assumed facts to be established.

[5] The court, of its own motion, gave the following instruction: "Duly qualified experts may give their opinion on questions in controversy at the trial. To assist the jury in deciding such questions, the jury may consider the opinion with the reasons stated therefor, if any, by the expert who gives the opinion. The jury is not bound to accept the opinions of any expert as conclusive but should give to it the weight to which they shall find it to be entitled. The jury may, however, disregard any such opinion." This instruction follows section 1127b of the Penal Code, omitting, however, the concluding phrase which reads, "if it shall be found by them to be

unreasonable." The instruction as given differed in an important respect from the instruction sanctioned by the Code, in that it left the jury free to disregard altogether the opinions of expert witnesses without determining whether such opinions were reasonable, or even if they might have believed them to be reasonable. The instruction was erroneous in its unqualified statement that the evidence might be wholly disregarded. To disregard it would be to pay no attention to it, to ignore it, which, of course, cannot be done. The inconsistent and conflicting statements in the instruction cannot logically be reconciled. If it was intended to preserve the meaning, there was no reason for departing from the language of the statutory instruction.

[6] That it is improper for the court to instruct the jury as to the comparative weight of different classes of evidence has been frequently decided. In *People v. Vereneseneckockockhoff*, 129 Cal. 497, 58 P. 156, 62 P. 111, it was held reversible error to instruct the jury "that circumstantial evidence has this great advantage, that various circumstances from various sources are not likely to be fabricated"; and in *People v. Nichols*, 69 Cal. App. 214, 230 P. 997, 1000, it was held to be an invasion of the province of the jury to give an instruction to the effect that testimony of an alibi should be scrutinized with care to make sure that the defense is not fabricated. In *Re Estate of Blake*, 136 Cal. 306, 68 P. 827, 828, 89 Am. St. Rep. 135, the court said: "There is no law that declares that the testimony of experts is unsatisfactory and unreliable. If so, the law should not allow it to be given in evidence. It is said by Lawson, in his work on Expert and Opinion Evidence (2d Ed.) p. 181: 'The credibility of the experts—the weight to be given to their testimony—is as much the province of the jury to determine as any other class of witnesses; and hence the court, in most of the states, is not permitted to advise the jury in the matter at all, or to assume to instruct as to whether expert or nonexpert evidence has greater weight.'" In *Rolland v. Porterfield*, 183 Cal. 466, 191 P. 913, 914, it is said: "Whatever the individual opinion as to the value of expert testimony, it has been clearly settled in this state that, as regards the preference or weight to be given the testimony in any particular case, the law makes no distinction between expert testimony and evidence of other character, and that, when there is a conflict be-

tween scientific testimony and testimony as to the facts, the jury, or trial court, must determine the relative weight of the evidence." In *Hirshfeld v. Dana*, 193 Cal. 142, 223 P. 451, 460, the court said: "Since the law authorizes the admission of expert testimony, like all other matters of fact, it should be left strictly to the jury to weigh and determine its effect and value unaided by the court, either by disquisitions on that character of evidence or by directing the mental processes of the jurors as to how they should resolve it into facts. * * * But it is never proper to instruct the jury that expert testimony is or is not reliable or as to how the jury should appraise it."

In other jurisdictions the principle is declared that competent opinion evidence may not be arbitrarily disregarded and that when unopposed it must be accepted. *Jensen v. Wisconsin Central Ry. Co.*, 145 Wis. 326, 128 N. W. 982; *Kerwin v. Friedman*, 127 Mo. App. 519, 105 S. W. 1102; *Harris v. Nashville C. & St. L. R. Co.*, 153 Ala. 139, 44 So. 962, 14 L. R. A. (N. S.) 261; *J. T. Morgan Lumber Co. v. Williams*, 143 Ky. 115, 136 S. W. 131.

[7] The court also instructed the jury in part as follows: "It does not matter from which side the evidence comes, whether from witnesses for the prosecution or witnesses for the defendant, or witnesses appointed by the court. You are entitled to consider all the evidence in the case, weighing it on the same scales, and giving to each part thereof such weight and value as you believe it to have." Neither this instruction nor the general instructions to the effect that the jury are the sole judges of the facts and the weight of the evidence can be construed as a correction or limitation of the erroneous statement that the jury might altogether disregard the opinions of expert witnesses. We are therefore of the opinion that the case was submitted to the jury without qualification of the erroneous statements of the law relating to expert testimony.

[8-10] Dr. Myers, one of the experts appointed by the court, testified on direct examination that at the time he examined the defendant on December 18, 1934, defendant at no time failed to know and distinguish between right and wrong. Dr. Brush, a prosecution witness, also testified on direct examination that at the several times when he examined the defendant at the jail defendant "at all times

appreciated the difference between right and wrong—that he knew that he had committed a crime; he knew the nature and quality of his acts." Defendant moved to strike out these statements upon the ground, among others, that the testimony invaded the province of the jury. The motions were denied. In this the court erred. The evidence was inadmissible. In *People v. O'Brien*, 122 Cal. App. 147, 9 P.(2d) 902, this court reviewed the authorities and adopted the rule that opinion evidence may not be received in criminal cases upon the question whether the defendant was able to distinguish between right and wrong. The court said, 122 Cal. App. 147, at page 154, 9 P.(2d) 902, 904: "Not only by the courts of this state, but as well by courts of other jurisdictions, wherein the rule obtains by which testimony of the nature of that here under consideration is denied admission, the universal reason assigned therefor is that such evidence trenches upon the province of the jury in that it permits a witness to decide the very question upon which the jury alone is qualified to pass judgment." It is true of that case, as respondent points out, that the witnesses who were asked to state whether the defendant was able to distinguish between right and wrong were not expert witnesses. They were, however, intimate acquaintances, whose opinions as to the sanity of the defendant, together with their reasons therefor, were admissible. We think it makes no difference whether the objectionable testimony comes from lay witnesses or experts. It is the nature of the testimony and the fact that it invades the province of the jury that render it inadmissible. The competency of the witness is not involved. In *People v. O'Brien*, supra, the decision was not placed upon the ground that the witnesses were nonexperts and the authorities relied upon were cases in which it was held that opinions of experts upon the ultimate fact in issue are inadmissible. Qualified witnesses, expert or nonexpert, may express opinions upon the question of sanity, but under our legal system the jury must decide in a criminal case where insanity is the defense whether the accused was capable of distinguishing between right and wrong at the time of the commission of the act. As pointed out in the *O'Brien* Case, testimony such as we are here considering would in reality amount to expressions of opinions of witnesses that the defendant was or was not legally responsible for the acts with

which he was charged. To sanction the practice of allowing psychiatrists to determine and testify as to the legal accountability for their acts of those claimed to be insane would substantially change the law. The right of jury trial extends to the defense of insanity in criminal cases and may not be abridged by a relaxation of the settled rules of evidence. It is further argued by respondent that the statements of the doctors were properly received because they were given not in response to direct questions, as in the O'Brien Case, but as reasons why they believed the defendant to be sane, and it is argued also that because the statements related not to the date of the crime, but to the date of the examinations made later, they did not attempt to decide the question of the mental responsibility of defendant on the date of the shooting. These distinctions are without significance. We are concerned with the effect of the testimony upon the defendant's case, and it was just as harmful coming in by one route as by another and being improper as evidence was therefore no less objectionable. The doctors testified not only as to the sanity of the defendant at the time of their examinations but as to his sanity on the date of the shooting. Since their opinions were based upon the previous history of the defendant and upon their later examinations, and inasmuch as there was no suggestion that there had been any change in the defendant's condition subsequent to the shooting, the opinions of the doctors to the effect that defendant was able to distinguish between right and wrong could only have been understood as relating also to the date upon which the acts charged were committed. The statements volunteered by the doctors should have been stricken out on defendant's motion.

[11-15] In a voluminous brief the district attorney and the Attorney General present an elaborate and lengthy argument in which they earnestly contend that had the above rulings and instructions of the court been different, defendant would nevertheless have been convicted, because of the alleged overwhelming weight of evidence of his sanity. If this argument is sound there should be an affirmance under section 4½, article 6 of the Constitution. In passing upon this question, we have reviewed the entire evidence upon the issue of defendant's sanity. The case is not one in which an obviously sane person

has presented a sham defense of insanity. Upon the contrary, the evidence of defendant's insanity was of a substantial character. In giving our reasons for these views we shall not attempt to state the entire evidence nor to give more than a concise summary thereof upon which we base our conclusions as to the cumulative weight of the several classes of evidence offered in support of the defense of insanity.

Defendant was a physician fifty-three years of age, practicing his profession in the city of Santa Barbara, where he had resided since 1924. For several years Adelaide Flint was employed in his office. Between the years 1927 and 1933 an illicit relationship had existed between them. This resulted in a temporary estrangement between defendant and his wife, the institution of a divorce action by defendant, and a suit for alienation of affections by the wife against Miss Flint, which was compromised and defendant's divorce suit withdrawn. After the termination of their intimacy, defendant developed an intense hatred of Miss Flint. He also became extremely bitter toward Mrs. Newlon, who lived with Miss Flint, in part because he blamed her for causing police officers to enter Miss Flint's home at a time when he was visiting there and because he believed she had interfered in his affairs with Miss Flint. He had had altercations with Mrs. Newlon's son. Defendant believed that Miss Flint had transferred her affections to or had relations with other men. He wrote a number of letters and cards addressed to and concerning Miss Flint and the Newlons, in which he referred to Miss Flint in vulgar terms and shamelessly adverted to his past relations with her, and in which also he made references to the Newlons. The evidence shows that defendant was greatly disturbed by his thoughts and feelings toward these women. On the 7th day of November, 1934, he drove by them upon a street in Santa Barbara and spoke to them, calling Miss Flint a snake. Some ten or fifteen minutes later, at a point several blocks further down the street, defendant alighted from his car, walked up to the women, and, without warning, started shooting at them from close range. When his victims had fallen, he got into his car and proceeded home at rapid speed. There he took a large quantity of morphine and reloaded his revolver with the apparent intention of shooting himself, from which he was dis-

suaded by his mother. When the officers came to arrest him, he held them off with the revolver until they procured and returned with a warrant for his arrest. Upon returning home after the shooting, he handed his mother a writing reading as follows:

"San Jose Justice

"Kill snakes as you meet them.

"To vindicate my home and my wife.

"My Regards to Miss Pearl Chase and

"Her dirty attorney Major McGregor

"Ask

"Dr. Saunders A common old Prostitute

"Psi Yun and Home Wrecker.

"Mr. Capone Dr. Jacobs

"six and 1/2 yrs.

"(One man she didn't fool)

"One man at Bakersfield
another at Pasadena."

Other writings of similar import were introduced. One of these addressed to Miss Flint, commenced as follows: "You dirty nasty old snake. One year ago today you allowed the rotten Newlon family to call the police on me." Other writings he signed, "Judas." These writings showed him to be in a highly nervous and excited mental condition and disclosed his bitter animosity toward Miss Flint and Mrs. Newlon. The contents of the letters and memoranda, expressing as they did an unreasonable hatred and having no other apparent purpose, might well have been accepted by the jury as some evidence of mental derangement. Dr. Jenkins, a physician of Los Angeles, proprietor of a hospital, testified to an occasion, some five or six weeks prior to the shooting, when defendant brought a patient to Dr. Jenkins for an operation. After detailing the actions of the defendant over a considerable period of time on that occasion, Dr. Jenkins expressed the opinion, supported by intelligent reasons, that defendant was then insane. Allen Jacobs, a nephew, twenty-six years of age, testified to an occasion in 1931 while he was visiting defendant at the latter's request when defendant became greatly excited and abusive and trembled with anger because the witness returned to the house about 10 o'clock in the evening, and to a similar occasion the following evening, when the witness left defendant's house after being loudly cursed for returning home at 10 o'clock. He testified that on the latter occasion defendant, clad only in a nightshirt, followed him

up the street for three or four blocks, cursing and upbraiding him and threatening to call the police. This conduct the witness designated as irrational. Other witnesses testified to violent rages which occasionally possessed defendant, and which they said he did not experience before 1929, to expansive ideas he entertained, to altercations which he had with tenants and neighbors, to threats of violence, and to other acts which they considered irrational and abnormal. The conduct of the defendant, as related by these witnesses, according to the testimony of the defense experts, disclosed symptoms of insanity. This testimony as a whole likewise furnished substantial evidence of mental derangement. It was an admitted fact that defendant was afflicted with syphilis which had progressed to a stage where it had affected his central nervous system. The medical testimony in the case revolved about the manifestations of the disease and the extent of the progress it had made toward the impairment of his brain. He undoubtedly was suffering from paresis in April, 1933, which resulted in damage to his brain. He received a course of treatment for about a year which benefited but did not cure him of the disease. Dr. Madge T. Holman, a physician who was a tenant of defendant for six or eight months, testified from personal observation and reports of clinical tests that in her opinion defendant was insane. Dr. Schurmeier and Dr. Preuss, in addition to the opinions given in response to the hypothetical question, gave their opinions, based upon medical facts and upon their personal observation of the defendant, that he was afflicted with paresis and insane. Dr. Preuss was shown defendant's writings and, basing his opinion upon these and upon laboratory tests showing a diseased involvement of the central nervous system, testified that defendant was insane at the time of the shooting.

Such, in brief, was the evidence tending to establish the insanity of the defendant. That it was sufficient, if believed, to show the defendant to have been mentally diseased and sometimes irrational, cannot be doubted. His mental disturbances seemed to center around Miss Flint and Mrs. Newlon, his hatred of the former being exhibited during his interviews with the medical witnesses of the prosecution following the shooting, and he unquestionably entertained the belief that they

had wronged him, a belief not justified by any facts disclosed by the record. The mental condition of the defendant, as affected by his illness, presented a question which was peculiarly the subject of expert testimony. Whether the defendant remained a parietic after his treatment or, as admitted by experts who testified to his sanity, a potential parietic merely, was purely a matter of opinion. We are asked to reject in its entirety the testimony of the defense physicians or to hold it entitled to no weight because of its inherent weakness and to hold also that the jury must necessarily have disregarded it without reference to the instruction which advised them that they might do so. This argument, effective though it was with the jury, does not convince us that the testimony of the defense doctors did not carry substantial weight. While the medical testimony of the prosecution and that given by the court's experts was indeed strong, we cannot attribute to it that overwhelming force which would have compelled its acceptance by the jury. As to the testimony of the lay witnesses, while a large number testified to the sane conduct of the defendant at times when they dealt or conversed with him and as they observed him in the practice of his profession and in other activities, the evidence of the prosecution does not preponderate over that of the defense sufficiently to have required the jury to find that the defendant did not have a distinctly disordered mind. It was not contended that defendant acted irrationally at all times, nor was it contended that even though insane he would not at times be lucid and act in a normal manner. The evidence shows that the type of insanity which he claims to have been suffering from is one in which the evidence and manifestations flare up or subside from time to time.

Having reviewed the evidence sufficiently to show its conflicting character, we have to consider the effect of the errors upon the defendant's case and to determine whether they probably led to the verdict declaring defendant sane. It is not our duty to undertake to say from the record before us where the preponderance of evidence rests. Where the evidence is not only conflicting but is of such substantial character as to amply support either of two conclusions, it is a delicate question to decide whether there exists a condition

of legal insanity. Misdirection of the jury in important particulars where a fine line of distinction must be drawn is more likely than in other cases to lead to false lines of reasoning and to erroneous conclusions. We are satisfied that the misdirection of the jury upon the subject of expert testimony tended directly and strongly to deprive the defendant of the full benefit of the testimony of his expert witnesses. There was no occasion for the court to instruct the jury upon the hypothetical question when it was propounded. To do so placed unnecessary emphasis upon the erroneous admonition. The uncalled for repetition of the statement magnified the effect of the error and could not have failed to impress the jury. The same instruction was not given the jury in connection with the opinions of the experts testifying for the prosecution or those appointed by the court. It might easily have been understood as a suggestion from the court that the evidence of the defense should be subjected to close scrutiny. As applied to the hypothetical question asked by the defense, the instruction could not have failed to be confusing and misleading. Some of the acts of defendant which had been termed irrational by the witnesses strongly indicated an unbalanced mind; others were reconcilable with a condition of sanity, and all were so intermingled with descriptions of the appearance and demeanor of the defendant, and with the inferences and conclusions of the witnesses, as to render it extremely doubtful whether the entire basis of the hypothetical question could have been accepted by the jury. The testimony of Drs. Schurmeier and Preuss does not show that either of these witnesses regarded all of the assumed facts to be necessary to show the insanity of the defendant. Under this instruction alone the defendant may have lost the benefit of their testimony.

We are convinced also that the defense of insanity was materially weakened by the instruction that the jury might disregard the expert testimony. The evidence was to the effect that defendant was suffering from paresis unless the medical treatment he received had removed that condition, which latter fact the defense experts denied. This question was exclusively one calling for professional opinion, and deserving of the most careful consideration. When and if it was removed from the case there was eliminated the

very important fact that defendant was suffering from a dread disease which may have made inroads upon his mental faculties. The opinions of the defense doctors were very important because they took into consideration acts of the defendant which indicated the extent of the impairment of his mentality. When his condition, from a medical viewpoint had been established by clinical tests, it became necessary that full consideration be given to the manifestations of derangement as stated in the hypothetical questions and in the writings which, in part, formed the basis of the opinions of the defense experts. By its verdict, the jury rejected the testimony of Drs. Schurmeier, Preuss, Holman, and Jenkins. It is impossible to say that in so doing they did not follow the erroneous instructions. Even though it be assumed that the jury disregarded all of the expert testimony in the case, which cannot be known, the prosecution would still have had the benefit of the legal presumption that the defendant was sane, unless such presumption was overcome by the testimony of lay witnesses called by the defendant, unsupported by evidence of the fact that he was to a greater or lesser extent suffering from impairment of his mental faculties by reason of disease.

It follows also from the views we have stated that the receipt of the opinions of doctors Myers and Brush that defendant was able to distinguish between right and wrong was prejudicial to the defendant. As they were the only witnesses who gave such testimony, and as the jury was fully instructed that that was the ultimate test of sanity, it is not improbable that their testimony, for this reason alone, was accepted by the jury as decisive. We are of the opinion that the defense of insanity might reasonably have prevailed but for the errors which we have passed upon. The errors went to the very foundation of the defendant's case and were so potent in their harmful effects that we cannot say they did not prevent a verdict in defendant's favor. Therefore, there has not been a full and fair trial of the issue which constituted the sole defense of the accused.

The rule by which we are guided, in disposing of the appeal, is stated in *People v. Davis*, 210 Cal. 540, 293 P. 32, 39, as follows: "The phrase 'miscarriage of justice,' used as descriptive of that condition

of a cause which justifies the reversal of a judgment, has no hard and fast definition. It seems assured, however, that where errors have been committed, and where the appellate court finds that upon the record it is seriously doubtful that without such errors the defendant would have been convicted, then it may well be that errors which otherwise would not be considered to be seriously prejudicial, will require a reversal."

In *People v. Wilson*, 23 Cal. App. 513, 138 P. 971, 976, in discussing the applicability of section 4½ of article 6 of the Constitution, the court stated: "It is not for us to say whether we think that the defendant is guilty. * * * We do hold that, if the jury had been instructed upon the law concerning their duty to consider the evidence of defendant's previous good character as a part of the evidence upon which they were to determine the question of his guilt or innocence, such instruction would have added a substantial item to the balance in defendant's favor, and might have changed the verdict. This being so, the case is one where the right of defendant to such instruction was a right the loss of which materially affected his general right to a fair and lawful trial."

In *People v. Nichols*, supra, it is said: "Under the provisions of section 4½ of article 6 of the state Constitution, whether the giving of an erroneous instruction does or does not constitute reversible error depends, in large measure, upon the conclusion of the Court of Appeal as to whether there has or has not been a miscarriage of justice by reason thereof. If it appears to the appellate court that the conclusion of the jury would have been the same with or without the instruction, then and in that case it cannot be said that a miscarriage of justice has resulted, but, where there is a strong conflict in the evidence, and the determination of the cause depends upon the credibility to be given to certain witnesses by the jury, and the court gives an erroneous instruction which tends to disparage such witnesses in the estimation of the jury, then and in that case we think that the people are not entitled to rely upon the provisions of the constitutional provision referred to, but that the defendant has not, under such circumstances, been given the fair and impartial trial to which all persons accused of crime are entitled."

"The central or all-important purpose of said constitutional provision is obviously to legally justify the courts in refusing to interfere with or disturb verdicts of guilty in criminal cases in the trial of which error has been committed and in which the evidence amply supports such verdicts, when such interferences may justly be withheld consistently with a just and proper regard for the substantial rights of persons tried for public offenses." *People v. Tomskey*, 20 Cal. App. 672, 130 P. 184, 189. Where the court cannot, after a careful review of the evidence, say that the jury if not improperly instructed would probably have reached the same conclusion, the error may not be disregarded. *Langford v. San Diego Electric R. Co.*, 174 Cal. 729, 164 P. 398.

There is ample evidence to support the finding that defendant was sane, but this fact in itself furnishes no sufficient reason for an affirmance of the judgment. As was said in *People v. Adams*, 76 Cal. App. 178, 244 P. 106, 109: "It is perfectly clear, however, that section 4½ of article 6 of the Constitution was not intended to mean that the mere fact that the evidence may support the judgment is a sufficient reason in all cases for refusing to set it aside. To give the section that meaning would often lead to gross miscarriages of justice, as where evidence vital to the case of a party is rejected or evidence vitally damaging to his case is erroneously admitted, or where the court erroneously instructs or refuses to instruct the jury as to the law applicable to an essential issue."

A statement of the Supreme Court in *People v. Roe*, 189 Cal. 548, 209 P. 560, 566, has direct application here, namely: "While it is true that section 4½ of article 6 of the Constitution confers upon this court the power to weigh, to a limited extent, the evidence in its entirety upon which a conviction has been had, still 'we are not substituted for the jury. We are not to determine, as an original inquiry, the question of the defendant's guilt or innocence.' We are to 'decide whether, in our judgment, any error committed has led to the verdict which was reached.'" *People v. O'Bryan*, 165 Cal. 55, 130 P. 1042. We are satisfied that the verdict of guilty was arrived at by the aid of the inapplicable and admittedly erroneous instructions, and this is so, in our judgment, because they obviously obscured and crip-

pled the defendant's defense to the extent practically of denying to her the right of any defense at all. We are fortified in this conclusion by the fact that a careful review of the cold record before us shows the evidence, educed upon the whole case, to be in irreconcilable conflict and closely balanced, in weight and quality, for and against the guilt of the defendant."

The evidence of the people in the instant case is not so strong and convincing as to justify us in saying that it is improbable that the jury would have found defendant insane had the inadmissible evidence not been received, and had the jury been properly instructed as to the law. Therefore the exception provided by section 4½ of article 6 of the Constitution applies, for in such case the determination of the question of sanity against the defendant under rulings and instructions which materially weakened his defense and strengthened the case of the people amounted to a miscarriage of justice within the meaning of the constitutional provision. The case is therefore one in which a reversal is required and not an affirmance under section 4½, article 6 of the Constitution.

[16, 17] Appellant claims error in the ruling sustaining an objection to his hypothetical question asked Dr. Stevens on cross-examination. As the same situation may arise upon a retrial we deem it advisable to rule upon this point. The objection was properly sustained. While the question purported to state facts, it contained such conclusions as that "defendant has become increasingly irrational and abnormal"; that defendant's irrationality and abnormality were evidenced by "inconsistent acts," by "delusions of grandeur"; that defendant's acts were "without apparent regard to his standing and reputation as a citizen and as a physician and surgeon in the community"; that he committed acts "in disregard of moral decency and sensitiveness." The question was not in proper form. A hypothetical question should consist of a statement of facts and inferences of fact, as distinguished from pure conclusions and opinions of the type we have pointed out. For example, it would be confusing in the extreme to require an expert witness to give an opinion as to sanity based in part upon the opinion of a lay witness that upon some occasion the conduct of the defendant had appeared to him

to be irrational or abnormal. In numerous particulars the question was subject to this criticism, as was illustrated when it was propounded to the experts during their cross-examination by defendant's counsel. They were unable to answer the question because they could not accept as understandable facts the generalities and conclusions given as a summary of the testimony of other witnesses. The question should have been reframed so as to avoid the objectionable descriptive embellishments and general statements which rendered it difficult or impossible of exact analysis.

[18, 19] We find nothing improper in the conduct of the court's expert, Dr. Myers, in making an effort to secure unanimity of opinion on the part of medical experts through conferences before the trial of the case. No undue persuasion was used by Dr. Myers to bring the others to his views. While a better purpose for the conferences would seem to have been a desire to arrive at the soundest possible conclusions, rather than to maintain the dignity of the profession by avoiding conflicting opinions, it does not appear that the conferences brought about any results that were unfair or prejudicial to the defendant. It is worthy of note, however, that the experts appointed by the court were satisfied to take defendant's history as related by himself, and that in forming their opinions they did not inquire into or have knowledge of the erratic and peculiar conduct of the defendant which, it was claimed in his defense, tended to prove him insane. We think these manifestations were important in determining the possible extent of the involvement of the defendant's mental faculties and that the opinions of the doctors would have been much more satisfactory had such facts been taken into consideration.

It is unnecessary to decide whether the defendant's instructions which were refused by the court were substantially covered by the instructions given. Upon a retrial the jury no doubt will be fully instructed.

The judgment and order denying a new trial are reversed.

We concur: HOUSER, P. J.; YORK, J.

In re CAMPBELL.

Civ. 9965.

District Court of Appeal, First District,
Division 2, California.

Nov. 1, 1935.

Hearing Denied by Supreme Court
Dec. 30, 1935.

1. Appeal and error ⇨931(3)

Findings having been expressly waived, appellate court must assume in support of decree that trial court would have found everything necessary to support its judgment.

2. Adoption ⇨7

Under statute, father's consent to adoption of illegitimate child *held* unnecessary, and hence exercise of court's discretion in granting grandmother's adoption petition over father's objections was not limited by general rule giving preference to father, especially in absence of finding that father was competent and suitable (Civ. Code, § 224, as amended by St. 1933, p. 1436).

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

In the matter of the adoption of Marilyn Campbell, a minor. Petition by Jessie Campbell for the adoption of the minor, to which objections were filed by Carroll Goss Hall. Decree for petitioner, and the objector appeals.

Affirmed.

Hubbard & Miller, of San Francisco, for appellant.

Harold Huovinen, of Oakland, for respondent.

NOURSE, Presiding Justice.

On January 20, 1931, Marilyn Campbell was born out of wedlock to Beatrice Campbell. The mother placed her in the home of the Ladies' Relief Society, where she remained and was cared for until the month of September, 1934. Beatrice Campbell died July 18, 1934, and soon thereafter her mother, the petitioner herein, applied for and was granted letters of guardianship over the minor child. In September, 1934, she removed the child to her own home and ever since has had the exclusive care and custody over her. On September 12, 1934, the petitioner filed this petition for the adoption of the child to which the putative father and appellant herein filed his objections, the basis of which was that the grandmother was unfit and not able to care for

the child and that the father had the ability and was a fit and proper person for that purpose. At the close of the hearing, the trial judge announced that he was prepared to find in favor of the petitioner and against the allegations of the opposition filed by the appellant. Counsel for appellant thereupon requested that no findings as to his fitness and ability be made, and when told that this request could not be granted, he stipulated that findings on all matters be waived. A decree was thereupon entered without findings which contained the recitals that the best interests of the child would be promoted by the adoption and that the objections of the appellant should be overruled.

[1] The appeal is argued on the sufficiency of the evidence to show the fitness of the petitioner and her ability to care for the child and the sufficiency of the evidence upon the same factors relative to the appellant. When findings of fact have been expressly waived, we must assume in support of the decree that if findings had been made, the court would have found everything necessary to support its judgment. Thus we must assume that the court would have found that petitioner was fit and able to care for the child. It may also have found that the appellant was not. The evidence in both instances is conflicting and the recitals in the decree are controlling here.

[2] The one question of law involved here finds complete answer in the statutes. Section 224 of the Civil Code (as amended by St. 1933, p. 1436) provides in part: "A legitimate child can not be adopted without the consent of its parents if living; * * * nor an illegitimate child without the consent of its mother if living." The Code section contains no ambiguous language and requires no interpretation. It declares in plain terms that an illegitimate child cannot be adopted without the consent of the mother, if living. If the Legislature had intended that the consent of the father was also necessary, it would have said so in simple language as it did in the first part of the section relating to the adoption of a legitimate child. On the authority of decisions taken from other jurisdictions, the appellant argues that as a general rule the putative father of an illegitimate child is entitled to preference in its adoption if found competent and suitable for that purpose. The argument is persuasive in so far as it states a general rule bearing on the discretion of the court in adoption proceed-

ings, but it has no force here for two reasons—the Code section places no such limitation upon the exercise of the discretion of the court, and there is no finding that the appellant was competent and suitable.

The decree is affirmed.

We concur: STURTEVANT, J.;
SPENCE, J.



DOYLE v. PACIFIC ELECTRIC RY. CO.

et al. *

Civ. 10427.

District Court of Appeal, Second District,
Division 2, California.

Nov. 19, 1935.

Rehearing Denied Dec. 13, 1935.

**Hearing Granted by Supreme Court
Jan. 16, 1936.**

1. Negligence ☞23(1)

Exception to general rule that owner of property owes no duty to mere trespassers to keep his property in safe condition is where attractive contrivances alluring to children but inherently dangerous to them are maintained with owner's knowledge.

2. Negligence ☞23(1), 136(19)

Maintenance of premises alluring to children but inherently dangerous to them is want of ordinary care, and whether device complained of constitutes trap, dangerous to children, is ordinarily for jury.

3. Negligence ☞136(19, 29)

Whether owner of premises alluring to children but inherently dangerous to them exercised ordinary care and whether child was old enough and intelligent enough to appreciate and avoid danger is for jury's determination.

4. Negligence ☞85(2), 136(29)

Whether injured child, who is required to exercise only that degree of care which is ordinarily exercised by minors of like age, mental capacity, and discretion, is contributorily negligent is ordinarily question for jury.

5. Trial ☞142

Motion for directed verdict should be granted only where one conclusion can be drawn from evidence.

6. Negligence ☞136(15, 29)

In action for injuries to thirteen year old boy who fell through skylight in roof of ballroom owned by defendant, whether plain-

tiff was trespasser and whether he was contributorily negligent held for jury.

WOOD, J., dissenting.

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Suit by James B. Doyle, a minor, by I. B. Doyle, his guardian ad litem, against the Pacific Electric Railway Company and others. From a judgment entered on a directed verdict for defendants, plaintiff appeals.

Reversed.

Henry G. Bodkin and V. P. Lucas, both of Los Angeles, for appellant.

Frank Karr, E. E. Morris, C. W. Cornell, and O. O. Collins, all of Los Angeles, for respondents.

GOULD, Justice pro tem.

Plaintiff, a minor, brought suit by his guardian ad litem to recover damages for injuries suffered when he fell through a skylight in the roof of a ballroom and public dance hall at Redondo Beach, owned and operated by defendant Pacific Electric Railway and under the supervision of defendant Henry C. Froude. At the time of the accident plaintiff was thirteen years and eight months of age, a junior high school pupil. The dance hall was open to the public generally, and plaintiff was a spectator in the balcony. In one corner of the balcony a ladder, nailed to the wall, led to an opening in the ceiling, whence a three-plank "cat-walk", traversed the attic over the joists to a skylight through which it was customary to shower balloons upon dancers below. No signs warned the public to keep out of the attic, no lock was upon the door leading thereto, and the cat-walk and skylight were unprotected by railing, although the interior of the attic was lighted by electricity. Without invitation from any one, plaintiff climbed the ladder and, observing in the distance employees of defendants inflating balloons, walked down the cat-walk in their direction to the skylight, which at the time was covered with canvas and was several inches lower than the walk. Stepping upon the canvas-covered skylight, he crashed through to the dance floor some twenty feet below and was painfully injured.

At the conclusion of plaintiff's case the court on defendants' motion directed the

jury to return a verdict against plaintiff and for defendants. From the judgment entered pursuant to such directed verdict, plaintiff appeals.

In taking the case from the jury the trial court impliedly held that plaintiff was a trespasser as a matter of law, that plaintiff was guilty of contributory negligence as a matter of law, and that as a matter of law the device of ladder, "cat-walk," skylight, and toy balloons as maintained by defendants was not an attractive nuisance, enticing to an immature and childish mind. Plaintiff presented his case upon the theory that defendants by implication invited him to explore an unguarded and open attic, and that the picture unfolded to the youthful mind of the explorer was such as to render defendants liable for maintaining an attractive nuisance, even assuming that plaintiff was a trespasser at the time.

[1-4] While the general rule is that the owner of property owes no duty to mere trespassers to keep his property in safe condition, the law has declared an exception where attractive contrivances are maintained with the knowledge of the owner, alluring to children but inherently dangerous to them. It is want of ordinary care to maintain such premises, and the question as to whether the device complained of constitutes a trap, dangerous to children, is a question of fact ordinarily to be determined by the jury. *Faylor v. Great Eastern, etc., Co.*, 45 Cal. App. 194, 187 P. 101. So, too, as the cited case holds, it is the jury's province to determine whether the owner has exercised ordinary care and whether the child was old enough and intelligent enough to appreciate and avoid the danger. Likewise it is ordinarily a question for the jury as to whether the child, who is required to exercise only that degree of care which is ordinarily exercised by minors of like age, mental capacity, and discretion, is guilty of contributory negligence. *Mize v. Duffy*, 106 Cal. App. 15, 288 P. 798, and cases therein cited.

[5, 6] A motion for a directed verdict should be granted only where there is but one conclusion that can be drawn from the evidence. In the instant case we feel that the evidence as submitted was not of this conclusive nature, and that the jury should have been allowed to determine the factual questions involved. In so holding we have in mind the general

rule that the exercised discretion of a trial court in directing a verdict should not be disturbed except for a clear showing of abuse of discretion, but the facts here do not constitute that exceptional case which resolves them into pure questions of law for the determination of the court.

The judgment is therefore reversed.

I concur: CRAIL, P. J.

I dissent: WOOD, J.



10 Cal.App.2d 161

PEOPLE v. MOORE.

Cr. 2773.

District Court of Appeal, Second District,
Division 1, California.

Nov. 13, 1935.

Hearing Denied by Supreme Court
Dec. 13, 1935.

1. Criminal law ⇨863(2)

On appeal from conviction of manslaughter, accused could not claim that court erred in commenting on evidence and discussing case in detail after jury had retired and had been out nearly 11 hours, where jury asked for further instructions and court explained instructions theretofore given.

2. Homicide ⇨216

In murder prosecution, alleged dying declarations of victim held properly refused as "hearsay," where accused was unable to make necessary proof that declarations were dying declarations.

[Ed. Note.—For other definitions of "Hearsay Evidence," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Albert C. Moore was convicted of manslaughter, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

DORAN, Justice.

Charged with the offense of murder, appellant, Albert C. Moore, was found guilty by a jury of the offense of manslaughter. The crime was the product of a party at appellant's home at which there was considerable liquor consumed. In addition to appellant and his wife, two daughters of appellant's wife by a former marriage, and their respective husbands, and two children of one of the daughters, were present. Provoked by a trivial argument, appellant left the room, procured a gun, and upon his return fired at Percy Jones, husband of one of the daughters. The shot missed its intended target but took the life of appellant's wife.

On an appeal from the judgment and an order denying a motion for a new trial, appellant presents four asserted prejudicial errors for consideration, namely: "1. The court erred in commenting on the evidence and discussing the case in detail, after the jury had retired to deliberate and had already been out nearly eleven hours. 2. The court erred in its instructions as to the law of manslaughter in its comments on the evidence. 3. The court erred in refusing to permit the testimony of Mrs. Thebold, as to the declarations of Mrs. Moore before she died. 4. The court erred in coercing the jury under threats to reach a verdict."

[1,2] With respect to the first point, the jury asked for further instructions and the court acted within the rule in explaining instructions theretofore given. As to the second point, the jury was fully and correctly instructed as to the crime of manslaughter. The refusal by the court to permit in evidence the so-called dying declarations of deceased, the third claim of error herein, was proper. Appellant was unable to make the necessary proof that such declarations were dying declarations within the rule, and they therefore were justly excluded as hearsay. The fourth point, namely, that the court coerced the jury, is without foundation. A reading of the entire record on this subject clearly reveals appellant's contention unwarranted.

There being no prejudicial errors in the record, the judgment and order are affirmed.

We concur: HOUSER, P. J.; YORK, J.

10 Cal.App.2d 257

**DONOVAN v. P. LORILLARD CO. OF
DELAWARE et al.**
Civ. 9916.

District Court of Appeal, First District,
Division 2, California.
Nov. 19, 1935.

Rehearing Denied Dec. 19, 1935.
Hearing Denied by Supreme Court
Jan. 16, 1936.

1. Automobiles Ⓒ217(6)

Pedestrian who continued to watch approaching traffic as he crossed street in pedestrian lane at intersection held not contributorily negligent in placing himself in path of on-coming truck which struck pedestrian when it swung out in street from behind parked automobile to turn corner.

2. Appeal and error Ⓒ930(1)

Reviewing court must assume that jury believed and acted on testimony of plaintiff in rendering verdict for plaintiff.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by John Donovan against the P. Lorillard Company of Delaware and another. From a judgment for plaintiff, defendants appeal.

Affirmed.

J. Hampton Hoge, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for appellants.

William M. Malone, of San Francisco (Conrad T. Hubner, of San Francisco, of counsel), for respondent.

STURTEVANT, Justice.

The defendants have appealed from the judgment rendered against them for damages suffered in an automobile accident. They claim the plaintiff was guilty of contributory negligence which was the proximate cause of the accident and that no judgment should have been rendered against them.

Third and Harrison streets in San Francisco cross each other at right angles. Harrison street runs east and west. Third street runs north and south. On December 26, 1933, at about 4:15 p. m. the plaintiff walked down the sidewalk on the south side of Harrison street until he came to Third street. He stopped and looked up Third street to his left and there was no traffic approaching. He stepped off the

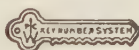
sidewalk into the pedestrian lane and proceeded to cross Third street. As he did so, he looked ahead and "kind of kept" his eyes to his left until he got to the middle of Third street and then he looked to his right. He saw a sedan and a truck coming from the south on the easterly side of Third street. The sedan was in the lead and the truck was following it. Each was traveling about 18 or 20 miles per hour. The plaintiff stopped in the middle of the northbound street car track to let the sedan go by, but it slowed up and the plaintiff passed in front of it. At about the same time the truck pulled to the right and started to pass the sedan. As it did so, the plaintiff continued to watch both vehicles. As the truck pulled abreast of the sedan, the plaintiff again stopped for the truck to pass him. It was traveling 18 to 20 miles per hour and did not slow down. The last place where the plaintiff stopped was 8 feet from the easterly car track and about 14 or 15 feet from the easterly curb line of Third street. The last time the plaintiff noticed the sedan it was 10 or 15 feet from him. While he stood in the place above mentioned, he was looking at the truck all of the time. It continued on its course. The front end passed him and, as he testified, swerved slightly to its left and then attempted to make a right-hand turn into Harrison street and travel to the east. But, in making those turns, the left rear wheel ran over the leg of the plaintiff and he was knocked or fell down in the street. There was some evidence that his body rested on the south side of the lane in the street. Plaintiff testified he walked in the pedestrian lane.

[1,2] The defendants contend that the plaintiff was guilty of contributory negligence. In so contending, they make several different assignments. They assert that if the front of the truck passed the plaintiff and the truck was executing a right-hand turn, then, as a law of physics, it necessarily follows the rear wheels would have cleared him. Be that as it may, the plaintiff testified and the jury were authorized in believing the truck first swerved to the left and then turned to the right. If such were its movements, it is clear that the truck could have run over and knocked the plaintiff down just as he testified. If so, it is clear that the inference that plaintiff ran or walked up against the truck is without foundation. We say

inference because there was no direct evidence that he did so. In this same connection the defendants point to the evidence as to how the plaintiff lay in the street after the accident and they argue that the accident did not occur in the pedestrian lane. The plaintiff testified it did. We must assume the jury believed and acted on his testimony. Finally the defendants cite *Moss v. H. R. Boynton Co.*, 44 Cal. App. 474, 476, 186 P. 631, 632, and they quote as follows: "It was a duty devolving upon plaintiff, as the act of an ordinary prudent man, immediately before placing himself in a position of danger, to look in the direction from which danger was to be anticipated. This was a continuing duty, and was not met by looking once and then looking away. In the exercise of ordinary care it is the duty of a pedestrian 'to look to the right and to the left whenever he has voluntarily put himself in a position which may be one of peril coming from either direction.' *Sheldon v. James*, 175 Cal. 474, 479, 166 P. 8, 11, 2 A. L. R. 1493." That and similar cases are not applicable to the facts of the instant case. The plaintiff, John Donovan, did not cease to look—he continued to look at and watch the approaching traffic from the instant he entered the street crossing until the accident.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.



10 Cal.App.2d 83

CROWN CITY LODGE, I. O. O. F., NO. 395,
et al. v. INDUSTRIAL ACCIDENT
COMMISSION et al.
Civ. 10411.

District Court of Appeal, Second District,
Division 1, California.

Nov. 8, 1935.

Hearing Denied by Supreme Court
Jan. 6, 1936.

1. Master and servant ⇨417(6)

Where facts material to question whether relationship of employer and employee exists are stipulated or undisputed, ruling of Industrial Accident Commission on question is not conclusive on appellate tribunal, since ruling on such facts is conclusion of law.

2. Master and servant ⇨367

Under contract for construction of lodge building on cost-plus basis whereby contractor agreed to hire lodge members but retained right to furnish foreman, foreman so employed, who was injured in construction of building, held not entitled to compensation award against lodge as its "employee," but to be an employee of the contractor which was engaged as an "independent contractor," where right of control by the lodge of foreman as its employee was absent.

[Ed. Note.—For other definitions of "Employee" and "Independent Contractor," see Words & Phrases.]

Proceeding under the Workmen's Compensation Act by O. W. Chisum, claimant, opposed by the Crown City Lodge, I.O.O. F., No. 395, employer, and the Norwich Union Indemnity Company, insurance carrier, for writ of review to review an award of the Industrial Accident Commission of the state of California awarding compensation to the claimant.

Award annulled.

F. Britton McConnell and W. H. Abrams, both of Los Angeles, for petitioner.

Everett A. Corten and Emmet J. Seawell, both of San Francisco, for respondents.

HOUSER, Presiding Justice.

Although not complete in minute detail, the controlling facts in this matter (which in substance are not in dispute herein) appear to be that in the course of the construction of a building by the Crown City Lodge, I. O. O. F., No. 395 (petitioner here), an original bid for the installation of electrical wiring in said building was submitted to said lodge by Bhend Electrical Construction Company. Said bid included the following provisions:

"Will install the above job according to the above schedule on a time material basis (cost plus 10%) and guarantee the sum not to exceed either contract amount of Alternate #1 or #0. Will employ any member belonging to I. O. O. F. #395 who is a qualified journeyman or helper in the City of Pasadena, but will insist on furnishing the foreman to represent our firm as well as satisfying the City of Pasadena Inspection Department."

Before said bid was accepted by the lodge, a refigured estimate of the cost of

labor and materials, computed at \$2,438.65, was submitted by Bhend Electrical Construction Company to the lodge, to which estimate was appended the following statement, to wit:

"Insurance and inspection included in above bid.

"Will install the above wiring on a Time and Materials cost plus 10% basis and guarantee not to exceed the above amount and to employ only one outside man as our foreman others to be members of Crown City Odd Fellows in either contract or time and materials basis."

Following the acceptance by the lodge of such refigured offer, the lodge designated as workmen on the job three of its members, who were electricians, and who thereafter were employed on the job; and the Bhend Electrical Construction Company supplied thereon "one outside man as * * * foreman," named Chisum, who was then, and for several years theretofore had been, in the employ of the Bhend Electrical Construction Company. As the work progressed, the lodge paid the current expense therein incurred, including the wages of Chisum and the other workmen. At the request of Bhend Electrical Construction Company, the lodge was also to pay the expense of workmen's insurance. The work of construction of the entire building was done under the general supervision of a committee of the members of the lodge that had been appointed by it; and one Gilkinson, who was a member of said committee, represented it on the job. The special work of installing the electric wiring, which was the subject of the agreement between the lodge and the Bhend Electrical Construction Company, was to be performed in accordance with certain plans and specifications which were delivered by Gilkinson to Chisum at the time when the latter appeared on the job; but as occasion arose from time to time, Gilkinson showed Chisum the location in the building, as per such plans and specifications, of various "outlets," fixed the time when the electricians should commence work each day, and kept their time; but gave Chisum no directions or orders with reference to the manner in which the work was to be accomplished. As materials were needed, Chisum reported the necessary requirements in that regard to the Bhend Electrical Construction Company, and it caused such materials to be delivered on the job. In the course of the in-

stallation of the electric wiring, on several occasions the electricians "caught up" with the carpenter and other work already done on the building, at each of which times Chisum notified Gilkinson that it would not "pay" to have the electricians at work until more carpenter or other work had been completed;—whereupon the electricians would "lay off" or suspend work on the lodge job until Chisum saw fit to resume work thereon. In the meantime, Chisum worked on other buildings that were being electrically wired by the Bhend Electrical Construction Company. Before the electric wiring on the lodge building was completed, several changes were made in the original plans and specifications, the cost of the installation of which was added to the "estimate" of the original cost of the electric wiring, and thus became an item in the final cost of the labor and material of said electrical wiring; which sum, plus 10 per cent. thereof, was paid to Bhend Electrical Construction Company, as per the agreement between the parties, and represented the total cost of the wiring of the building.

While performing labor under the conditions hereinbefore set forth, Chisum sustained injuries, for and on account of which, on his application made to the respondent commission, an award was made by the latter to Chisum as against the insurer of the lodge; and which award having become final as far as the respondent commission was concerned, has become the subject of this inquiry.

In effect the contention of the petitioner herein is that the evidence did not support the finding of fact made by the respondent commission, in substance, that at the time when Chisum sustained his said injuries he was an employee of the lodge; but that, to the contrary, the evidence indubitably established the fact that at such time Chisum was an employee of the Bhend Electrical Construction Company, which was an independent contractor on the work in which Chisum was engaged.

[1] It was held in the case of *Hillen v. Industrial Acc. Comm.*, 199 Cal. 577, 580, 250 P. 570, 571, and later followed in the cases of *La Franchi v. Industrial Acc. Comm.*, 213 Cal. 675, 676, 3 P.(2d) 305, and in *Metropolitan C. Ins. Co. v. Industrial Acc. Comm.*, 117 Cal. App. 369, 371, 4 P.(2d) 190, whether the relation of employer and employee exists is a "question of mixed law and fact, to be proved like

any other question"; and excepting where the record discloses an entire absence of evidence in support of a finding of fact made thereon by the commission with relation to such question, such finding is binding on the court. But it is manifest that in its entirety such ruling is applicable only when the primary and controlling facts with reference to the question of whether the relationship of employer and employee exists between the parties are actually in dispute. In other words, when it appears that the material facts either are stipulated by the respective parties, or that no conflict as to such facts exists in the evidence as presented by them respectively, and consequently that, in effect, only a conclusion of law could be made with reference to such facts, a ruling by the commission on the law with respect thereto is not conclusive, as far as the right by an appellate tribunal to review such a decision is concerned. In 4 California Jurisprudence page 1111, it is said: "When a finding or conclusion of fact is based on uncontradicted evidence, its accuracy becomes a mere question of law, and in that event the question may be reviewed, if it goes to the jurisdiction." Citing numerous authorities.

[2] It is clear that Chisum himself was either an employee of the Bhend Electrical Construction Company, or of the lodge. If the stated facts warrant the ultimate finding of fact that Chisum was an employee of the lodge, the conclusion reached in that regard by the respondent commission may not be disturbed. On the other hand, in the circumstances, if in fact, Chisum was the employee of Bhend Electrical Construction Company and that corporation was an independent contractor, the award made by respondent commission is properly a subject of attack. In that connection, the agreement between the parties, as hereinbefore has been substantially set forth, very clearly indicates that (paraphrasing the language in 13 Cal. Jur. 1014, where the term "independent contractor" is defined, as determined in numerous cases therein cited), in rendering the services contemplated by the provisions of the said agreement. Bhend Electrical Construction Company exercised an independent employment or occupation and represented the lodge only as to the results of the work that was the subject of the agreement between the parties, and not as to the means whereby it was to be accomplished; from which it follows that,

within the meaning of the law as applied to the undisputed facts in the case, Bhend Electrical Construction Company was an independent contractor. As to whether Chisum was an employee of the lodge, the provisions of the written agreement established the fact to a certainty that, both in making its original bid for the job and in its subsequent refigured estimate and proposition connected therewith, Bhend Electrical Construction Company agreed (1) to "employ any member belonging to I. O. O. F. #395 who is a qualified journeyman or helper * * * but will insist on furnishing the foreman (Chisum) to represent our firm"; and (2) "to employ only one outside man as our foreman (Chisum), others to be members of Crown City Odd Fellows. * * *"

In that regard, no subsequent written agreement of the parties, nor no executed oral understanding between them, in any way modified the written contract, under the provisions of which the work was being done. It is true that, in the absence of the specific written agreement between the parties with reference to their relationship one with the other, certain facts, such as the payment by the lodge of the wages of the employees, the presence of Gilkinson on the job as possibly in effect its general superintendent, and his action in showing Chisum the location of "outlets" in the building, as distinguished from their location as indicated on the plans and specifications, might have furnished some slight evidence from which it might have been inferred that Chisum was employed by the lodge; but in the face of the controlling provisions of the written agreement between the parties, none of such facts, nor all of them combined, may be said to furnish sufficient evidence to justify the conclusion that Chisum was the employee of the lodge. It is common knowledge that all the acts performed by the lodge, through Gilkinson, were such as usually are performed by an owner of property, where, under a written contract, a residence or other building is being constructed. In the instant case, the essential and determinative element of "right of control" by the lodge of Chisum as its employee was entirely lacking. The lodge did not hire Chisum, nor did it possess the right to discharge him from his employment as foreman on the job. The lodge was concerned with the result only of the work that was being performed, but in no manner was the lodge legally interested in

the means by which such results were to be accomplished.

The award is annulled.

We concur: YORK, J.; DORAN, J.



10 Cal.App.2d 131

JORDAN v. PALO VERDE IRR. DIST. et al.

Civ. 1594.

District Court of Appeal, Fourth District,
California.

Nov. 12, 1935.

Appeal and error ☞655(1)

Motion purporting to be for diminution of record to strike from record on appeal certain portions thereof on ground that matters therein set forth were immaterial to appeal and not before trial court at time of judgment *held* motion to strike out portions of transcript as forming no part of record which motion could not be entertained in advance of hearing of appeal on merits.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Action by James H. Jordan against the Palo Verde Irrigation District and another. Judgment for plaintiff, and the named defendant appeals. On motion for diminution of the record.

Motion denied.

Stewart, Shaw & Murphey, of Los Angeles, for appellant.

A. Heber Winder, of Riverside, for respondent.

JENNINGS, Justice.

This is a motion by appellant upon suggestion of diminution of the record to strike from the record on appeal certain portions thereof on the ground that the matters therein set forth are incompetent, irrelevant, and immaterial to the appeal and that the documents included in those parts of the record which are sought to be stricken therefrom were not before the

trial court at the time the judgment was rendered.

It is apparent that, while the motion is entitled a motion for diminution of the record, it is in reality a motion to strike out certain portions of the transcript on the ground that they are no part of the record. Such a motion cannot now be entertained in advance of a hearing of the appeal on its merits. If, upon a consideration of the appeal, it appears that the matters referred to have no proper place in the record, they will be disregarded. *Sutton v. Symons*, 97 Cal. 475, 32 P. 588; *Brode v. Goslin*, 158 Cal. 699, 112 P. 280.

The motion is therefore denied.

We concur: BARNARD, P. J.; MARKS, J.



10 Cal.App.2d 760

**James H. JORDAN, Plaintiff and Respondent,
v. PALO VERDE IRRIGATION DISTRICT
(an Irrigation District) and Palo Verde
Drainage District (a Public Corporation), De-
fendants; Palo Verde Irrigation District, Ap-
pellant.**

Civ. 1595.

District Court of Appeal, Fourth District,
California.

Nov. 12, 1935.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Stewart, Shaw & Murphey, of Los Angeles, for appellant.

A. Heber Winder, of Riverside, for respondent.

JENNINGS, Justice.

This motion for diminution of the record is in all respects similar to that presented in *Jordan v. Palo Verde Irrigation District* (Cal. App.) 51 P.(2d) 146, this day decided. For the reasons stated in the above-mentioned decision, the motion is denied.

We concur: BARNARD, P. J.; MARKS, J.

10 Cal.App.2d 761

FIRST NATIONAL BANK OF TUSTIN, CALIFORNIA (a Corporation), Plaintiff and Respondent, v. **PALO VERDE IRRIGATION DISTRICT** (an Irrigation District) and **Palo Verde Drainage District** (a Public Corporation), Defendants; **Palo Verde Irrigation District**, Appellant.

Civ. 1596.

District Court of Appeal, Fourth District, California.

Nov. 12, 1935.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Stewart, Shaw & Murphey, of Los Angeles, for appellant.

A. Heber Winder, of Riverside, for respondent.

JENNINGS, Justice.

The motion here made is precisely the same motion presented in *Jordan v. Palo Verde Irrigation District* (Cal. App.) 51 P.(2d) 146, this day decided. For the reasons therein stated, the motion is denied.

We concur: BARNARD, P. J.; MARKS, J.



10 Cal.App.2d 163

PEOPLE v. EARL et al.
Cr. 2760.

District Court of Appeal, Second District, Division 2, California.

Nov. 13, 1935.

Hearing Denied by Supreme Court
Dec. 13, 1935.

1. Conspiracy ⚡47

Testimony of accomplice that he and other defendants had agreed upon a plan to enter house and secure certain money and bonds, and, taking with them a piece of rope and a gun, had gone to vicinity of such house and waited for opportunity to enter, but had desisted because it appeared that the robbery could not be successfully consummated, *held* to establish conspiracy to commit robbery.

2 Criminal law ⚡511(10)

Confessions of parties accused of conspiring to commit a robbery *held* to furnish

necessary corroboration of testimony of accomplice to sustain conviction.

3. Criminal law ⚡1158(4)

In prosecution for conspiracy to commit robbery, findings of trial court that confessions of two of defendants were admissible, could not be disturbed even though trial court had found confession of third defendant inadmissible on testimony very similar to that in case of the two defendants.

4. Conspiracy ⚡48

Failure of jury finding defendants guilty of conspiracy to commit robbery to fix degree of robbery contemplated by conspiracy *held* not to render verdict void.

5. Criminal law ⚡656(5), 1166½(12)

Action of trial judge in stating while accused was on witness stand that he had tried to get witness to speak like a man, but it did not seem to do any good, and in asking accused why he told all those lies, whether it was his custom to lie, and other questions to similar effect, *held* improper, but not to require reversal of conviction, in view of evidence.

6. Criminal law ⚡377

Refusal to permit defendant, who, along with several others, was being prosecuted for conspiring to commit robbery, to testify as to whether he had ever been convicted of a felony in order to remove effect of officer's statement in testifying as to confession of a codefendant that codefendant had stated defendant "was a loser from Detroit" *held* not error, although testimony might with propriety have been admitted.

Appeal from Los Angeles County; Charles S. Burnell, Judge.

Willard G. Earl and Kenneth V. Ryan were convicted of conspiracy to commit robbery, and they appeal.

Affirmed.

William E. Dudley, Kirtland I. Perky, and James E. Fenton, all of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

WOOD, Justice.

The information charged defendants Earl, Ryan, Dalebout, and Rasmussen with the crime of conspiracy to commit robbery. The information was dismissed as to defendant Dalebout in order that he might become a witness for the people. At the

close of the prosecution's evidence the court dismissed the charge as to defendant Rasmussen for insufficiency of the evidence. Defendants Earl and Ryan prosecute this appeal from a judgment of conviction.

[1,2] From the testimony of Dalebout, it appears that in January, 1935, the defendants met and agreed upon a plan to go to a residence at 414 South Oxford street, Los Angeles, where they were to enter the house and secure certain money and bonds, and, if necessary, bind the occupants of the house with rope. Later all of the defendants went to the vicinity of 414 South Oxford street for the purpose of carrying out the object of the conspiracy and waited for a considerable length of time while they were watching the movements of an employee at the residence, but they desisted from entering the house for the reason that it appeared to them that the robbery could not be successfully consummated. They took with them a piece of rope and a gun. A witness testified that defendant Rasmussen and another man had, before the trip to the Oxford street residence, appeared at the store where he was employed and had purchased rope similar to the rope taken to the residence in question. Ryan admitted in the office of the district attorney that he had accompanied Rasmussen at the time the rope was purchased. Evidence was admitted that both of the appellants made statements after their arrest and before the trial which virtually amounted to confessions that they had taken part in the conspiracy and that they had accompanied the other defendants to the neighborhood of 414 South Oxford street as related by Dalebout.

The testimony of Dalebout, even though he was an accomplice, is sufficient to establish facts necessary to constitute the crime, and the confessions of the appellants are sufficient to furnish the corroboration required by the Code. *People v. Henson*, 32 Cal. App. 600, 163 P. 685; *People v. Tobin*, 39 Cal. App. 76, 179 P. 443; *People v. Richardson*, 161 Cal. 552, 120 P. 20; *People v. Josselyn*, 39 Cal. 393; *People v. Barnnovich*, 16 Cal. App. 427, 117 P. 572; *People v. Zimmerman*, 3 Cal. App. 84, 84 P. 446.

[3] Appellants complain of the ruling of the trial court admitting in evidence the confessions of appellants. It appears

that the confession of Rasmussen was refused admission on the ground that it was not freely and voluntarily made, and appellants assert that the evidence as to their confession was quite similar to the confession of Rasmussen. There was a serious conflict between the testimony produced by the prosecution and that offered by the defense on the subject of the admissibility of the confessions. The evidence was heard by both the court and a jury. The court having found from the evidence that the confessions were admissible, and the jury, upon proper instructions, having found defendants guilty, a reviewing court may not disturb these findings. *People v. Bird*, 60 Cal. 7; *People v. Wells*, 145 Cal. 138, 78 P. 470; *People v. Erno*, 195 Cal. 272, 232 P. 710; *People v. Tedesco*, 1 Cal. (2d) 211, 34 P.(2d) 467. The fact that the court may have found the confession of Rasmussen inadmissible does not change the rule as applied to the other defendants.

[4] In finding the appellants guilty, the jury did not fix the degree of robbery contemplated by the conspiracy, and appellants now argue that the verdict is void for uncertainty. This contention cannot be upheld. It has been held under similar circumstances that such a verdict is sufficient. *People v. Clement*, 97 Cal. App. 238, 275 P. 511; *People v. Dukes*, 2 Cal. App. (2d) 698, 38 P.(2d) 805; *People v. Welch*, 89 Cal. App. 18, 264 P. 324.

[5] Appellants vigorously assert that the trial court was guilty of misconduct in his remarks made while defendant Ryan was on the witness stand and in his questions directed to this defendant. The record shows that the trial judge made this statement: "I have tried to get this witness to speak like a man, but it doesn't seem to do any good. He doesn't seem to want the jury to hear his testimony." A little later in the record the following questions by the court and answers by the defendant Ryan appear:

"Q. You did tell the truth then occasionally, did you? * * *

"Q. What was your idea in telling all of those lies? A. I did not know what to say.

"Q. Did it ever occur to you to tell the truth? A. Yes, I tried to make it look—

"Q. How did you happen to be telling all those lies on this particular case? A. I

did not know what to say. Everyone was firing questions at me.

"Q. When people ask you questions, is it your custom to lie? A. No, it hasn't been.

"Q. This was just a special time, at that particular time you concluded to lie part of the time? A. I did not know what to say.

"Q. Didn't it ever occur to you to tell the truth? A. I told the truth as much as I knew about it.

"Q. That is all I wanted to ask you."

The statements made by the court and the questions asked were not proper. In *Quercia v. United States*, 289 U. S. 466, 53 S. Ct. 698, 77 L. Ed. 1321, the court gave the following charge to the jury: "And now I am going to tell you what I think of the defendant's testimony. You may have noticed, Mr. Foreman and gentlemen, that he wiped his hands during his testimony. It is rather a curious thing, but that is almost always an indication of lying. Why it should be so we don't know, but that is the fact. I think that every single word that man said, except when he agreed with the Government's testimony, was a lie." In reversing the judgment, the court, speaking through Chief Justice Hughes, said: "His characterization of the manner and testimony of the accused was of a sort most likely to remain firmly lodged in the memory of the jury and to excite a prejudice which would preclude a fair and dispassionate consideration of the evidence." The court in that case held that the error of the trial judge was not cured by his statement that "his opinion of the evidence was not binding on the jury." However, in view of the nature of the entire testimony of the witness, who admitted that he had falsified in his statements to the officers, and in view of all of the evidence in the case, we cannot say that the error resulted in a miscarriage of justice and that it calls for a reversal of the judgment.

[6] During the trial Officer Conner gave testimony as to the alleged confession of Rasmussen, and in giving this testimony he stated that he (Rasmussen) had told him that he knew defendant Ryan, and that he (Ryan) "was a loser from Detroit." Later in the trial Rasmussen's attorney sought to ask him whether he had been convicted of a felony. An objection to this testimony

was sustained on the ground that defendant could not impeach his own witness. The court had admonished the jury that the testimony concerning the alleged confession of Rasmussen was being received only as against the defendant Rasmussen. Although the court might with propriety have permitted Ryan to efface from the minds of the jury any wrongful impression they may have received from the reference to him in the testimony as "a loser from Detroit," it cannot be said that any legal error was committed in the refusal of the court to admit the testimony.

Further complaint is made that the court gave certain instructions requested by the prosecution which are alleged to be prejudicial, and refused to give other instructions in favor of the defendants. We find no error in this regard.

The judgments and orders appealed from are affirmed.

We concur: CRAIL, P. J.; GOULD, Justice pro tem.



10 Cal.App.2d 168

ERWIN v. MORRIS et al.

Civ. 10475.

District Court of Appeal, Second District,
Division 2, California.

Nov. 13, 1935.

Rehearing Denied Dec. 4, 1935.

Hearing Denied by Supreme Court
Jan. 10, 1936.

1. Appeal and error ☞930(1)

On appeal from judgment for plaintiff, evidence would be viewed most favorably to plaintiff.

2. Negligence ☞83

Doctrine of "last clear chance" presupposes evidence or inferences properly deducible therefrom that plaintiff is negligent, that as result thereof plaintiff is in situation of danger from which he cannot escape by ordinary care, that defendant is aware of plaintiff's dangerous situation, that he realizes or ought to realize plaintiff's inability to escape therefrom, and that defendant then has clear chance to avoid injuring plaintiff by exercise of ordinary care and fails to do so.

[Ed. Note.—For other definitions of "Last Clear Chance," see Words & Phrases.]

3. Negligence Ⓒ83

If any element of doctrine of last clear chance is absent, case is governed by ordinary rules of negligence and contributory negligence.

4. Automobiles Ⓒ244(59)

Last clear chance doctrine *held* inapplicable under evidence in action for injuries sustained in automobile collision on highway.

Evidence disclosed that plaintiff stopped automobile on right half of highway for purpose of repairing windshield wiper; that defendant observed plaintiff's automobile approximately three-fifths of a mile in front of defendant; that defendant continued to travel on right half of highway until she reached a point fifty to sixty feet behind plaintiff's automobile; that at such time defendant turned to left across center line of highway in order to pass parked automobile; and that about one car length to rear of plaintiff's automobile, defendant's automobile skidded and collided with plaintiff's automobile.

5. Trial Ⓒ252(8)

Where evidence of any one of elements necessary to apply doctrine of last clear chance is lacking, it is reversible error to instruct jury with respect to such doctrine.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by Loren Erwin against Lena Morris and another. From a judgment for plaintiff, defendants appeal.

Reversed.

Paul Nourse, of Los Angeles, for appellants.

Lasher B. Gallagher, of Los Angeles, and Mark H. Edwards, of Santa Paula, for respondent.

McCOMB, Justice pro tem.

This is an appeal by defendants from a judgment in favor of plaintiff for \$5,000 after a trial before a jury.

[1] Viewing the evidence most favorably to plaintiff (*Ah Gett v. Carr*, 3 Cal. App. 47, 48, 84 P. 458), the facts in the instant case are:

Plaintiff, while traveling in a westerly direction on Telegraph road, a highway which runs east and west, stopped his car on the north half of the highway for the

purpose of repairing his windshield wiper, it having rained shortly before. An automobile owned by defendant Paul Morris was being driven by his codefendant, Lena Morris, in a westerly direction on Telegraph road, when she observed approximately three-fifths of a mile in front of her the parked car of plaintiff. She continued to travel on the north half of the highway until she reached a point 50 to 60 feet behind plaintiff's automobile. At this time she turned to the left across the center line of the highway, in order to pass the parked car. About one car length to the rear of plaintiff's automobile the car she was driving skidded, the front of it coming into contact with the left rear corner of plaintiff's automobile.

Defendants rely for reversal of the judgment on the proposition that the trial court committed prejudicial error in submitting instructions to the jury on the doctrine of last clear chance.

[2] The doctrine of last clear chance presupposes evidence or inferences properly deducible therefrom of the following elements: First, negligence of plaintiff; second, that as a result thereof plaintiff is in a situation of danger from which he cannot escape by the exercise of ordinary care; third, that the defendant is aware of plaintiff's dangerous situation under such circumstances, that he realizes, or ought to realize, plaintiff's inability to escape therefrom; and, fourth, that defendant then has a clear chance to avoid injuring plaintiff by the exercise of ordinary care and fails to do so. *Palmer v. Tschudy*, 191 Cal. 696, 700, 218 P. 36.

[3] If any one of the foregoing elements is absent, the doctrine of last clear chance does not apply and the case is governed by the ordinary rules of negligence and contributory negligence. *Palmer v. Tschudy*, 191 Cal. 696, 700, 218 P. 36. Applying this test to the instant case, and assuming, for the purpose of this appeal only, that there was evidence of the first three elements necessary to make applicable the doctrine of last clear chance, it is obvious that the fourth requirement, to wit, that defendant had a clear chance, after realizing that plaintiff was in a dangerous situation and without ability to escape therefrom, to avoid the accident, is entirely absent.

[4] It cannot be disputed that defendant Lena Morris, after observing defendant's

DAVIS v. CONANT et al.
Civ. 10462.

District Court of Appeal, Second District,
Division 2, California.

Nov. 7, 1935.

automobile parked in the highway, followed a reasonable and prudent course by proceeding in the right half of the highway to a point a short distance to the rear of plaintiff's automobile and acted likewise in turning to the left, in order to pass the parked car. The dangerous situation did not arise until the car she was driving commenced to skid and immediately thereafter the accident ensued. The record does not disclose any substantial evidence that the defendant Lena Morris had a clear chance to avoid the accident. The rule applicable in such a case is clearly stated by Mr. Justice Parker in *Bagwill v. Pacific Electric R. Co.*, 90 Cal. App. 114, 265 P. 517. He says, 90 Cal. App. 114, at page 121, 265 P. 517, 519:

"Certainly the doctrine of last clear chance never meant a splitting of seconds when emergencies arise. There seems still to be some misconception of this doctrine of last clear chance. It was not devised as a last resort to fasten liability on defendants. Like the body of the law of negligence, to which the doctrine is appended, the test remains as that of ordinary care under all of the circumstances. * * * It says to a negligent plaintiff that in spite of his lack of caution he will be protected against wanton, willful, or avoidable harm. But, on the other hand, it penalizes no innocent person. We are not to tear down the facts of a case and rebuild the same so that, by a trimming-down and tight-fitting operation, something can be constructed upon which may be fastened the claim of last clear chance. The words mean exactly as they indicate, namely, last clear chance, not possible chance. The Supreme Court has not left us to speculate on the application of the doctrine."

[5] Where evidence of any one of the elements necessary to apply the doctrine of last clear chance is lacking, it is reversible error to instruct the jury with respect to such doctrine. *Poncino v. Reid-Murdock & Co.*, 136 Cal. App. 223, 228, 28 P.(2d) 932; *Wallis v. Southern Pacific Co.*, 184 Cal. 662, 672, 195 P. 408, 15 A. L. R. 117.

Since the judgment must be reversed for the error heretofore mentioned, it is unnecessary for us to pass upon the alleged error of the trial court in excluding certain evidence offered by defendants.

The judgment is reversed.

We concur: CRAIL, P. J.; WOOD, J.

1. Appeal and error ☞1002

Verdict was binding where there was a substantial conflict in testimony.

2. Husband and wife ☞329

Where evidence disclosed that while plaintiff, in action for alienation of husband's affections, and husband had separated December 26, 1932, plaintiff had visited her husband in January, 1933, and that husband had exhibited affection for plaintiff after January 1, 1933, and marital relationship had continued after that date, although they lived in separate domiciles, action for alienation of affections instituted December 29, 1933, held not barred by statutory one year limitation.

3. Jury ☞31(5)

Court may refuse a jury trial if jury fees are not deposited as required by statute, and litigant is not thereby deprived of any constitutional right, but it is not an abuse of discretion to relieve a litigant for failure to comply with statute because of mistake, inadvertence, surprise, or excusable neglect (Code Civ. Proc. § 631).

4. Courts ☞50

Motion for jury trial after being denied in one department of trial court could legally be renewed in another department, since several departments function as one court.

5. Evidence ☞82

Where after motion for jury trial was denied in one department of trial court party renewed motion in another department and record was silent as to whether application for second order was accompanied by affidavit reciting history of previous application and containing statement of new facts in support of order, presumption was that court acted regularly and on a proper observance of statutes and rules (Code Civ. Proc. §§ 631, 1963; § 1008, as added by St. 1933, p. 1898, § 177).

Appeal from Superior Court, Los Angeles County; Minor Moore, Judge.

Action by Emily R. C. Davis against Frederick W. Conant, Dorothy Conant, and others. Judgment for plaintiff, and named defendants appeal.

Affirmed.

Sylvan G. Bay, of Los Angeles, for appellants.

Ben M. Goldman, of Los Angeles (Aaron B. Rosenthal, of Los Angeles, of counsel), for respondent.

GOULD, Justice pro tem.

Plaintiff's action herein is based upon her claim for damages upon allegations that her husband's affections were alienated by defendants Conant, the sister and brother-in-law of plaintiff's husband. A jury at the trial estimated the alienated affections to be of the value of \$15,000 and gave a verdict of compensatory damages in that amount against both such defendants. Plaintiff averted an order granting a new trial by accepting the court's reduced award in the sum of \$5,500.

[1] Upon appeal defendants' greatest stress is upon the point that the evidence is insufficient to sustain the verdict, or that in any event it is not strong enough to warrant the court in holding defendant Frederick W. Conant. The record consists of approximately 700 pages of typewritten testimony, which we have examined with care. It is true that the jury might have found in favor of defendants and against plaintiff, but the evidence is not wholly in favor of defendants. The jurors chose to believe plaintiff's story, and that alone is sufficient to sustain the verdict not only against one but against both defendants. With that verdict we may not interfere where there is a substantial conflict in testimony.

[2] Appellants also urge that the action is barred by the statute of limitations. Testimony showed that plaintiff and her husband separated December 26, 1932, while the within action was not filed until December 29, 1933, which appellants claim is three days beyond the statutory one year limitation. But there was testimony that in January, 1933, plaintiff visited her husband at the home of defendants, who at that time, after lengthy discussion, forcibly ejected plaintiff from their house. Plaintiff also testified that her husband exhibited love and affection for her after January 1, 1933, and that their marital relationship continued after that date although they lived in separate domiciles. Her husband's suit for annulment of their marriage was not filed until February 7, 1933. Ample evidentiary support thus sustains respondent's claim that her action is not barred by statutory limitation.

[3-5] Appellants finally raise the point that the trial court erred in granting plaintiff a jury trial. It appears that upon the call of the case in the calendar department of the superior court on April 3, 1934, defendants objected to the jury trial therefore demanded by plaintiff because the latter had not deposited the required jury fees ten days before the trial date. In that department an order was entered sustaining the objection and striking the cause from the jury calendar. Thereafter, on April 4, 1934, in the trial department to which the case had been assigned, plaintiff renewed her motion for jury trial and the court granted said motion.

The court may refuse a jury trial if jury fees are not deposited as required by section 631 of the Code of Civil Procedure, and the litigant is not thereby deprived of any constitutional right. *Gray v. Craig*, 127 Cal. App. 374, 15 P.(2d) 762, 16 P.(2d) 798. On the other hand, it is not an abuse of discretion to relieve a litigant for failure to comply with section 631 because of mistake, inadvertence, surprise, or excusable neglect. *Stern v. Hillman*, 115 Cal. App. 156, 300 P. 972. Therefore the only question presented here is whether the motion for jury trial after being denied in one department of the trial court might legally be renewed in another department. The several departments function as one court, and the net result of the action complained of is the same as if the same judge had made an order vacating his previous ruling denying a jury trial. It is true that section 1008 of the Code of Civil Procedure (as added by St. 1933, p. 1898, § 177) provides that when an application for an order has been made and refused a subsequent application for the same order shall be accompanied by an affidavit reciting the history of the previous application and also containing a statement of new facts in support of the order. For aught that appears in the present case, such an affidavit was presented to the court which granted the jury trial. The record is silent upon that point, and it will therefore be presumed that the court acted regularly and upon a proper observance of the statutes and rules governing in the case. Section 1963, Code Civ. Proc. It is obvious also that a miscarriage of justice, such as is contemplated by the constitutional mandate (article 6, § 4½), would not result from the trial by jury of a case included within the class of cases

which the Constitution contemplates shall be tried by jury.

We discover no abuse of discretion warranting interference with the result of the trial.

No error being shown, the judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.



9 Cal.App.2d 739

BEISIGL et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 1199.

District Court of Appeal, Fourth District,
California.

Nov. 4, 1935.

1. Master and servant ☞358

Amount expended by farmer for labor in installing irrigation system *held* required to be considered as part of the "pay roll" within statute providing that any employer and employee engaged in farm employment should be conclusively presumed to have accepted compensation act unless pay roll for preceding calendar year did not exceed \$500, notwithstanding installation of irrigation system was a permanent improvement and that men so employed were not regularly employed (St. 1927, p. 1681; St. 1931, p. 1962).

[Ed. Note.—For other definitions of "Pay Roll," see Words & Phrases.]

2. Master and servant ☞375(1)

Fatal injuries received by employee of farmer while he was engaged in blasting operations *held* compensable as received "in course of employment," as against contention that employee was hired on such occasion for particular purpose of planting corn and had engaged in blasting operations as mere volunteer without knowledge or consent of employer (St. 1933, p. 2613, § 8(a, c).

[Ed. Note.—For other definitions of "Course of Employment," see Words & Phrases.]

3. Master and servant ☞410½

Finding for employer in action for death of employee, brought under provision of compensation act permitting negligence action where employer failed to secure payment of compensation, *held* not a finding that employee was not acting in course of employ-

ment at time, especially in view of direct finding to contrary, as respects contention that such a finding would be binding on compensation commission in proceeding under compensation act (St. 1933, p. 975, § 29(a, b).

Application by August Beisigl and another for writ of certiorari to review an award of compensation made by the Industrial Accident Commission in favor of Arthur Merrill and others on account of the death of Leslie Merrill.

Award affirmed.

Wright, Monroe, Thomas & Glenn, of San Diego, for petitioners.

Everett A. Corten, of San Francisco, for respondents.

BARNARD, Presiding Justice.

The petitioners seek to annul an award made by the respondent commission in favor of the other respondents on account of the death of Leslie Merrill, who was killed on February 21, 1934, while blasting out a tree basin on a small farm owned and operated by the petitioners.

[1] The main question here presented is whether the petitioners were under and affected by the Workmen's Compensation Act (St. 1917, p. 831, as amended) by reason of the act of 1927 relating to the acceptance of the provisions of the act in connection with farm work (Stats. 1927, p. 1681), and the 1931 amendatory act (Stats. 1931, p. 1962). While it is conceded that no notice of rejection of the provisions of said act was given, it is earnestly maintained that the petitioners did not have a pay roll exceeding \$500 during the preceding calendar year, within the meaning of these acts.

It is assumed by both parties that the amount of the pay roll in question is that for the calendar year 1933. It is admitted that during that year the petitioners paid out in excess of \$1,000 for labor and that \$350 of this amount may properly be classed as "pay roll," but it is argued that the remainder was expended on permanent improvements and that this cannot be considered as part of the pay roll within the meaning of the act. The petitioners were operating and improving a small ranch set out to avocados, and Mr. Beisigl was in poor health and could do little work. He

employed one man for half time by the month, and, in addition, during the year 1933 and the early part of the year 1934, he employed Leslie Merrill and his father and brothers at intervals. During the latter part of the year 1933, Leslie Merrill was employed in installing a pipe-line system for the purpose of irrigating the avocado trees. As petitioners state, "The case actually hinged upon the question of whether moneys spent for labor performed in the installation of permanent improvements upon the orchard property constituted pay roll. In the instant case the permanent improvements consisted of the installation of a pipe-line or irrigating system. This pipe-line is composed of a line of pipes joined together and running through the orchard, buried beneath the surface and with stands or risers at each tree with faucets attached, so that the various trees can be irrigated by turning on the faucets. The installation is permanent in character." The question before us is whether the money spent for labor on such an improvement, to be used in operating an avocado ranch, is to be considered a part of the pay roll under the terms of this act. If it is to be so considered, the finding of the commission that the petitioners' pay roll exceeded \$500 for the year 1933 is fully supported by the evidence.

The petitioners argue that the word "pay roll," as used in this act, implies and must be taken as meaning that any employee whose name appears thereon must be regularly employed in the sense that his time must have been definitely contracted for, and, further, that the work done by him must not be casual or unusual in the sense of being in the nature of repairs or the installation of improvements. In other words, the contention is that anything paid for labor in the making of permanent improvements may not be considered in determining whether the pay roll amounted to \$500, and that it was the intention of the Legislature to limit the pay roll, thus to be used as a criterion, to wages paid to employees who are regularly employed in carrying on those regular farming operations which must be repeated year after year.

It seems apparent that this use of the word "pay roll" was not intended to apply only to men regularly employed, that is whose time was definitely contracted for for any particular time. In ordinary farming operations, there are many sea-

sonal workers such as fruit pickers, harvesters, and the like, who are never regularly employed on a particular farm in the way such regular employment may well be reflected on the pay roll of certain other industries. A farmer may pay large amounts for labor in the harvesting or planting season to men who cannot be said to be regularly employed in the sense contended for by the appellants. Not only may the period of such seasonal work be short, but the particular men employed may frequently change during the season. Notwithstanding such facts, the amount paid for such labor is expended in the ordinary and usual course of farming operations and must have been intended by the Legislature to be considered as a part of the pay roll of such a farmer. Nor do we think it was intended by the act to exclude from consideration sums paid for labor in the ordinary and usual course of farming operations simply because the result accomplished by the labor is or may be more or less permanent in character. Many farm operations as, for instance, leveling ground, laying out ditches, and planting trees or vines, although a regular and usual part of carrying on the work of a farm, are a more or less permanent benefit and improvement. In many instances, it is not possible to separate the future benefit of the work done from its use and value during the year in which it is done. An irrigation ditch or a leveling job may be useful from both angles. Even the trimming of trees and vines necessary for the crop of a particular year may have a beneficial effect which extends some years in the future. The petitioners seem to argue that permanent improvements of any nature are not to be considered because they are casual and not to be repeated each year. The Workmen's Compensation Act has never excluded an employment because the same was casual, but only when it was both casual and "not in the course of the trade, business, profession or occupation of his employer." Section 8 (a) of the act (St. 1917, p. 835, as amended by St. 1933, p. 2613). Section 8(c) of the act (St. 1917, p. 835, as amended by St. 1933, p. 2613) provides that the phrase just referred to "shall be taken to include all services tending toward the preservation, maintenance or operation of the business, business premises or business property of the employer." In *Globe Indemnity Co. v. Industrial Accident Commission*, 43

Cal. App. 328, 187 P. 452, it was held that carpenter work in building a silo to be used in a dairy conducted by the employers was work done in the course of the business of the employers. There is nothing in the act to exclude from its provision any service which may be of more or less permanent benefit to the business being carried on and the general purpose of the act, where it applies, may be said to cover anything done in connection with the business for its benefit and in furtherance thereof, with no distinction between work done which may have a permanent effect as an improvement and work which is obviously a temporary operation and which must be constantly repeated. In determining whether a particular farming operation comes within the provisions of the act, we think the word "pay roll" must be similarly interpreted and that it was not intended thereby to distinguish between labor employed in raising crops during a particular year and other labor which is not only usual and customary in that line of work, but also of future benefit to the business.

In our opinion, the amount expended for labor in installing the irrigation system here in question was a part of the pay roll within the meaning of the act and, this being true, the finding attacked is sustained by the evidence.

[2] It is next urged that the evidence is not sufficient to sustain the commission's finding that the fatal injuries were received by the deceased while he was acting in the course of his employment. It is argued that he was hired on that occasion for the particular purpose of planting corn and that he engaged in blasting operations as a mere volunteer and without the knowledge or consent of his employer.

It appears from the evidence that during the fall of 1933, the deceased worked for a large portion of his time upon the Beisigl place, being mainly employed in the installation of an irrigating system. At times, however, he did other work on the place when there was such work to be done. In the early part of 1934, the installation of the irrigating system was practically completed and the deceased continued to do miscellaneous work from time to time around the place. Mrs. Beisigl testified that on the morning of February 21, Leslie came and asked for work; that Mr. Beisigl told him to go

with John Kom to move some rocks; that a little later her husband called to John and told him to stop work because it was raining; that Leslie came in and told them they had some dynamite but no fuse; that the men, including Leslie, always used dynamite for blasting when digging ditches for the pipe line, in planting trees, and for other work; that Leslie always looked after things; that after dinner Leslie and John came back and John came in and asked what they should do; that she asked her husband and reported to them that they were to get some ground ready to plant corn and Mr. Beisigl would be down soon; that Leslie had brought some fuse from his home; that there were some basins where fig trees had died the year before; that Leslie was a good boy and could see work that was needed; that if he was around the place and saw something that needed to be done, he would go ahead and do it; that he would then bring in his bill at 30 cents an hour and they would pay it; that they left it to Leslie to find his job on the place; that her husband needed him as he had so many "attacks" and "he left it to Les. Yes, Leslie was a good boy"; and that Leslie must have thought he would get the basins where the fig trees had died ready for some trees. Mr. Beisigl testified that he was lying down when his wife asked him what the boys should do; that later he heard a blast and went to the orchard; that Leslie told him he had put in a blast and he saw that he had planted a lime tree in one of the basins; that he told Leslie the tree was planted too low and told him to raise it; that Leslie raised it a few inches and then walked away with his shovel and pick; that he did not know exactly where he was going; that he went back to where the others were planting corn and soon Leslie came over to them and waited until another blast went off; that he then knew that Leslie had set this blast; and that Leslie had previously blasted when it was needed in digging ditches and setting trees. It was brought out that at another time, in giving his deposition, Mr. Beisigl had stated that after Leslie raised the tree as directed, he "went to another place and started to drilling holes where the fig tree had died." It appears that Leslie had placed two blasts in the tree hole and that he went over to where Mr. Beisigl and the others were planting corn, which was only a few feet away, and waited for the ex-

plosion. One blast went off and when he went back to see about the other it went off and killed him.

In view of the previous custom of the parties and the knowledge possessed by Mr. Beisigl at the time, as to what Leslie was doing, we think the evidence is sufficient to sustain the finding that he was then acting in the course of his employment.

[3] The last point raised is that it has, in effect, been found in an action in the superior court that the deceased was not acting in the course of his employment at the time he was killed, that this is an adjudicated fact which is controlling in this proceeding, and that the commission was without power to make a finding to the contrary. An action was begun by the individual respondents in the superior court of San Diego county as permitted by section 29(b) of the Workmen's Compensation Act (St. 1917, p. 857, as amended by St. 1933, p. 975) where an employer has failed to secure the payment of compensation in one of the ways provided in section 29(a) of that act (St. 1917, p. 857, as amended by St. 1933, p. 975). That action was based upon the alleged negligence of the defendants, the petitioners here, in assigning a dangerous task of blasting to an inexperienced youth without warning him as to the dangerous nature of the work. A judgment was entered for the defendants which has become final. It is here argued that in order to determine the question of negligence thus raised, it became necessary for the court to determine whether the act of blasting constituted any part of the duty for which the deceased was employed, that in determining that question the court found that in doing the blasting the deceased was acting as a volunteer, that it necessarily follows that the court found that while using the dynamite the deceased was not acting in the course of his employment, and that this finding is controlling upon the commission.

The findings of the court in the action referred to were introduced in evidence in this proceeding and are now before us. The court found: "That on said 21st day of February, 1934, the said Leslie Merrill, while with the knowledge of the defendant engaged in the course of his employment by defendant, August Beisigl, in doing miscellaneous work upon said tract of land, undertook to prepare certain holes on said property for the planting of trees,

and in doing so, planted certain charges of dynamite for the purpose of blasting material from said holes, which dynamite said Leslie Merrill caused to be exploded by the use of caps which were fired by the burning of fuses, which in turn were ignited by means of a match or small flame. That the death of said Leslie Merrill was not occasioned or contributed to by any negligent act or omission of the defendants or either of them, nor were defendants or either of them negligent as alleged in the complaint, or at all; that it is not true that defendants or either of them gave to said Leslie Merrill any task of blasting; that blasting was no part of the duty of the said Leslie Merrill, but merely a means of excavating adopted by him in his own initiative, and that no failure of defendants to instruct said Leslie Merrill how to blast amounted to negligence; that said Leslie Merrill was mature for his years and fully capable of doing a man's work, both mentally and physically, and was not inexperienced in blasting; that having reason to believe Leslie Merrill to be in all respects capable of doing a man's work and not to be inexperienced in blasting, defendants were not negligent in failing sufficiently or otherwise to warn him of the dangerous nature of his work. * * *

It thus appears that the court did not find that the deceased was not acting in the course of his employment at the time he was killed, but, on the other hand, it was expressly found that he used the dynamite while engaged in the course of his employment by the defendant. While the court also found that the defendants had not instructed the deceased to do the blasting and that such blasting was merely a means of excavating adopted by him, these facts were found as a part of and because of their bearing on the question of defendant's negligence in failing to instruct the deceased with respect to the manner of using dynamite. While these facts had an important bearing in that action, they were not important in the proceeding before the commission, where negligence on the part of the petitioners was not involved. No conflicting adjudication appears on the essential question as to whether the deceased was engaged in the course of his employment at the time he was injured. Whether the method of doing the work was adopted on his own initiative or under instructions from his employer is not controlling here.

The larger question, suggested by counsel, as to whether an express finding, in such an action at law, that the injuries were not received in the course of the employment, must be accepted by the commission as an adjudicated fact, is not involved here and we express no opinion thereon.

For the reasons given, the award is affirmed.

We concur: MARKS, J.; JENNINGS, J.



CENTRAL BANK OF OAKLAND v. PROCTOR et al.*
Civ. 9794.

District Court of Appeal, First District,
Division 2, California.
Nov. 6, 1935.

Hearing Granted by Supreme Court
Jan. 2, 1936.

1. Mortgages ⇨561

In action for deficiency judgment after trustee's sale, statute providing for procedural changes and creating added rights which was not expressly made retroactive *held* not retroactive, and hence evidence regarding market value of property, admission of which depended upon retroactive nature of statute, was properly excluded (St. 1933, p. 1669).

2. Mortgages ⇨556

Deed of trust which contained no expression that payment from trustee's sale would be accepted in full settlement of obligation and recited that grantee should apply proceeds first to expense of sale and then to note and any balance should go to grantor *held* not to show that parties agreed to accept proceeds of sale as payment in full.

3. Mortgages ⇨561

In action for deficiency judgment, evidence that mortgagor whose payments were in default directed that moneys received from mortgaged property be paid to plaintiff to be credited on account due mortgagee under original contract *held* not to show modification of original contract between parties.

4. Mortgages ⇨561

In action for deficiency judgment, error in admitting ledger sheet where there was no proper foundation laid *held* not prejudicial

where sheet showed only amount of loan which was admitted by pleadings and amount of expenses of trustee's sale, and disbursement thereof which witness who procured ledger sheet testified he personally made.

5. Mortgages ⇨561

In action for deficiency judgment, burden was upon mortgagors to show payments made by them.

6. Mortgages ⇨561

In action for deficiency judgment, where pleadings presented no question of fraud, Court of Appeal *held* not required to consider whether fraud was committed in obtaining signature of mortgagor who contended she signed note and trust deed merely for purpose of subjecting her community interest and without intention to become personally liable.

7. Husband and wife ⇨267(5)

In absence of provision contained in trust deed or note limiting her liability, trial court properly excluded, in deficiency judgment action, proof that mortgagor signed note and trust deed merely for purpose of subjecting her community interest, if any, in realty involved.

8. Mortgages ⇨408

Payment by mortgagors to former trustee named in trust deed of certain amount after notice of default was recorded and after mortgagors were notified that arrangement which had been made for payment of rents from mortgaged property to mortgagee was terminated *held* not waiver by mortgagee of default, where payments were to be made directly to mortgagee and mortgagors relied merely on fact payment was made to former trustee under trust deed.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by the Central Bank of Oakland against Frank H. Proctor and another. From an adverse judgment, the defendants appeal.

Judgment affirmed.

John T. Wentz and Booth B. Goodman, both of Oakland, for appellants.

Fitzgerald, Abbott & Beardsley, of Oakland, for respondent.

STURTEVANT, Justice.

In an action to obtain a deficiency judgment after a sale had under a trust deed, the defendants have appealed.

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Superseded by opinion 54 P.(2d) 718.

The name of the plaintiff was formerly Central Savings Bank of Oakland, but prior to the commencement of this action its name was changed to Central Bank of Oakland. Heretofore the plaintiff loaned to the defendants \$45,000, and in evidence thereof they executed their promissory note dated January 21, 1932. By the terms of the note, \$100 was payable February 21, 1932, and \$100 on the 21st day of each and every succeeding month thereafter until the 21st day of January, 1933, on which day the entire unpaid balance became due and payable. On the same day the note was made, the defendants, as grantors, executed to Central National Bank of Oakland a trust deed in favor of the plaintiff as beneficiary. By its terms the trust deed conveyed a lot in Oakland and the apartment house standing thereon. Interest was paid to the 15th day of July, 1932, and \$9.21 on account of future interest.

[1] Chapter 642 of the Statutes of 1933 (page 1669) took effect August 21, 1933. By its terms it provided certain regulations and limitations of and concerning deficiency judgments. However, it contained no language to the effect that any part or portion was retroactive. The statute contained certain amendments to the Civil Code by inserting amended sections and also new sections. It also contained amendments to the Code of Civil Procedure by adding new sections. It is conceded that it provides changes in procedure, and furthermore it is conceded that the statute provides certain new rights. Throughout the trial the learned judge presiding consistently ruled that, in so far as the statute conferred new rights, its provisions were not applicable in the trial of the instant case. The defendants claim that said rulings were erroneous. In making that claim, we think they are clearly mistaken. Both the Civil Code and the Code of Civil Procedure contain sections to the effect that their provisions are not retroactive unless expressly so declared. In the absence of statutory provisions to that effect, the rule has long been the policy of the law. 59 C. J. 1159-1172.

During the trial, the defendants sought to introduce evidence regarding the market value of the property described in the deed at the date of the sale. The evidence was excluded. Relying on the provisions of the statute of 1933, the defendants assign those rulings as erroneous. It is not contended that prior to the enactment of said

statute the evidence would have been material. As we have just shown that the statute was not applicable, it follows that the rulings excluding evidence of value were in no manner erroneous.

[2] The defendants contend that under the terms of the deed the plaintiff agreed to accept the proceeds of the sale as payment in full. Freely conceding that such a contract could have been made, nevertheless we think there is nothing in the deed that supports the contention of the defendants. The covenants contained in the deed on which the defendants base their contention are as follows: "And the grantee, or its successors or assigns, shall establish as one of the conditions of such sale, that all bids and payments for said property shall be made in like lawful money as aforesaid, and upon such sale it shall make, execute, and, after due payments made, shall deliver to the purchaser or purchasers, his or their heirs or assigns, a deed or deeds of the premises so sold, and shall apply the proceeds of sale thereof, in payment, firstly, of the expense of such sale, together with the reasonable expenses of this trust, including therein counsel fees, in lawful money, in an amount equal to five per cent of the amount secured hereby and remaining unpaid, which shall become due upon any default made by the said grantors in any of the payments aforesaid; and also such sums, if any, as said grantee, or said party of the third part shall have paid for procuring an abstract of, or for search of, the title to said premises, or any part thereof, subsequent to the execution of this Deed of Trust, and in payment, secondly, of the said promissory note—and of the amount of the principal and interest thereon then remaining unpaid, and the amount of all other moneys, with interest thereon, herein agreed or provided to be paid by the said grantors; and the balance or surplus of such proceeds of sale it shall pay to the said grantors, their heirs, executors, administrators or assigns." It will be noted that the covenant quoted contains no expression to the effect that the payment will be accepted "in full." On the other hand, the covenant does recite that the grantee "* * * shall apply the proceeds of sale thereof firstly, of the expense of such sale, together with the reasonable expenses of this trust. * * *" For the reasons stated, and others not necessary to state, we think that the contention of the defendants would in effect

place a strained construction on the terms of the trust deed.

[3] In their amended answers the defendants set forth what purported to be contracts modifying the terms of the original contract. In effect the trial court held that no modified contract was proved. In so holding we think the trial court did not commit an error. On the 15th of March, 1933, the defendants were behind in their payments. The plaintiff was pressing them to comply with the terms of their contract. Thereupon the defendant Frank H. Proctor wrote a letter dated March 15, 1933, to Mr. C. J. Gates, who was in charge of the property for the defendants, to pay to Central National Bank all moneys received from the property less current expenses. On the same date he wrote a letter to Central National Bank, directing it to pay said moneys to plaintiff to be credited on account of interest, etc. Thereafter on April 10, 1933, Mr. Proctor sent copies of said letters to the plaintiff. No written document signed by the plaintiff or its agents touching the subject-matter was offered in evidence; however, the defendants sought to prove that Mr. C. D. Bowman, who was on said date assistant cashier of the plaintiff, made certain oral promises to the defendants. It will be observed that the amounts ordered paid to the plaintiff were moneys which the plaintiff was entitled to receive under and by virtue of the original contract. The source from which those moneys came was a matter of no concern to the plaintiff. The letters written by Mr. Proctor do not show on their face any promise made either orally or in writing by the plaintiff. If the defendants would claim that these transactions constituted a written contract, they failed to show any writing on the part of the plaintiff. The fact that the letters were signed by the defendants and not by the plaintiff did not establish a written contract. If they would claim that an executed oral agreement was made, such claim must fall for the proof shows that it was not executed. We think there was no evidence that the contract between the parties was modified. *Rottman v. Hevener*, 54 Cal. App. 474, 202 P. 329.

[4, 5] During the trial the plaintiff offered in evidence, and over the objection and exception of the defendants the trial court admitted, a ledger sheet. The objection of the defendants was that no proper foundation therefor was made.

The objection was well founded, and it should have been sustained. *Chan Kiu Sing v. Gordon*, 171 Cal. 28, 151 P. 657. It follows that it was error to admit the sheet. However, the error was not prejudicial. On its face it showed the amount of the loan, \$45,000. That item was admitted by the pleadings. It also showed the expenses, etc., of the trustee's sale and the disbursement thereof. The latter entries were made in the handwriting of Mr. Peterson, the witness on the stand, who produced the ledger sheet and who testified that he personally made the disbursements. On the card certain payments on the debt of the defendants were set forth. We do not understand the defendants to claim that said payments were not made. Furthermore the burden rested on the defendants to introduce evidence of and concerning payments made by them. It follows that admitting the ledger sheet was not a prejudicial error.

[6, 7] The defendant Flora MacD. Proctor offered to prove that she signed the note and deed of trust in the case at bar for a particular purpose and that T. A. Crellin, the executive vice president of the plaintiff bank, was advised and accepted her signature for the purpose of subjecting her community interest, if any she had, in the real property in question, and that she assumed no personal liability by the signing of said note or deed of trust, and that she should have been permitted to introduce that proof. Before going further, it should be noted that the pleadings presented no question of fraud; therefore it is not necessary to consider whether fraud was or was not committed. In the absence of any provision contained in the contract limiting her liability, we think that Mrs. Proctor may not complain of the court's ruling. *Hammond Lumber Co. v. Danziger*, 2 Cal. App. (2d) 197, 200, 37 P.(2d) 517.

[8] After the notice of default was recorded and after the defendants had been notified in a letter from the attorneys that the arrangement for the payment of the rent to the plaintiff was terminated, the defendants paid \$868.19 to the Central National Bank of Oakland. The evidence shows affirmatively that said moneys were not paid to the plaintiff. Nevertheless the defendants complain because the trial court did not allow the jury to pass on the question as to whether such moneys had been paid to the plaintiff. The record shows

nothing to the contrary but that the Central National Bank received and now holds the \$868.19 on some obligation not germane to the instant litigation. As stated hereinabove, if the defendants claimed that said payments were made on the note dated January 21, 1932, and should have been applied thereto, the burden rested on them to show the facts. They neither did so nor offered to do so, but relied solely on the fact that Central National Bank of Oakland was at one time the trustee named in the trust deed. In that connection the evidence shows affirmatively that it ceased to be such trustee on April 21, 1933. However, by the terms of the contracts between the parties no covenant authorized payments due the plaintiff to be collected by the trustee; but the note provided that the principal and interest were payable to the plaintiff at its office, and by the terms of Mr. Proctor's letters the proceeds from the apartment house were to be credited only after they were received by the plaintiff. Under the foregoing facts we think it is clear that, after the notice of default, the plaintiff received no further payments from the defendants and did not waive the default, and furthermore that there was no evidence received or offered showing that a deficiency judgment was waived.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.;
SPENCE, J.



10 Cal.App.2d 80

MERCHANTS FINANCE CORPORATION

v. WARING, City Treasurer.

Civ. 9746.

District Court of Appeal, First District,
Division 2, California.

Nov. 8, 1935.

Rehearing Denied Dec. 7, 1935.

Hearing Denied by Supreme Court
Jan. 6, 1936.

1. Municipal corporations Ⓒ953

City issuing improvement bond representing amount of assessment levied against real property described therein for payment of street work held without contractual right to penalties originally provided in statute which were payable to city upon default in payment of principal or interest on bond (St. 1927, p. 1410, § 62; St. 1923, p. 278, § 63).

2. Municipal corporations Ⓒ907

Repeal of provision of statute providing for payment of penalties to city for default in principal or interest due on city improvement bond representing amount of assessment levied against real property described therein held remission of such penalties accruing prior to repeal of provision, and hence holder of bond was entitled to cancellation thereof after foreclosure without payment of statutory penalties to city for default which had occurred before amendment of statute (St. 1933, p. 2386, § 62; p. 2628, § 63).

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Mandamus proceeding by the Merchants Finance Corporation against R. O. Waring, Treasurer of the City of Oakland. Judgment for petitioner, and respondent appeals.

Affirmed.

F. Bert Fernhoff, City Atty., and Homer W. Buckley, Asst. City Atty., both of Oakland, for appellant.

Eugene K. Sturgis, of Oakland, for respondent.

SPENCE, Justice.

This is an appeal by the treasurer of the city of Oakland from a judgment of the superior court directing that a writ of mandate issue compelling said treasurer to cancel a certain street improvement bond "without the payment of any penalties to the City of Oakland." In order to avoid confusion, we will refer to the parties as plaintiff and defendant rather than as petitioner and respondent.

The facts are undisputed. Plaintiff was the owner of improvement bond No. 26 of series 934 issued in 1929 pursuant to the provisions of the Improvement Act of 1911 (Stats. 1911, p. 730) and acts amendatory thereto. Said bond represented the amount of the assessment levied against the real property described therein for the payment of certain street work. At the time of the issuance of said bond, section 62 of said act (as amended by St. 1927, p. 1410) and section 63 (as amended by St. 1923, p. 278) provided for certain penalties in case of default in payment of principal or interest. Said section 63 provided in part: "In case of such default, there shall be immediately added to such defaulted amount, five per cent of the

amount thereof, and on the first day of each month following such default there shall be added a further penalty of one per cent of such defaulted amount. The city shall be entitled to one-half the penalty first imposed, namely, two and one-half per cent and the other two and one-half per cent and all subsequent penalties shall be paid to the holder of the bond along with and as a part of such defaulted payment."

Default was made in the payment of principal and interest due under said bond. Thereafter, but before plaintiff commenced its action to foreclose said bond, said sections 62 and 63 of said act were amended (Stats. 1933, chs. 917 and 1032 [pages 2386, 2628]). The effect of the amendments was to reduce the 5 per cent. penalty to one per cent. and to provide that all penalties should be paid to the bondholder, thereby eliminating the provision entitling the city to a portion of the penalties.

When plaintiff commenced its action to foreclose, it demanded only the 1 per cent. penalties provided in the amendments of 1933. The property owner defaulted and a decree of foreclosure was entered in accordance with the prayer of plaintiff's complaint. Plaintiff was required to tender said bond to the treasurer of the city of Oakland, but upon tendering said bond, said treasurer refused to accept or cancel the same unless plaintiff paid to the city of Oakland the sum of \$12.29 being the amount alleged to be due to the city of Oakland as penalties by reason of the provisions of said sections 62 and 63 prior to the amendments of 1933. Thereupon plaintiff petitioned for a writ of mandate to compel defendant to cancel said bond upon the records of the city of Oakland without the payment of any penalties to the city of Oakland, and the trial court entered its judgment directing the issuance of the writ.

[1,2] It is clear from what has been said that the controversy here is solely between the bondholder and the treasurer of the city of Oakland as the representative of said city and involves no question of the rights of the bondholder against the landowner. The defendant as the representative of the city is apparently standing upon the city's alleged contractual right to the penalties provided in the act before the amendments of 1933 and contends that the case of *Islais Co. v. Mathe-*

son (Cal. Sup.) 45 P.(2d) 326, is "completely determinative of every issue raised by this case." Defendant's contention may not be sustained. In the case cited, it is clearly pointed out on page 328 of 45 P.(2d) that the controversy there was one involving the contractual rights between the bondholders and the landowners and was not one where the state or any of its taxing agencies was claiming any contractual rights to a penalty on its own behalf. We are of the opinion that the city of Oakland had no contractual right to the penalties which it claims and this view finds support in the language used in one of the authorities cited by defendant. *Hershey v. Cole*, 130 Cal. App. 683, 687, 20 P.(2d) 972. We are further of the opinion that when the portion of the act entitling the city to certain penalties was repealed, such repeal acted as a remission of such penalties. 25 Cor. Jur. 1213; 20 Cal. Jur. 983. See, also, *Islais Co. v. Matheson*, *supra*.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



10 Cal.App.2d 48

CARSTENS PACKING CO. v. MILLER.

Civ. 9251.

District Court of Appeal, Second District,
Division 1, California.

Nov. 6, 1935.

Rehearing Denied Nov. 27, 1935.

1. Principal and agent ☞103(2)

Where agent of buyer had charge of buyer's business during his absence, and completed deal for purchase of hog hair and cattle switches, and cattle switches were accepted and paid for by buyer, buyer who refused to accept hog hair *held* liable for breach of contract, since, even if buyer had no actual knowledge of agent's acts, contract was within apparent authority of agent.

2. Frauds, statute of ☞129(1)

Where letters regarding purchase of hog hair and cattle switches did not state affirmatively that negotiations related to goods as a whole, but sufficiently showed that buyer and seller so understood them, and conduct of

parties pointed to same conclusion, contract held entire and acceptance of cattle switches operated as part performance, taking case out of statute of frauds, and rendering unnecessary written authority for agent who completed deal (Civ. Code, § 1624, subd. 4, as amended by St. 1905, p. 611).

3. Contracts ⇐170(1)

Act of parties in treating contract as entire or severable has important bearing upon its construction.

4. Sales ⇐71(1), 72(1)

Where letters forming basis for contract to purchase hog hair and cattle switches were indefinite as to quantity of hog hair, but purchase apparently related to accumulation at time of purchase, and seller indicated in letter amount on hand, to which buyer did not object, seller later resold that amount, and quality of hog hair was specified as "sweet and clean" and best that could be processed, contract held to sufficiently state quantity or quality of hog hair purchased.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by the Carstens Packing Company against Robert Miller. From a judgment for the plaintiff, the defendant appeals.

Judgment affirmed.

Willcox & Judson, Fred W. Heatherly, and Joe Orloff, all of Los Angeles (John N. Metcalf and William Katz, both of Los Angeles, of counsel), for appellant.

William A. Freeman and Edward Flam, both of Los Angeles, for respondent.

SHINN, Justice pro tem.

Defendant appeals from a judgment for damages resulting from an alleged breach of contract to purchase 138,000 pounds of hog hair. The contract was in the form of correspondence between plaintiff, operator of packing houses at Tacoma and Seattle, and defendant, a processor at Los Angeles of curled hair. This correspondence was initiated by defendant personally in February, 1929, and concluded by R. S. Braun, an employee of defendant, in June of the same year.

[1] Appellant's first contention is that he did not authorize or have knowledge of Braun's purchase of the goods and that he did not ratify the purchase, all of which issues the court found in plaintiff's favor. These findings in our opinion, are not

without support in the evidence. Defendant spent most of his time at a ranch located near Los Angeles, but came in to his place of business at least once a week. He testified that during his absence Braun had charge of the business. Braun testified that he discussed with defendant the matter of the delivery of the goods purchased shortly after the contract was made. This evidence and corroborating circumstance, together with defendant's acceptance and payment for part of the goods covered by the contract, to be discussed later, led reasonably to the court's conclusion that Braun's acts were not unauthorized. Even though the trial court had been in doubt as to defendant's actual knowledge of Braun's acts in the conduct of the business, we think defendant could not have escaped liability for those acts, in view of the fact, as testified to by defendant, that Braun had charge of the business the greater part of the time. The contract with plaintiff was within the scope of the apparent authority which defendant allowed Braun to assume and exercise. It would be unjust to allow defendant to shift the loss occasioned by his own acts to the plaintiff, who dealt with Braun in good faith, rightfully assuming that Braun was defendant's duly authorized agent. *Henry Cowell Lime & Cement Co. v. Farmers' & Merchants' Nat. Bank of Santa Cruz*, 82 Cal. App. 519, 255 P. 881; *Producers' Fruit Co. v. Goddard*, 75 Cal. App. 737, 243 P. 686.

It was not necessary that Braun's authority should be evidenced by a writing. On May 29, 1929, in the name of defendant and over his own signature, Braun wrote plaintiff offering 60 cents a dozen for cattle switches and 7 cents a pound net weight f. o. b. Los Angeles for hog hair, which offer was accepted by plaintiff by letter dated June 1, 1929. On June 4 Braun asked for shipment of the cattle switches on hand, but, on account of shortage of storage space, asked that shipment of the hog hair be deferred until necessary warehouse space could be made available, and inquired as to the quantity of hog hair on hand. Plaintiff replied to that letter, and to subsequent inquiry, that there were 450 or 475 bales of hair stored on the dock, weighing approximately 150,000 pounds. The cattle switches were shipped July 18, 1929, and defendant paid for the same the full purchase price of \$1,500. Plaintiff thereafter insisted by

letters that delivery of the hog hair be accepted, but in reply to these several requests Braun asked for more time to accept delivery. On December 19, 1929, defendant wrote plaintiff stating that he did not know whether he had signed a contract to purchase the hog hair, but that he could not take the hog hair nor allow plaintiff to draw on him for the same.

[2,3] It is the contention of respondent that the receipt of part of the goods sold and the payment of part of the purchase money did away with the necessity for a written agreement for the purchase of the goods, under former section 1624, subd. 4, Civil Code (as amended by St. 1905, p. 611), and therefore made it unnecessary that the authority of the agent should have been in writing. If the contract was entire, it was an agreement to purchase all of the goods, and the partial performance would have made it a binding contract, even though it was not in writing. Defendant contends that it was his privilege to buy either the cattle switches or the hog hair at the prices quoted, separately from the other, and he invokes the rule that, where a distinct price is apportioned to each of several distinct items according to their value and is not fixed at a round sum for the whole, the contract will be regarded as severable. *Herzog v. Purdy*, 119 Cal. 99, 51 P. 27; *Sterling v. Gregory*, 149 Cal. 117, 85 P. 305; *Norris v. Harris*, 15 Cal. 226; *More v. Bonnet*, 40 Cal. 251, 6 Am. Rep. 621. Although the letters did not state affirmatively that the negotiations related to the goods as a whole, they sufficiently show that both buyer and seller so understood them. The conduct of the parties points to the same conclusion, and it is well settled that acts of the parties in treating a contract as entire or severable have an important bearing upon its construction. 13 Cor. Jur. 564. On February 26 Miller had written to inquire whether plaintiff would sell him again its accumulation of cattle switches and hog hair and what the price would be. Plaintiff answered, quoting 60 cents per dozen for cattle switches and 8 cents a pound for hog hair delivered wharf, Tacoma. Defendant wrote on March 11, 1929, stating that he was willing to pay 60 cents per dozen for cattle switches, but that the price on hog hair seemed high, and offering 7½ cents per pound f. o. b. Los Angeles. Plaintiff replied, offering the hog hair at 8 cents per pound, delivered wharf at Tacoma, for a year's contract on

the hair, and offering to ship the switches and hair by steamer. Defendant did not reply. Correspondence was resumed May 18, and thereafter was conducted between plaintiff and Braun, and, as we have seen, resulted in Braun's offer, which was accepted by plaintiff. Defendant was willing to buy the cattle switches at 60 cents when that price was first quoted, and so advised plaintiff, but he did not offer to purchase them separately, nor did plaintiff offer to sell them separately, then or at any other time. Negotiations were continued dealing with the two articles as a whole. The quotation of separate prices was necessary to render the total price capable of ascertainment, and did not necessarily indicate an intention to sell a part only of the goods. The correspondence in its entirety is clearly inconsistent with the claim that the contract of purchase was severable. We think the trial court would not have been warranted in holding that either party intended a sale of a part of the goods where throughout the entire correspondence no such intention was expressed on either side and a contrary intention was reasonably to be inferred.

[4] Appellant's next contention is that the contract was indefinite, in that it failed to stipulate the quantity or quality of hair purchased; but in this contention we think appellant takes too narrow a view of the entire transaction. It is true that defendant's offer and plaintiff's acceptance, which furnished the basis of the contract, were indefinite as to quantity, but from the entire correspondence it is clear that the purchase related to the accumulation of hair at the time of the purchase. Defendant was informed as to the number of bales ready for shipment and that the amount on hand weighed 150,000 pounds. Defendant made no objection to plaintiff's statement of the quantity on hand. The evidence shows that plaintiff resold 150,000 pounds. The court computed the total weight according to memoranda made by plaintiff's employees at 138,000 pounds and gave judgment accordingly. Defendant produced no evidence as to the amount of hair plaintiff had on hand at the time of the contract. While no witness testified directly as to the quantity of hair on hand, plaintiff's written statement to defendant, acquiesced in by the latter, and plaintiff's repeated offers to ship the hair, together with the testimony that 150,000 pounds were resold, were sufficient to show, in the absence of contradictory evidence, that

plaintiff did have on hand at least 138,000 pounds of hair. We cannot regard this alleged deficiency in plaintiff's proof as furnishing a ground for reversal of the judgment, where it appears not improbable that, upon a retrial of the case and upon more complete proof, plaintiff's damage would be found equal to, if not in excess of, the amount for which judgment was given. The quality of the hog hair was sufficiently specified by plaintiff's written statement that it was "sweet and clean" and the best that could be processed.

The judgment is affirmed.

We concur: HOUSER, P. J.;
YORK, J.



10 Cal.App.2d 31

CUTLER v. BOWEN et al.
Civ. 9789.

District Court of Appeal, First District,
Division 2, California.
Nov. 6, 1935.

Hearing Denied by Supreme Court
Jan. 2, 1936.

1. Frauds, statute of §38

Oral evidence of brokers' assurances to ranch owner of financial standing of owner of apartment house which was exchanged for ranch held inadmissible under statute of frauds (Code Civ. Proc. § 1974).

2. Fraud §12

Ordinarily, promise to be performed in future, even though false, is not actionable, unless made with fraudulent intention of not performing promise.

3. Fraud §50

In action for fraud, allegation that promise was made with fraudulent intention of not performing it must be proved either by direct proof or by inference, although record must contain facts on which to base such inference (Code Civ. Proc. § 1960).

4. Fraud §50

In ranch owner's suit against brokers for damages arising out of alleged false representations of brokers as to financial standing of owner of apartment which was exchanged for ranch, ranch owner must prove that representations were material to contract, and that contract would not have been made if representations had not been made (Civ. Code, § 1568).

5. Brokers §65(1)

Fraud §59(1)

Recovery can be denied in brokers' action to recover commission where transaction is so tainted with fraud that there is failure of consideration, but, when suit is against broker in damages for fraud, recovery must follow proof of damages sustained (Civ. Code § 3358).

6. Trial §250

In ranch owner's suit against brokers for damages arising out of exchange of properties, instruction that brokers were not entitled to compensation if they were guilty of fraud and that ranch owner could recover commission paid by her as part of her damages held error, where ranch owner did not by allegation or proof make any case for recovery of commission.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Suit by Sophie W. Cutler against T. A. Bowen and others. From a judgment for the plaintiff, the defendants appeal.

Reversed.

Horace W. B. Smith and Theodore Tamba, both of San Francisco, for appellants.

Arthur L. Shannon, of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued the defendants Bowen and Bartell in damages for fraud and joined the Fidelity Company as surety on their bond given under the California Real Estate Act (St. 1919, p. 1252, as amended). The cause was tried with a jury, and plaintiff had a verdict and judgment against the brokers for \$2,300 and against the surety for \$2,000, which was the full amount of the bond. All the defendants appeal.

Plaintiff was the owner of ranch property near Orland which was subject to three deeds of trust—one a second lien on the east half of the property in the sum of \$1,900 which was known as the "Clark deed." This property was traded to one Tweedt for an apartment house in Oakland through the efforts of the defendant brokers. As a part of the trade, Tweedt agreed in writing to assume all the indebtedness on the Orland property and plaintiff agreed to and did pay \$10,000 in cash. Tweedt failed to pay off any of

the indebtedness, and the first deeds of trust were foreclosed without any deficiency judgments against the plaintiff. This, however, extinguished the second, or Clark, deed of trust.

While negotiations for the exchange of the properties were being conducted, but without the knowledge of Tweedt or of the brokers, the plaintiff negotiated with Clark for the sale of his deed of trust and paid to Clark the sum of \$1,000. In the proration on the exchange, the sum of \$565.14 was found payable from the plaintiff to Tweedt in addition to the \$10,000 paid in the exchange. Though this sum was payable in cash, it was credited on the Clark note at the request of the plaintiff. The demand of the plaintiff in this action is for the full sum of the Clark note—\$1,900—and the sum of \$1,000 representing the commission allowed the brokers out of the \$10,000 cash payment.

The judgment must be reversed for these reasons: The demand for damages rests on the allegations that the brokers represented to plaintiff that their client "was financially responsible and was able, and intended, to pay and discharge all of the indebtedness and encumbrances on said Orland property within a period of sixty days"; that said brokers represented that they would cause all of said indebtedness to be paid either by refinancing the same or by causing the same to be paid out of the \$9,000 cash payment to Tweedt; and that said Tweedt would immediately move to said ranch and farm, care for, and maintain it.

[1] In her effort to prove these allegations, respondent relied wholly on oral testimony which was specifically contradicted by the appellants. All the evidence relating to the assurances of Tweedt's financial standing was inadmissible under section 1974 of the Code of Civil Procedure. The language of this section requires no interpretation. It reads: "*Representation of Credit by Writing.* No evidence is admissible to charge a person upon a representation as to the credit of a third person unless such representation, or some memorandum thereof, be in writing, and either subscribed by or in the handwriting of the party to be charged."

In a case identical with the case at bar in pleading the court in Carr v. Tatum, 133 Cal. App. 274, 24 P.(2d) 195, made a careful review of the cases involving a

similar rule of the common law, and found that the weight of authority supported a strict interpretation of the section without exception as to persons in a confidential relation or whether the representation was made honestly or in bad faith. The clear and unequivocal language of the section compels the holding that all this oral evidence was inadmissible. The objection was first raised by demurrer to the complaint as was done in the Carr Case. The error was emphasized by an instruction that the representation was actionable. It should be said, however, that it does not appear that the Carr Case was at any time called to the attention of the learned trial judge. In some other jurisdictions an exception had been made to the rule if a confidential relation existed, and the respondent contended for that exception here. This was expressly rejected in the Carr Case, where the court held that a complaint in almost identical language did not state a cause of action.

[2, 3] To avoid the doctrine stated in Carr v. Tatum, supra, the plaintiff contends she pleaded several false representations other than the misrepresentation of the credit of Tweedt. An examination of the complaint discloses that it made four separate attempts to plead the one misrepresentation, but it was insufficient as a pleading of even one false representation and that the proof was wanting in the same particulars. Ordinarily, promises to be performed in the future, even though false, are not actionable. But, if made with no intention of performing them, the rule is different. Lawrence v. Gayetty, 78 Cal. 126, 20 P. 382, 12 Am. St. Rep. 29; Rogers v. Harris, 76 Okl. 215, 184 P. 459; Corbin Co. v. Preston, 109 Or. 230, 212 P. 541, 218 P. 917; Papanikolas v. Sampson, 73 Utah, 404, 274 P. 856. In such cases, however, as Lovell v. Dotson, 128 Wash. 669, 223 P. 1061, fraudulent intent at the time the promise is made is the gist of the action. Papanikolas v. Sampson, supra. The person making the charge must prove it. McCarthy v. White, 21 Cal. 495, 82 Am. Dec. 754. Direct proof is not required but it may be inferred. But the record must contain facts on which to base said inference. Section 1960, Code Civ. Proc.; People v. Nitta, 17 Cal. App. 152, 118 P. 946; Ryder v. Bamberger, 172 Cal. 791, 799, 158 P. 753; Williams v. Spazier, 134 Cal. App. 340, 349, 25 P.(2d) 851.

[4] The plaintiff was also bound to prove that the alleged false representation was material to the contract of exchange. To do that means that she was bound to prove that, if the representation had not been made, the contract of exchange would not have been made. Civ. Code, § 1568. But there is no evidence to that effect in the record.

The prejudicial effect of the inadmissible evidence and the instruction upon it is unmistakable. The respondent alleged and testified that she relied on the representations as to Tweedt's credit, and there is no credible evidence that she relied on any other representation or promise of the brokers independent of that. Thus all the alleged misrepresentations and promises, including the promise that Tweedt would move to the ranch and farm it, are so closely interwoven with the matter of Tweedt's credit that it is impossible to say that the evidence relating to the latter did not affect the verdict.

The judgment must be reversed for another and independent reason. The jury was instructed that, if the brokers were guilty of fraud, they were not entitled to any compensation, and that plaintiff would then "be entitled to recover, as part of her damages, the \$1000 paid by her to said defendant brokers as a commission." The instruction was based upon a statement in *Cohn v. Chain*, 62 Cal. App. 617, 217 P. 579, and is defended by citations to *Anderson v. Geo. L. Barney Co.*, 1 Cal. App. (2d) 340, 36 P.(2d) 717, and *Barron Estate Co. v. Woodruff Co.*, 163 Cal. 561, 126 P. 351, 42 L. R. A. (N. S.) 125. The *Anderson* Case was an action for secret profits obtained by agents in a real estate exchange. Though plaintiff recovered the commission paid as part of her damages, the question of law involved is not mentioned in the opinion. The *Barron Estate Co.* opinion touches this subject in the brief statement found on page 578 of 163 Cal., on page 358 of 126 P., 42 L. R. A. (N. S.) 125, reading: "It is at once apparent that the allegation that defendants received \$70,000, by way of commissions for services procured through fraud and of no value to plaintiff would, upon adequate proof, entitle it to a recovery in this amount." *Cohn v. Chain* was an action upon a promissory note given in payment of a commission to brokers for the sale of real estate. The suit was defended upon the ground of the brokers' fraud in the transaction. No ques-

tion of damages was involved. In denying recovery upon the note, the opinion carries the statement that, because of the faithlessness in the execution of the agency, the brokers "forfeited all right to compensation for their services." This case cited as authority *Chain v. Katze*, 62 Cal. App. 615, 217 P. 578, which rested on the authority of *Hageman v. Colombet*, 52 Cal. App. 350, 198 P. 842. The latter case was also a suit by an agent to recover a commission in a real estate exchange. The court held that the whole transaction was so tainted with fraud through which the defendant lost far more than the amount of the commission sued for that plaintiff should not be permitted to recover.

In the comparatively recent case of *Darrow v. Houlihan*, 205 Cal. 771, 272 P. 1049, the Supreme Court had an action by a broker to recover a commission which was defended on the ground of fraud in the transaction. The court there said that proof of fraud alone "does not necessarily prove fatal to the plaintiff's recovery." 205 Cal. 771, page 775, 272 P. 1049, 1050. It was further said that, so far as might appear, the defendant might have gained all that she bargained for. This all followed the statement that: "It is equally well settled, however, that fraud unproductive of injury, 'will not justify a rescission, nor support an action either for rescission or damages. * * *'" *Spreckels v. Gorrill*, 152 Cal. 383, 388, 92 P. 1011, 1014." 205 Cal. 771, 774, 272 P. 1049, 1050.

[5] This expresses the true principle involved in the whole controversy. If the suit is by the broker or agent to recover a commission and the entire transaction has been so tainted with fraud that there is a failure of consideration, then the courts may deny any recovery. But, when the suit is against the broker or agent in damages for fraud, the recovery must follow proof of the damage sustained. This follows from section 3358 of the Civil Code, which reads in part: "Notwithstanding the provisions of this chapter, no person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides."

[6] Hence the language of the instruction to the jury that, "if you find * * * that the defendant brokers were guilty of fraud in the execution of their agency,

then they were not entitled to any compensation for their services, * * * was too broad. The respondent had the election to rescind the contract of exchange and sue for the damages or to affirm the contract and sue for the fraud. She chose the latter and must stand by her election. The commission was a part of the contract which she affirmed. It was therefore incumbent upon her to prove her damage. For all that appears, she profited by the exchange beyond the amount of the commission paid. But she did not by either allegation or proof make any case for the recovery of the commission or of any part of it.

The judgment is reversed.

We concur: STURTEVANT, J.;
SPENCE, J.



10 Cal.App.2d 69

MELVIN et al. v. MORTGAGE GUARANTEE
CO.
Civ. 10403.

District Court of Appeal, Second District,
Division 2, California.
Nov. 7, 1935.

Rehearing Denied Dec. 6, 1935.

1. Appeal and error ⇨989

On question whether findings are contrary to evidence, reviewing court merely examines record to ascertain if there is substantial evidence to support findings.

2. Appeal and error ⇨1054(3)

In action for fraud of creditor in inducing debtor to refrain from attempting to refinance deed of trust, on representation that debtor could repurchase after foreclosure, exclusion of evidence as to defendant's custom in refinancing mortgages and failure to take judicial notice of customary incidents of refinancing held not reversible error where trial court found there was no contract relative to refinancing and no fraud.

3. Appeal and error ⇨1010(1)

Alleged rule that slight evidence is sufficient to establish fraud where beneficiary at trustee's sale paid price greatly disproportionate to value of property does not apply in appellate court.

Appeal from Superior Court, Los Angeles County; J. J. Trabucco, Judge.

Action by Martha E. Melvin and others against the Mortgage Guarantee Company. From a judgment for defendant, plaintiffs appeal.

Affirmed.

Ivan Miller, of Los Angeles, for appellants.

O'Melveny, Tuller & Myers, J. R. Girling, and Marshall Taylor, all of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is an action in damages for fraud and deceit under section 1572 of the Civil Code. The appeal is from a judgment in favor of defendant. Plaintiff Melvin was the owner of a house and lot against which she executed a trust deed in favor of defendant to secure the payment of a promissory note in the sum of \$7,500. Later she conveyed the property to plaintiffs Cubberley, subject to the trust deed, for the purpose of securing the payment of \$5,000. Thereafter default was made in the payment of principal and interest on the defendant's note and trust deed, and the property was sold at trustee's sale to the defendant for \$5,000, although the amount due at the time was \$8,526.25. Defendant thereafter sold the property for \$10,250. The contention of the plaintiffs in the trial court was that at a time prior to the foreclosure sale, they offered to pay the defendant \$225 to apply on the indebtedness due the defendant, and the defendant promised and agreed to and with the plaintiffs that, in consideration of the plaintiffs' forbearing to pursue other means of refinancing then in progress and permitting defendant to foreclose the trust deed, the defendant would purchase the property at the trustee's foreclosure sale and resell the same to appellants for the amount of the indebtedness then due to the defendant, plus interest and expenses of foreclosure; and that the plaintiffs believing and relying upon the said representations abandoned steps then being taken to remove a certain cloud from the property and to refinance and pay off the indebtedness against the property, which objects the plaintiffs were then able to accomplish and which, but for defendant's promise and representations as aforesaid and the plaintiffs' reliance thereon, plain-

tiffs would have accomplished; that thereafter the plaintiffs presented themselves at the office of the defendant and informed defendant of their readiness and ability to proceed with the repurchase of the property, whereupon the defendant refused to sell the property to the plaintiffs in accordance with said representations and promises, all to plaintiffs' damage.

[1] The first contention of the plaintiffs on appeal is that the findings of fact are contrary to the evidence. In behalf of this point, the plaintiffs attempt to try the case *de novo* in this court and content themselves with setting out the evidence in favor of their allegations. Nowhere do they attempt to set out all the evidence tending to sustain the findings. This court is not a fact finder and is not a weigher of evidence. When such a question is raised, it is our duty to examine the record to see if there is any substantial evidence to support the findings of the trial court, and if there is such evidence, the examination ceases. 2 Cal. Jur. 918. It is sufficient to say that there is substantial evidence to support the findings of the trial court.

[2] The plaintiffs also contend that the trial court should have permitted the plaintiffs to introduce evidence of the usual and customary incidents of the financing and refinancing of obligations in connection with the purchase of real property, but that it sustained the objections of respondent to this line of questioning. The only illustration which the plaintiffs give us for review is the following question: "Q. Now, then, speaking of deals, when one of your mortgage debtors refinances his property through another mortgage or finance company, do you [customarily] require, before taking any steps in the deal, that your debtor deliver the cash to you? Mr. Girling: I will object to that as immaterial what may transpire in other transactions that may involve other property and other conditions. * * * The Court: Objection sustained. You may elicit the facts in this particular case, but what was done in other cases would not be binding upon the Court." It will first be observed that the question was not asked as a question regarding custom, but merely with regard to what the defendant customarily

did. If it were a question calling for the opinion of a witness in regard to a special custom in business, it had not yet been established that the witness was qualified to testify regarding the matter, and finally it must be remembered that the court found that the defendant did not enter into the alleged agreement, nor make the false representations relative to a refinancing operation. Accordingly, any evidence bearing upon the supposed custom and usage among mortgage and finance companies as to refinancing would now be immaterial. No reversal would be granted under the circumstances if the ruling had been erroneous.

The plaintiffs next contend that where performance by the debtor contemplates the co-operation of, and concert of action by, the creditor and where before performance by the debtor is due the creditor refuses to accept performance, such refusal excuses performance by the debtor and excuses absence of ability upon the part of the debtor to perform. This contention is answered by what we have already said, *i. e.*, that the court found against the plaintiffs on the alleged fraud and the alleged contract. The same may be said with regard to the contention that the trial court should have taken judicial notice of the usual and customary incidents of the financing and refinancing of obligations in connection with the purchase of real property.

[3] The plaintiffs' final contention is that "where (a) the beneficiary is the purchaser at the trustee's sale, and (b) the price paid is greatly disproportionate to the actual value of the property, very slight evidence of unfairness or irregularity is sufficient to establish fraud," citing the case of *Winbigler v. Sherman*, 175 Cal. 270, 165 P. 943, and similar cases. Such is not the rule for an appellate court. It is our duty as heretofore stated to examine the record to see if there is any substantial evidence to support the findings, and if there is such evidence, the examination ceases.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, Justice pro tem.

10 Cal.App.2d 54

PEOPLE v. COOK et al.

Cr. 2771.

District Court of Appeal, Second District,
Division 2, California.

Nov. 6, 1935.

Rehearing Denied Nov. 21, 1935.

Hearing Denied by Supreme Court
Dec. 5, 1935.

1. Larceny ¶62(2)

In prosecution for theft of bonds which were obtained from prosecutrix on pretext that proceeds thereof would be used to establish country club and that prosecutrix' money would be repaid to her, evidence held to support finding of larceny by trick and device and to sustain conviction (Pen. Code, § 484, as amended by St. 1927, p. 1046, § 1).

2. Larceny ¶14(1)

Crime of "larceny" is committed when person, with preconceived design to appropriate property to his own use, obtains possession of property by means of fraud or trickery.

[Ed. Note.—For other definitions of "Larceny," see Words & Phrases.]

3. Criminal law ¶423(2)

In prosecution for theft of bonds, admitting testimony of prosecutrix as to conversation with one of codefendants in absence of defendant held not error, where conspiracy between defendants was established.

4. Criminal law ¶351(3)

In prosecution for theft of bonds, admitting evidence of flight of defendant after he was informed that he would be arrested held not error, since evidence of flight is admissible as indication of guilty mind.

Appeal from Superior Court, Los Angeles County; Wilber F. Downs, Judge.

Edward Cook was convicted of theft of certain bonds of the value of \$5,000, and he appeals.

Affirmed.

Donald Mackay, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John O. Palstine, Deputy Atty. Gen., for the People.

WOOD, Justice.

Defendant and appellant, Edward Cook, was tried before the court without a jury together with defendants Davis and Weis-

brod on an information charging them with the theft of certain bonds of the value of \$5000. All of the defendants were found guilty, and appellant prosecutes this appeal from the judgment and from the order denying his motion for a new trial.

The evidence relied upon for conviction comes mainly from the complaining witness, Mrs. Powell. From her testimony the following circumstances appear: Defendant Davis called upon her on October 26, 1934, and stated that he and the other two defendants had made arrangements with the manager of a country club in the city of Long Beach for the sale of membership tickets in the club; that the tickets would entitle the holders to membership in the club and would also qualify them to be officers of the club, the election of officers to be by drawing, the president to receive a salary of \$20,000. Davis said they were going to consummate the deal through defendant Cook, who had a Chinese friend in San Francisco having 2,500 agencies on the coast where the tickets could be sold; that the tickets could be sold in pool halls, barber shops, and cigar stores. Davis asked her for \$5,000 "to put the deal over." Mrs. Powell disclaimed interest in the project, and Davis suggested that Cook could explain more about the scheme and that he would have Cook call upon her. Davis told her she was to receive a bonus of \$5000 in addition to the return of her money; that the Chinaman, as distributing agent for the memberships, would receive 20 per cent. of the gross receipts, 55 per cent. would be distributed to the members in salaries, and the balance would be for the three defendants after the repayment to Mrs. Powell of her money and the payment of the bonus. Cook called upon her on October 29, 1934, and repeated in substance the statements made by Davis. She manifested some interest in the matter, and Cook called upon her again on October 30 and also on October 31. Cook asked Mrs. Powell what bonds she had and she showed him a list of her holdings. Finally Mrs. Powell went with Cook to a bank where she obtained the bonds needed for the scheme and they then returned to her apartment. She gave him bonds of the value of \$5000 and he delivered to her a promissory note signed by each of the defendants and also promised to give her the accrued interest on the bonds. At the same time he de-

livered to her a document entitled "Temporary Receipt and Agreement." In this document, which was also signed by all of the defendants, receipt was acknowledged of the bonds "as a loan for a period of four months," and promise was made therein to return the same or similar bonds or their cash market value equivalent. The money which Mrs. Powell was asked to furnish through the medium of the bonds was to be used by defendant "to incorporate and get out the literature, and to rent an office, and for travelling expenses." Cook received the bonds from Mrs. Powell on October 31, 1934.

During the same afternoon in which he received the bonds, Cook borrowed \$300 on the bonds from a bank. The next day the bonds were sold by the bank on the order of Cook, and the proceeds of sale, \$4,618.76, was placed in the bank to the credit of the defendants, each of them signing the signature card. On the following day three \$1,000 checks were drawn on the account, each in favor of one of the defendants, and all of the checks were promptly cashed. On November 2, 1934, a check was drawn to the order of cash in the amount of \$48.76 and this amount was used to purchase a cashier's check in favor of Mrs. Powell; the amount being the sum due for accrued interest on the bonds. This check was sent to Mrs. Powell from San Francisco on November 13, 1934. Between November 16 and November 27, 1934, checks were drawn by the defendants from time to time until the account was finally closed.

Mrs. Powell attempted to contact defendants Weisbrod and Davis at the office where they were employed, about November 4, 1934, in order to have her bonds returned. At that time she talked to Mr. Lemon, the broker in charge of the office, who took her to the office of Mr. Seiler, an attorney. On November 6, 1934, Mr. Lemon discussed the matter with Davis and Davis said that the bonds had not been sold. On November 7, 1934, Davis told Mr. Lemon that the bonds had been sold. Mr. Seiler had a conversation with Cook some time after January 1, 1935, in which Cook stated that the money he had received from the bank account had been used for "front money"; that it was "to put on a show, to buy some clothes, buy an automobile and other things." He further stated that he had used most of the money after Mr. Seiler had, on behalf of

Mrs. Powell, asked for the return of the bonds.

Mr. Brayton, deputy district attorney, testified that Cook admitted to him that he had stated to Mrs. Powell that the memberships were to be sold through a nationally known Chinese organization with headquarters in San Francisco. When Mr. Brayton asked him what he expected to do with the securities obtained from Mrs. Powell, he stated that they planned to take over a dude ranch near San Bernardino.

[1,2] Appellant contends that the evidence is insufficient to sustain the judgment, claiming that, if anything, the testimony of Mrs. Powell shows the offense of obtaining money by false pretenses and that her testimony is not corroborated. This contention cannot be upheld. Since the amendment in 1927 to section 484 of the Penal Code (St. 1927, p. 1046, § 1), defendant may be convicted of grand theft upon proof showing either larceny, embezzlement, or obtaining money by false pretenses. The evidence in this case is amply sufficient to uphold a finding by the court of larceny by trick and device. The title to the property did not pass from the complaining witness; it was especially referred to in writing as a loan. The crime of larceny is committed when a person with a preconceived design to appropriate property to his own use obtains possession of it by means of fraud or trickery. *People v. Edwards*, 72 Cal. App. 102, 236 P. 944. Consideration of the evidence above outlined leads unerringly to the conclusion that the defendants tricked Mrs. Powell into delivering the bonds to them and that the money derived from the sale of the bonds was not used for the purpose for which it was intended. Indeed, it is difficult to see how the trial court could have done other than find all of the defendants guilty.

[3] Complaint is made of the admission in evidence of the testimony of Mrs. Powell as to the first conversation had with defendant Davis in the absence of defendant Cook. Conspiracy between the three defendants was unquestionably established, and the activities and statements of Davis in furtherance of the conspiracy were admissible in evidence. The ruling of the court was proper.

[4] The trial court received in evidence testimony concerning the flight of appellant. On March 12, 1935, after complaint

had been made to the authorities by Mrs. Powell, defendants Weisbrod and Cook, with their attorney, Mr. Underwood, were before the deputy district attorney in charge of the prosecution of the case. At that time the deputy informed Cook that he would be arrested, and in discussing the amount of bail with his attorney stated that it would be \$5,000. Upon his request, and in order to try to secure bail, he was permitted under certain restrictions to depart from the office, under promise of returning to the district attorney's office or to the office of his attorney the following morning. Cook did not appear, and a search was made for him. Several days later he was found in the unpainted house of an old miner near El Monte. Evidence of flight is admissible as an indication of a guilty mind. The court did not err in receiving the evidence. 8 Cal. Jur. 44, § 158; *People v. Abbott*, 65 Cal. App. 120, 223 P. 77.

The judgment and order are affirmed.

We concur: CRAIL, P. J.; McCOMB, Justice pro tem.



10 Cal.App.2d 5

ROBINSON v. WADA.

Civ. 9827.

District Court of Appeal, First District,
Division 2, California.

Nov. 5, 1935.

Hearing Denied by Supreme Court
Jan. 2, 1936.

1. Trial ⇨66

In action for injuries to plaintiff when struck by defendant's automobile, tried before jury, defendant *held* not entitled to take additional evidence to show plaintiff's subsequent conviction of felony and confession of third party that he had stolen defendant's automobile and was driving it at time of accident.

2. Trial ⇨108½

Rule permitting counsel to ask in good faith whether prospective juror is interested in any insurance company must not unnecessarily convey impression that defendant is so insured.

3. Appeal and error ⇨1170(6)

Whether counsel's misconduct in questioning prospective jurors so as to inform them that defendant carried automobile insurance is reversible error is determined by closeness of question of liability and amount of damages awarded (Const. art. 6, § 4½).

4. Appeal and error ⇨1170(6)

Questioning of prospective juror by plaintiff's counsel as to whether fact that she carried automobile insurance with company in question would cause her to "lean in their favor a little bit" and of another juror likewise insured as to whether such fact would have any bearing on her sitting "in this action" *held* prejudicial misconduct requiring new trial, where question of liability was close one (Const. art. 6, § 4½).

Appeal from Superior Court, Santa Cruz County; James L. Atteridge, Judge.

Action by E. Robinson against M. Wada, also known as Cow Wada. From a judgment for plaintiff, defendant appeals.

Reversed.

Cornish & Cornish, of Berkeley, for appellant.

Stanford G. Smith, of Santa Cruz, and F. M. Ostrander, of Merced, for respondent.

SPENCE, Justice.

Plaintiff sought to recover damages for personal injuries sustained when struck by the automobile of defendant. Upon a trial by jury plaintiff had judgment, from which judgment defendant appeals.

It was practically conceded in the trial court that plaintiff sustained his injuries as a result of the negligence of the driver of the automobile and without fault on the part of plaintiff. The real issue was whether said automobile was being driven by defendant Wada at the time or, as claimed by said defendant, said automobile was being driven by some other person who had stolen the same. The evidence was conflicting upon this issue.

The accident occurred after 11 p. m. on August 13, 1933, in the city of Watsonville. Plaintiff produced two witnesses who claimed to be able to identify defendant as the driver of the car. Each of said witnesses admitted that he looked at the driver of the car for only about one second as said driver left the car and fled from the scene of the accident. On the other hand, defendant produced seven witnesses

to prove that defendant was not driving the car at the time. The jury, however, resolved the conflict in favor of plaintiff.

[1] Before discussing the appeal on its merits, we should dispose of the motion made by appellant in this court for leave to take additional evidence. Appellant sought such leave for the purpose of showing that, since the trial of the cause, respondent had been convicted of a felony and to further show that, since the trial of the cause, one Yutaka Nakamura had been arrested and had confessed that he had stolen appellant's automobile on the night in question and was driving the same at the time of the accident. Respondent opposed the granting of said motion upon the ground that the cause was tried by a jury, and that in such cases, an appellate court may not take additional evidence. *People v. Myers*, 122 Cal. App. 675, 10 P.(2d) 498; *People v. Willison*, 122 Cal. App. 760, 10 P.(2d) 766; *Syfert v. Solomon*, 95 Cal. App. 228, 272 P. 810. The authorities cited clearly sustain respondent's position. The motion must therefore be denied and it is so ordered.

Appellant contends that the judgment should be reversed because of prejudicial misconduct on the part of counsel for respondent. The main charge of misconduct centers around the references to insurance made by counsel for respondent in the examination of the jurors. We may first refer to the reasoning found in the authorities dealing with this subject.

[2] While the probable prejudice resulting from any reference to insurance in an action for damages is universally recognized, it is likewise recognized that a plaintiff is entitled to a fair and impartial jury. Therefore the rule permitting counsel to ask in good faith whether a prospective juror is interested in a particular insurance company or in any insurance company has been established as a rule of necessity. The authorities, however, have quite definitely limited the scope of the examination along this line. Reference may be made here to the exhaustive discussion of this subject in *Arnold v. California Portland Cement Co.*, 41 Cal. App. 420, 183 P. 171. The court there said on pages 425 and 426, 183 P. 171, 173: "But counsel must take pains to propound such questions in such a manner as not unnecessarily to convey the impression that the defendant is in fact so insured. It is misconduct on the part of counsel for plaintiff in such actions so to frame his

question that it goes beyond what is reasonably necessary to serve the legitimate purpose of eliciting the facts he is entitled to adduce in order to secure a jury free from bias or prejudice, if it is also apparent that the question may fairly be said to have the effect of serving the illegitimate purpose of prejudicing the jury by fixing in their minds the idea that the defendant is protected by insurance against liability for negligence. * * * Asking a juror whether he is interested in a specified casualty company, or, generally, in any insurance company, if the question be propounded in good faith, may be necessary in order to insure the plaintiff a body of jurors unbiased by any connection in favor of the party really interested in the defense of the action. But beyond this it is neither necessary nor proper to go. It is not permitted to counsel, under the guise of testing their qualifications as jurors, to go beyond what is necessary to insure a body of unbiased jurors and seek to create the impression that an insurance company, and not the defendant in the case, will be called upon to respond to such damages as the jury may assess. When questions propounded to prospective jurors overreach the limit, they may prove unprofitable to the party asking them."

The *Arnold Case* has been cited with approval on numerous occasions (*Citti v. Bava*, 204 Cal. 136, 266 P. 954; *Robbins v. Roques*, 128 Cal. App. 1, 16 P.(2d) 695; *Dermer v. Pistoresi*, 109 Cal. App. 310, 293 P. 78; *Curtis v. McAuliffe*, 106 Cal. App. 1, 288 P. 675; *McVea v. Nickols*, 105 Cal. App. 28, 286 P. 761; *Dougherty v. Ellingson*, 97 Cal. App. 87, 275 P. 456; *Daniel v. Asbill*, 97 Cal. App. 731, 276 P. 149; *Sharkey v. Sheets*, 87 Cal. App. 99, 261 P. 1049; *Eldridge v. Clark & Henery Const. Co.*, 75 Cal. App. 516, 243 P. 43, and in *Curtis v. McAuliffe*, 106 Cal. App. 1, on page 12, 288 P. 675, 679, the court said: "The rule established in these cases goes far enough, and we cannot approve any extension of it."

In the present case counsel for respondent propounded to numerous jurors proper questions on the subject under discussion. In certain instances questions regarding insurance were practically the only questions asked of these jurors. When counsel examined Mrs. Rose M. Hoover, the following questions were asked and the following answers were given:

"Q. You are not financially interested in the State Farm Mutual Insurance Com-

pany of Bloomington, Illinois? A. My car is insured in that.

"Q. In that company? A. Yes. * * *

"Q. Would the fact that your car is insured in this company, do you think that would tend or cause you to lean in their favor a little bit? A. I don't see why it would."

Counsel for appellant objected after the answer was given. The objection was sustained and the jury was admonished. In examining Mrs. Maude C. Evans, the following questions were asked and the following answers were given:

"Q. Are you or any of your family interested financially in the State Farm Mutual Insurance Company of Bloomington, Illinois? A. I can not say positively, Mr. Evans attends to that business, but if the line is carried by the Farmers Cooperative Exchange, I think the car is insured in that company.

"Q. I am almost sure that is the Farmers Inter-Exchange Insurance Company of Los Angeles, you are speaking of, at any rate no matter what it is would that have any bearing on your sitting in this action? A. No."

We are of the opinion that the foregoing examination went beyond what was reasonably necessary to serve the legitimate purpose for which questions may be asked regarding the possible interest of the juror in an insurance company. In the case of Mrs. Hoover, counsel asked her if the fact that she was insured in "this company" (State Farm Mutual Insurance Company) would cause her to "lean in their favor a little bit." In the case of Mrs. Evans, counsel asked her if the fact that she might be insured in State Farm Mutual Insurance Company would have any bearing on her sitting "in this action." In both instances counsel directly implied that appellant was insured in said insurance company and that said company rather than appellant would be required to respond to any verdict that might be rendered. We cannot place the stamp of approval on this line of questioning, as it could only serve the illegitimate purpose of unduly impressing upon the minds of the jurors the idea that the de-

fendant was protected by insurance. We therefore conclude that counsel overstepped the bounds of propriety and was guilty of misconduct.

[3,4] The further inquiry arises as to whether such misconduct was prejudicial. In pursuing this inquiry, we are fully aware of the numerous cases in which judgments have been affirmed despite such misconduct where the question of liability was not a close one and where the damages awarded were not disproportionate to the injuries received. This seems to be the accepted test in determining whether such judgments may be affirmed under section 4½ of article 6 of the Constitution. *Robbins v. Roques*, supra; *Eldridge v. Clark & Henry Const. Co.*, supra; *Arnold v. California Portland Cement Co.*, supra; *Dougherty v. Ellingson*, 97 Cal. App. 87, 275 P. 456; *Daniel v. Asbill*, 97 Cal. App. 731, 276 P. 149; *Girard v. Irvine*, 97 Cal. App. 377, 275 P. 840. But here the question of liability was, to say the least, a close one. Seven witnesses testified in favor of appellant on the principal issue before the jury, while but two testified in favor of respondent. This does not necessarily mean that there was a preponderance of the evidence in favor of appellant as that term is used in law, but it does indicate that any such misconduct might well have played a definite part in improperly influencing the jury.

As was said in *Squires v. Riffe*, 211 Cal. 370, at page 374, 295 P. 517, 519, quoting with approval from *Citti v. Bava*, supra: "The natural tendency of a line of examination that suggests to the jury that the defendant is indemnified against any judgment for damages against him is highly prejudicial to his rights, especially in a closely balanced case where the evidence otherwise would be easily sufficient on appeal to support a verdict either for the plaintiff or for the defendant." We are of the opinion that the record before us discloses a case where the misconduct must be treated as prejudicial to the rights of appellant.

The judgment is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.

10 Cal.App.2d 89

DAVIDSON et al. v. KESSLER.

Civ. 10529.

District Court of Appeal, Second District,
Division 2, California.

Nov. 8, 1935.

Rehearing Denied Dec. 4, 1935.

Hearing Denied by Supreme Court
Jan. 6, 1936.**1. Contracts** ⇨31

Oral contracts are enforceable except when they are required by Code to be in writing.

2. Frauds, statute of ⇨84

Oral contract, whereby defendant promised plaintiffs to resell wine purchased by plaintiffs, *held* not unenforceable as being within statute requiring certain contracts to be in writing, since statute applies only to those cases in which sale or contract to sell is actually made between seller and purchaser (Civ. Code, § 1624a, subd. 1).

3. Contracts ⇨346(4)

In action for breach of contract whereby defendant orally agreed to resell wine purchased by plaintiffs from another, defendant could not claim error in permitting introduction of testimony tending to prove oral contract at variance with written contract; action being based upon oral contract with defendant, and not upon written contract between plaintiffs and seller of wine.

4. Contracts ⇨153

Court may not assume in absence of evidence that parties intended to make unlawful contract.

5. Intoxicating liquors ⇨327(1)

In action for breach of oral contract whereby defendant agreed to resell wine purchased by plaintiffs before repeal of prohibition amendment, contract *held* not unenforceable as being illegal, where record failed to disclose that parties did not intend resale of wine for sacramental purposes.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Action by Joseph Davidson and another, copartners doing business under the firm name and style of Davidson & Studer, against John J. Kessler. From a judgment for plaintiffs, defendant appeals.

Affirmed.

Birger Tinglof and David Schwartz, both of Los Angeles, for appellant.

Dockweiler & Dockweiler, of Los Angeles, for respondents.

WOOD, Justice.

By an instrument in writing dated September 27, 1933, plaintiffs purchased 2,000 cases of wine from Beaulieu Vineyard through the instrumentality of the sales representative of this company, defendant herein. On the same date defendant by an oral contract with plaintiffs promised to resell the wine for plaintiffs before the repeal of the prohibition amendment at a net profit to plaintiffs of not less than \$1 per case. Defendant failed to comply with the terms of the oral agreement to resell the wine and plaintiffs recovered a judgment for damages for breach of the contract, from which defendant appeals.

Defendant now contends that the contract is unenforceable in view of the provisions of section 1624a, subd. 1, Civil Code, which are as follows: "(1) A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upward shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf."

[1,2] Oral contracts are enforceable except only in those cases which are required by the code to be in writing. The section applies only to those cases in which a sale or contract to sell is actually made between a seller and a purchaser. In the case before us defendant did not agree to buy the wine from plaintiffs but rather agreed to find a purchaser. See *Kutz v. Fleisher*, 67 Cal. 93, 7 P. 195. The contract in question is not embraced within the provisions of the code section upon which defendant relies.

[3] Defendant argues that the trial court erred in "permitting the introduction of the testimony over the objection of the defendant, tending to prove an oral contract in variance with the written contract." The ruling of the court was proper. The action is based upon the oral contract with defendant and not upon the written contract between plaintiff and Beaulieu Vineyard.

[4,5] In asserting that the contract is unenforceable defendant contends that since defendant promised to resell the wine before the repeal of the prohibition amendment, the contract is illegal. In his argument he points out that during prohibition days he sold wine for sacramental purposes. For aught that appears in the record the parties may have intended a resale of the wine in question for sacramental purposes. The court may not assume, in the absence of evidence, that the parties intended to make an unlawful contract.

Defendant complains of alleged errors in the admission of evidence and also that the evidence is insufficient to support the findings as to the amount of damages. The record discloses that the evidence was properly received and is sufficient to support the findings. *Koeberle v. Hotchkiss* (Cal. App.) 48 P.(2d) 104.

The judgment is affirmed.

We concur: CRAIL, P. J.; GOULD, Justice pro tem.



10 Cal.App.2d 144

PEOPLE v. MORE.

Cr. 1844.

District Court of Appeal, First District,
Division 2, California.

Nov. 13, 1935.

1. Criminal law ⇨385

In prosecution for theft of jewelry, owner of jewelry could testify as to its value, notwithstanding that jewelry was not produced at trial (Pen. Code, § 1102).

2. Criminal law ⇨824(3)

In prosecution for theft of jewelry, refusal to give instruction on petty theft held not error where defendant did not request such instruction, especially where full and clear instruction on subject was given.

3. Criminal law ⇨814(1)

In prosecution for theft of jewelry, refusal to instruct that defendant should be acquitted if he never had "the two brief cases" containing jewelry in his possession held

not error, where no mention was made of "brief cases" in information.

4. Criminal law ⇨728(1)

Ruling made after defendant commenced interposing unfounded objections and assignments of misconduct during district attorney's reply argument, that everything which district attorney said could be treated as objected to and assigned as misconduct, could not be treated as statement of trial court that district attorney was guilty of misconduct in everything he said and did.

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Tyler A. More was convicted of grand theft, and he appeals.

Affirmed.

A. J. Hennessy, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

STURTEVANT, Justice.

The defendant was convicted of grand theft. He made a motion for a new trial and he also made a motion in arrest of judgment. The court made orders denying both motions and the defendant appealed from the judgment and from the order denying him a new trial.

[1] He contends that the verdict is contrary to law. That contention is based on the fact that certain jewelry, alleged to have been stolen, was not produced at the trial and that over the objection and exception of the defendant the owner of the jewelry was permitted to testify as to its value. The contention may not be sustained. The owner of property is a competent witness to testify as to its value. *Burns v. Osborne-Fitzpatrick Finance Co.*, 101 Cal. App. 680, 282 P. 419. The rules of evidence in a criminal action are the same as in a civil action except as modified by statute. Pen. Code, § 1102. No rule requires that property be produced in the courtroom for the purpose of proving its value.

It is next contended that the verdict is contrary to the evidence. The defendant quotes portions of the record showing evidence in his favor. It will be conceded that there was, including his own testimony, such evidence. But it must also be

conceded that there was much evidence to the contrary and the jury adopted the latter and refused to follow the former.

[2] The next point presented and argued by the defendant is a claim that the trial court erred in refusing to give certain instructions asked by the defendant. He says the trial court erred because it did not give his proposed instruction on petty theft. But it is a sufficient answer to state that an examination of the record discloses no such request was made. However, it should be stated that the trial court gave a full, clear instruction on the subject.

[3] The fourth instruction which the defendant asked and which was refused was as follows: "You are instructed that if you do not believe from all of the evidence in the case that Tyler More ever had the two brief cases containing jewelry in his possession, you are to acquit the defendant." We think the point may not be sustained. The information was in the usual form. It alleged the theft of certain jewelry, describing it. It made no mention of "brief cases." Hence the instruction was not pertinent to any issue made by the pleadings.

[4] Finally it is asserted that the district attorney was guilty of misconduct. No single act is specified. No assignment is quoted in the briefs. No request is quoted wherein the trial court was asked to admonish the jury and that it failed to do so. But a statement is quoted, in which it is claimed the trial court orally proclaimed that the district attorney was guilty of misconduct in everything he said and did. The record does not sustain the claim. Almost immediately after the district attorney commenced his reply argument the attorney for the defendant commenced interposing objections and assignments of misconduct, none of which were well founded. Finally the court ruled that everything the district attorney said could be treated as objected to and assigned as misconduct. We have read the record and we do not find any misconduct on the part of the district attorney.

The judgment appealed from and the order denying a new trial are both affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

CORVIN et al. v. HYATT et al.

Civ. 10540.

District Court of Appeal, Second District,
Division 2, California.

Nov. 9, 1935.

Rehearing Denied Nov. 15, 1935.

Hearing Denied by Supreme Court
Jan. 6, 1936.

1. Appeal and error ☞ 1004(1)

Verdict will not be set aside on appeal on ground damages are excessive, unless verdict is so outrageously excessive as to suggest at the first blush, passion, prejudice, or corruption.

2. Death ☞ 99(4)

\$5,000 for death of mother who was seventy-seven years of age and had devoted most of her time, services, society, comfort, and counsel to one of her daughters with whom she had lived for twenty-two years held not excessive.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Action by Kathryn E. Corvin and others against Victor Hyatt, the National Automobile Insurance Company, and another. Judgment for plaintiffs, and the named defendants appeal.

Affirmed.

George L. Greer, of Los Angeles, for appellants.

J. Howard Corvin, of Los Angeles, for respondents.

McCOMB, Justice pro tem.

This is an appeal by defendants from a judgment in favor of plaintiffs after a trial before a jury.

[1,2] The sole question presented for determination is: Was the verdict of the jury for \$5,000 excessive damages, as the decedent was seventy-seven years of age, the mother of plaintiffs, who devoted most of her time, services, society, comfort, and counsel to one of her daughters with whom she lived for twenty-two years?

The jury's verdict will not be set aside upon appeal on the ground that the damages are excessive, unless the verdict is so outrageously excessive as to suggest at the first blush, passion, prejudice, or corruption. *Bach v. C. Swanston & Son*, 105 Cal. App. 72, 83, 286 P. 1097; *Kerrison v. Unger*, 135 Cal. App. 607, 612, 27 P.(2d) 927. In the

instant case the amount of the award does not fall in this category.

The judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.



**DRYDEN v. BOARD OF PENSION COM'RS
OF CITY OF LOS ANGELES et al.**

(two cases). *

Civ. 9912, 10025.

District Court of Appeal, Second District,
Division 1, California.

Nov. 1, 1935.

Hearing Granted by Supreme Court
Dec. 30, 1935.

1. Municipal corporations ⇨187

Evidence held to support finding that policeman's death resulted from traumatic thrombosis caused by injury in automobile collision and that widow was entitled to pension if other conditions were met (St. 1927, p. 2023, § 183).

2. Municipal corporations ⇨187

"Pension" based on policeman's payment of 4 per cent. of each salary check for period of fourteen years preceding death is not "gratuity" but periodical allowance of money granted by city in consideration of services rendered or of loss or injury sustained, and payments actually made for such purpose (St. 1927, pp. 2024, 2025, §§ 186, 186½).

[Ed. Note.—For other definitions of "Gratuity" and "Pension," see Words & Phrases.]

3. Municipal corporations ⇨187

Pension provisions of city charter are integral portion of contemplated compensation set forth in contract of employment between city and member of police department, and are indispensable part of such contract under which right to pension becomes vested on acceptance of employment by applicant (St. 1927, pp. 2023, 2024, 2025, §§ 183, 186, 186½).

4. Statutes ⇨224

Statutes providing for payment of pension to widow of policeman who has died as result of injury received during performance of duty and that no suit should be brought on any claim for money against city unless demand is presented within six months after last item of account or claim accrues should

be construed together (St. 1927, pp. 2014, 2023, §§ 376, 183).

5. Municipal corporations ⇨187

Failure of widow of policeman to file claim for payment of pension within six months after death of husband held not bar to right to pension payments which accrued within period of six months prior to application for pension or subsequent to that date, since right to pension is a continuing one (St. 1927, pp. 2014, 2023, §§ 376, 183).

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Proceeding on the petition of Maude Dryden against the Board of Pension Commissioners of the city of Los Angeles and Irving Hellman and others, as members of the Board of Pension Commissioners of the city of Los Angeles. From the judgment, petitioner and defendants separately appeal.

Reversed, with directions.

Ignatius F. Parker and Albert Sidney Brown, both of Los Angeles, for petitioner.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Robert J. Stahl, Deputy City Atty., all of Los Angeles, for defendants.

ROTH, Justice pro tem.

Petitioner and defendants both filed separate appeals from the judgment in this case in favor of defendants. Petitioner's appeal is Civil No. 9912, and the appeal of defendants is Civil No. 10025. Both will be considered together.

Petitioner is the widow of Claude Le Roy Dryden, a former police officer of the city of Los Angeles, who for more than three years prior to his death held the rank of detective-lieutenant. The trial court found from conflicting evidence that on October 13, 1924, deceased received injuries in an automobile accident, occurring while deceased was acting in the line of duty, which injuries were a primary contributing cause of his death on August 10, 1931. On June 6, 1932, approximately ten months after the death of Dryden, his widow, petitioner herein, presented to the board of pension commissioners of the city of Los Angeles and the members thereof (defendants herein) her claim and petition for pension, which was by said

board denied. The trial court upheld the action of the pension board on the sole ground that section 376 of the city charter (St. 1927, p. 2014) required all such claims or demands to be presented within six months, and that, since more than six months had elapsed since the death of petitioner's husband, the said claim was barred and petitioner entitled to no relief under the pension provisions of the city charter of the city of Los Angeles.

The sole point presented on petitioner's appeal (Civ. No. 9912) is the correctness of the trial court's ruling in this respect. The appeal of defendants (Civ. No. 10025) attacks the correctness of the finding made by the trial court to the effect that the injuries received in the accident of 1924 were a primary cause of death. A number of experts testified as to the cause of death, and the trial court in a written opinion sums up the evidence and states its conclusions as follows:

"Dr. R. M. Dunsmoor, the only physician who performed an autopsy and the only eye witness thereto, testified that upon the opening of the heart of the deceased he found a thrombus, a fibrous ribbon-like substance about the size of a rubber document band, such as he presented at the trial. This thrombus when found was attached to the lower apex of the right ventricle, extending free, upward, in the main sinus of the ventricle, through the tricuspid valve into the right auricle. He testified that the clinical symptoms indicated a degree of closure of the tricuspid valve by reason of the presence of this connective, ribbon-like tissue, which closure resulted in the death of the lieutenant.

"All of the evidence of the physicians indicated that thrombosis may *originate* in an ante mortem blood clot forming by reason of such a fracture.

"The physicians differed materially as to whether such a thrombus would tend to and could work its way *against* the blood stream through the tricuspid valve into the auricle. One of the witnesses stated that it would tend to and does in many cases work its way into the pulmonary arteries.

"None of the evidence denies that the witness Dr. Dunsmoor found the conditions as stated. He was an eye witness, the only one, and his evidence is contradicted only by the negative evidence of learned witnesses as to their observation

in numerous other cases and their deduction from years of study and practice.
* * *

"We value very highly the testimony of these learned men, but in applying the law of evidence greater weight must be given to the unshaken testimony of an expert *eye witness*.

"We are therefore inclined to hold that the lieutenant's death resulted from a traumatic thrombosis caused by the injury in the automobile collision in question."

[1] A perusal of the reporter's transcript convinces us that the foregoing résumé of the evidence made by the trial court is fair and fully corroborated by the record. We are, therefore, satisfied that there was a substantial conflict in the evidence, and that the conclusion of the trial court on the facts cannot be disturbed.

[2,3] Petitioner's appeal presents a more substantial question. Section 186 of article 17 of the charter of the city of Los Angeles (St. 1927, p. 2024) provides for the creation of a pension fund and particularizes the sources from which money shall be derived to make up the fund. Section 186½ of the same article (St. 1927, p. 2025) requires, in effect, that a member of the police or fire departments of the city of Los Angeles shall pay to this fund 4 per cent. of each salary check received. The deceased was a member of the police department for approximately fourteen years before his death, during the entire period of which he paid his required 4 per cent. of each salary check received. A pension based upon such facts is not a gratuity. It is a periodical allowance of money granted by the city in consideration of services rendered or of loss or injury sustained, and payments actually made for that purpose. It has been clearly held that the pension provisions of the city charter are an integral portion of the contemplated compensation set forth in the contract of employment between the city and a member of the police department, and are an indispensable part of that contract, and that the right to a pension becomes a vested one upon acceptance of employment by an applicant. *O'Dea v. Cook*, 176 Cal. 659, 169 P. 366; *Aitken v. Roche*, 48 Cal. App. 753, 192 P. 464; *French v. Cook*, 173 Cal. 126, 160 P. 411; article 17, § 183, Charter of the City of Los Angeles.

The pertinent portion of section 183 of the charter is as follows:

"Whenever any member of the * * * Police Department shall die as a result of any injury received during the performance of his duty * * * then an annual pension shall be paid in equal monthly installments to his widow * * * in an amount equal to one-half (½) of the average monthly rate of salary which such deceased member shall have received in such department during the three years immediately preceding the time of his death." Stats. 1927, pp. 2008, 2023.

[4, 5] Section 183 undoubtedly gives to petitioner the unqualified right to a pension. The section does not, nor does any other section of article 17, which article is in its entirety devoted to pensions, set out the procedural machinery by which the pension therein provided for may be obtained. There is nothing in the whole of said article 17 which requires a widow to file an application for a pension within a given period of time or to file such an application at all. As defendants concede in their brief, "standing alone, it (section 183) amounts to a declaration that a pension shall be paid, but is silent as to the manner of its payment." It seems to be conceded by all parties that section 183 provides that, when the facts stated therein exist relative to the death of a member of the police department as a result of any injury received during the performance of his duty, "then an annual pension shall be paid in equal monthly installments to his widow."

All of the facts which are required to exist as conditions precedent to the enforcement of a pension claim, as required by section 183, have been by the trial court found to exist. Defendants assert, however, that the charter must be read as a whole, and that section 376 of article 28 of the charter requires that a claim or application for a pension must be filed within six months. The pertinent portion of section 376 is as follows:

"No suit shall be brought on any claim for money * * * against the City of Los Angeles, or any * * * board of the city, until a demand for the same has been presented, as herein provided, and rejected in whole or in part. * * * Except in those cases where a shorter period of time is otherwise provided by law, * * * all * * * claims or demands shall be presented within six (6)

months after the last item of the account or claim accrued." Stats. 1927, p. 2014.

It has been consistently held that laws requiring the presentation of claims, whether sounding in tort or in contract [Western Salt Co. v. City of San Diego, 181 Cal. 696, 186 P. 345] to a designated officer or governmental agency within a limited time as a condition precedent to institution of action, are constitutional [Yolo County v. City of Sacramento, 36 Cal. 193; Farmers' & Merchants' Bank of Los Angeles v. City of Los Angeles, 151 Cal. 655, 91 P. 795; Geimann v. Board of Police Commissioners, 158 Cal. 748, 112 P. 553; McQuillen Municipal Corps. (2d Ed.), vol. 6, p. 463; Chapman v. City of Fullerton, 90 Cal. App. 463, 265 P. 1035; Southern Pacific Co. v. City of Santa Cruz, 26 Cal. App. 26, 145 P. 736; Brown v. Board of Police Commissioners, 2 Cal. App. (2d) 245, 37 P.(2d) 737]; and it has been specifically held that a claim for salary unlawfully withheld cannot be recovered in absence of allegation and proof that section 376 had been complied with [Shannon v. City of Los Angeles, 205 Cal. 366, 270 P. 682; Brown v. Board of Police Commissioners, supra]. So, also, it has been held that, in the absence of charter provisions, the statute of limitations specified by subdivision 1, § 338, Code of Civil Procedure, will run against a claim for accrued pension payments. Hermanson v. Board of Pension Commissioners, 219 Cal. 622, 28 P.(2d) 21. The point made by defendants, therefore, that the provisions of section 183 should be read together with those of section 376 must be conceded. This concession, however, does not in our opinion mean that petitioner is not entitled to *any* pension payments. The right to pension payments *is a continuing right*. Petitioner by her conduct may have barred herself from collecting payments which have accrued, but this does not mean that she is without means to enforce her right to *present and future* pension payments, as distinguished from past and accrued pension payments, provided she proceeds to do so in the manner required by law. The distinction between a single covenant and a continuing covenant is well settled in the law. McGlynn v. Moore, 25 Cal. 384, 395; German-American Savings Bank v. Gollmer, 155 Cal. 683, 102 P. 932, 24 L. R. A. (N. S.) 1066; Mulborn v. Montezuma Improvement Co., 69 Cal. App. 621, 232 P. 162; Woodard v. Glenwood Lum-

ber Co., 171 Cal. 513, 153 P. 951; Grotheer v. Panama-Pacific Land Co., 41 Cal. App. 19, 22, 181 P. 667; Congregation of the Roman Catholic Church of Ascension v. Texas & P. Ry. Co. (C. C.) 41 F. 564. A case directly in point is Gaffney v. Young et al., 200 Iowa, 1030, 205 N. W. 865, 867. In the Gaffney Case, the deceased husband of the petitioner in said action died on January 18, 1912, of illness as result of exposure suffered in the performance of his duties as a policeman. Petitioner filed application for pension on September 10, 1924, more than twelve years after the death of her husband. The claim was rejected. There were no charter provisions requiring the presentation of a claim within six months or within any other period of time, but in the Gaffney Case, as in the Hermanson Case, 219 Cal. 622, 28 P.(2d) 21, the plea of the statute of limitations was raised. The court passed directly upon the question and said:

"The question here is whether, when the right of the appellee to a pension accrued and vested in her on the death of her husband, the right to enforce it may be wholly lost and barred by a failure to do so within the period of any statutory limitation. The act providing for the creation of the pension fund and for the payment of pensions from it fixes no limit of time within which application for a pension must be made or action to enforce the right commenced. The appellee's right to the pension, assuming it to exist, and to the payments to be made monthly would continue during her life, so long as she remained unmarried and of good moral character. *The right was and is a continuing one*, and, so far as present and future payments are concerned, we are of the opinion it was one she could enforce at any time upon proof of the facts sustaining it. * * *

"If appellee was, on the death of her husband, entitled to a pension, *her right to present and future payments* from the pension fund is not barred by any provision of the statute of limitations. * * *

"Counsel for appellants relies upon Nicols v. Board of Police Pension Fund Com'rs, 1 Cal. App. 494, 82 P. 557, * * * and Lund v. Minneapolis Fire Department Relief Ass'n, 137 Minn. 395, 163 N. W. 742, as holding that a claim for a pension may be barred by the statute

of limitations. * * * In neither of these cases was the fact that the *right to the pension was a continuing one considered.*" (Italics ours.)

It may be added that in the case of Nicols v. Board of Police Pension Fund Commissioners, supra, the claim made was in its entirety for past accrued payments. The same question was therefore not before the court on the facts of that case, and for that very good reason is not even considered.

It is our opinion that the petitioner is entitled to all those periodic pension payments which fell due within a period of six months prior to her application to the board of pension commissioners, and to all those periodic pension payments which have accrued since such date and which will continue to accrue in the future under the provisions of section 183 of the charter.

The judgment is reversed with directions to the trial court to amend its findings and enter judgment in favor of petitioner in accordance with the views herein expressed.

We concur: HOUSER, P. J.; DORAN, J.



9 Cal.App.2d 707

PACIFIC DRY GOODS CO. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 9933.

District Court of Appeal, First District,
Division 1, California.

Nov. 4, 1935.

I. Courts ☞ 176½

Dismissal on motion of plaintiff, pursuant to statute providing for dismissal of appeals from justices' courts, of appeal from judgment of small claims court five years after appeal was filed *held* proper, even though appeal was filed prior to revision of statute providing that appeals from small claims court should be taken in same manner as from justices' court (Code Civ. Proc. § 981a, and § 927] [now § 117]), as re-enacted and re-numbered by St. 1933, p. 1820).

2. Courts ⇨176½

Whether verified demand filed in small claims court was sufficient to vest court with jurisdiction could not be determined in proceeding questioning jurisdiction of superior court to dismiss appeal from judgment rendered by small claims court (Code Civ. Proc. § 981a).

3. Costs ⇨252

Dismissal of appeal from judgment rendered in small claims court for failure to bring appeal to trial within one year after filing held "final judgment" authorizing addition of attorney's fee in sum of \$15 to amount of judgment as provided by statute (Code Civ. Proc. § 927j, as re-enacted and renumbered by St. 1933, p. 1820; § 981a).

[Ed. Note.—For other definitions of "Final Decree or Judgment," see Words & Phrases.]

Certiorari by the Pacific Dry Goods Company, a copartnership, consisting of Y. Toyomoto and others, against the Superior Court of the state of California, in and for the City and County of San Francisco, and others, to have an order dismissing an appeal annulled.

Writ discharged.

Jesse A. Mueller, of San Francisco, for petitioner.

George C. W. Egan, of San Francisco, for respondents.

KNIGHT, Justice.

More than five years after petitioner had filed an appeal in the superior court from a judgment rendered against it by a justice of the peace while exercising the jurisdiction of the small claims court, the superior court, on motion of the plaintiff in the action, dismissed the appeal pursuant to the mandatory provisions of section 981a of the Code of Civil Procedure which require the superior court, on its own initiative or on motion of any interested party, to dismiss any appeal theretofore or thereafter taken from the justice court when the appealing party has failed to bring said appeal to trial in the superior court within one year after the same is filed therein. And petitioner now seeks by this proceeding in certiorari to have the order of dismissal annulled.

[1] Said section 981a was enacted in 1923; and prior thereto it had been held in three early cases, the last of which was

Kraker v. Superior Court, 15 Cal. App. 651, 115 P. 663, that in justice court appeals taken by a defendant on questions of law and fact it was incumbent on the plaintiff in the action and not the defendant, as the appealing party, to bring the appeal to trial in the superior court; and as ground urged for the annulment of the order of dismissal herein, petitioner contends that said section 981a when enacted applied exclusively to appeals from justices' courts and did not become operative as to appeals from small claims courts until 1933, at which time section 927j was revised, re-enacted, and renumbered as section 117j of said Code (St. 1933, p. 1820); that the revised section contained no retrospective clause; and that therefore, inasmuch as the appeal herein was taken prior to such revision, the judicial doctrine restated in the Kraker Case, supra, and not the legislative rule established by said section 981a, should have been held controlling herein in determining the motion for dismissal. We find no merit in the foregoing contention.

The manifest purpose of the enactment of section 981a was to abrogate the judicial doctrine declared by the earlier cases above referred to, and to establish a new uniform rule contrary thereto which should thereafter govern the superior court in the exercise of its power in dealing with the dismissal of all appeals from inferior courts and which also would be in conformity with the settled doctrine governing the dismissal of appeals taken from superior court judgments, namely, that the burden is on the appealing party to prosecute his appeal with diligence; otherwise it will be dismissed. The small claims court came into existence in 1921, two years prior to the enactment of section 981a, but, as will hereinafter appear, an independent tribunal was not created. The law provided merely for a subsidiary of the justice court. By virtue of section 927 of the same Code, also enacted in 1921, "all justices of the peace" were charged with the duty of exercising the jurisdiction conferred upon the small claims courts; and as said in Hughes v. Municipal Court, 200 Cal. 215, 252 P. 575, 576, "The Legislature, by providing the small claims court procedure did not set up a separate, independent judicial tribunal, to be presided over by a judge elected or appointed exclusively to perform the duties

prescribed by the small claims court statute, but made it the duty of the several justices of the peace of the state to enforce its provisions. In other words, additional duties were imposed by statute upon the justices of the peace. * * * Thus it will be seen that a separate, formally constituted court was not created, but a certain procedure was merely adopted as to small demands, and the justices of the peace were required to conform to it in actions where the demand was \$50 or less. The justice's courts always had jurisdiction of the subject-matter of the actions affected by the small claims court procedure. The practical effect of the statute was to lay additional burdens upon the justices of the peace as to matters of procedure. We think it apparent that it was not the intention of the Legislature to establish a separate court of justice in the sense that courts are ordinarily constituted." It is evidence, therefore, that by the enactment of section 981a it was intended to prescribe a single rule to be followed by the superior court in dealing with motions for the dismissal of all appeals from judgments rendered by justices of the peace sitting either as such or while exercising the jurisdiction of the small claims courts, and that thereafter there should not exist two contradictory rules, one to be followed in determining motions for the dismissal of appeals from judgments rendered by justices of the peace acting as such, and another to be applied when the judgments appealed from were rendered by such justices through the medium of the small claims court.

The clause incorporated in the revised section 117j (St. 1933, p. 1820), upon which the whole force of petitioner's argument seems to depend, reads as follows: "Except as otherwise provided in this chapter, such appeal [from the small claims court] shall be *taken* as provided in Chapter III of Title XIII of Part II of this code for appeals from justices' courts." (Italics ours.) As will be seen, it pertains merely to the manner of *taking* appeals from small claims courts, and does not purport to trench upon or interfere in any manner with the power of the superior court in the exercise of its appellate jurisdiction, nor to extend or otherwise affect the operation of section 981a.

In other words, prior to the enactment of said revised section, certain Code sections provided for the taking of appeals from small claims courts in a summary manner which was quite different from the procedure prescribed for taking appeals from justices' courts; and in 1933 there was a revision of those Code sections so as to establish a uniform practice for the taking of appeals from judgments rendered by justices of the peace acting strictly as such or while presiding over the small claims courts.

Moreover, as held in *Hochheimer & Co. v. Superior Court*, 65 Cal. App. 206, 223 P. 564, long prior to the enactment of section 981a the superior court was vested with ample power, both inherent and statutory (section 980, Code Civ. Proc.), to dismiss appeals from inferior courts for failure to prosecute the same, or for unnecessary delay in bringing them to a hearing. It would seem, therefore, that even aside from the mandatory duty imposed by the provisions of section 981a, the superior court in the present case was authorized to dismiss the appeal upon the ground stated in its order.

[2] Further contention is made that the verified demand filed by the plaintiff in the small claims court was legally insufficient to vest jurisdiction in said court to hear or determine the cause. But the question presented thereby is one of law of which the superior court had jurisdiction to hear and determine upon the hearing of the appeal. Consequently, petitioner is precluded from having it determined in the present proceeding. *Hochheimer & Co. v. Superior Court*, supra. We are concerned here only with the question of the jurisdiction of the superior court to make the order dismissing the appeal.

[3] Nor did the superior court exceed its jurisdiction, as petitioner contends, in adding to the amount of the judgment attorney's fees in the sum of \$15, as provided in said section 117j, for the reason that the order of dismissal was in effect a "final judgment" in the action, within the meaning of said section.

The writ is discharged.

We concur: TYLER, P. J.; CASHIN, J.

KELLETT v. MARVEL *

Civ. 9549.

District Court of Appeal, Second District,
Division 1, California.

Nov. 1, 1935.

Rehearing Denied Nov. 25, 1935.

Hearing Granted by Supreme Court
Dec. 30, 1935.

1. Divorce ⇨181

Notice of appeal, in divorce action, which specifically stated that plaintiff was appealing from order denying her motion to resist defendant's application for final decree of divorce, was insufficient notice of appeal from final decree of divorce (Code Civ. Proc. § 940).

2. Divorce ⇨181

Notice of appeal from order in divorce action denying plaintiff's motion to resist defendant's application for final decree of divorce held ineffectual, since appeal does not lie from order made before judgment (Code Civ. Proc. § 940).

3. Appeal and error ⇨418

Actions which were consolidated for purpose of trial were not consolidated as one action for all purposes thereafter, and notice of appeal in one action was insufficient notice of appeal in the other actions (Code Civ. Proc. §§ 940, 1048).

4. Appeal and error ⇨110

Appeal does not lie from order denying motion for new trial.

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by Marion Clara Kellett against O. R. Marvel, administrator of the estate of Thomas N. Kellett, deceased, substituted for Thomas N. Kellett, deceased. From an order, the plaintiff appeals.

Appeal dismissed.

Marion Clara Kellett, in pro. per.

Neil G. Locke, of Los Angeles, for respondent.

EDMONDS, Justice pro tem.

The tangled skein of this litigation includes four separate actions brought by appellant as plaintiff in the superior court. In the first action numbered D-57350 in that court, she sued for divorce. Her husband defaulted and she secured an interlocutory decree of divorce, which ordered him to pay her the sum of \$2,400, awarded her certain personal property, and

gave him certain real estate. The property rights were determined in accordance with an agreement which the parties had entered into. Thereafter, appellant moved to set aside the interlocutory decree of divorce under the provisions of section 473 of the Code of Civil Procedure. This motion was denied and the ruling was affirmed on appeal. Kellett v. Kellett, 110 Cal. App. 691, 294 P. 755. Subsequently appellant made a motion for counsel fees in connection with an appeal from another order made after judgment, and for alimony, which motion was denied. This ruling was also affirmed on appeal. Id. (Cal. Sup.) 39 P.(2d) 203.

During the progress of the various proceedings in the divorce action, appellant filed three other actions against her husband. In the first of these (No. D-65544), she sought to set aside the interlocutory decree of divorce which had been made in her favor in action No. D-57350. Another action (No. 306434) was brought by appellant for the purpose of quieting title to the real estate awarded to the husband in the divorce action (No. D-57350), pursuant to the property settlement agreement. In the last action commenced by appellant (No. D-92871), she asked the court to set aside the interlocutory decree in the divorce action (No. D-57350), and the judgment in case No. D-65544, by which the court refused to set aside the same decree.

In February, 1931, the cases mentioned were in the following situation: In the divorce action a motion made by appellant "to deny the application and motion of the defendant for a final decree" was pending for hearing. The issues in cases numbered 306434 and D-92871 were ready for trial. Case No. D-65544 had been tried two years before and a judgment entered therein adverse to the appellant. No appeal had been taken therefrom. When appellant's motion, termed by her "a resistance to the filing of the final decree," came before the court, the trial judge suggested that he hear not only the motion but also that he also try the issues in the other cases. His statement to counsel was that "you better enter into a written stipulation all those cases may be consolidated for the purpose of trial at this time. Then you will have all of them, and then I will give a decision in each and every one of them."

Accordingly, a written stipulation was filed in each of the four cases identical in form except as to case numbers, and providing "that the cases * * * may be consolidated * * * for hearing, and that all the matters therein contained may be heard and adjudicated at this time and the decision entered herein shall be in complete adjudication of each case herein designated." The trial proceeded, evidence was introduced by both parties, and the court determined all issues adversely to appellant. A written order was filed denying appellant's motion in case No. D-57350, and separate judgments were filed in each of cases numbered 306434 and D-92871. The judgments are based upon separate findings of act and conclusions of law. No judgment or order was made at that time in case D-65544, and we cannot see why this case was included in the stipulation for trial. It had been tried some two years before, judgment had been entered adverse to the appellant here, and no appeal had been taken therefrom. Obviously that judgment had become final, and while the principal question before the court in the trial of the issues presented in the other three cases was whether or not they were *res judicata* by reason of the judgment in case D-65544, the latter action could not have been before the court for any purpose other than a consideration of the terms of the judgment previously rendered to determine the issue of *res judicata* in the other cases.

The present appeal comes to this court under a notice filed only in case D-57350 and in which it is stated appellant appeals: "From the order denying plaintiff's motion to resist defendant's application for final decree of divorce entered and rendered in said action in favor of the defendant, Thomas N. Kellett, and against the plaintiff, Marion Clara Kellett, on the 19th day of March, 1931, and entered in Book 787, page 112, on the 27th day of March, 1931, and the whole thereof; and from the order rendered in the above-entitled action, in favor of defendant and against the plaintiff, but being case No. D-65544, on the 26th day of March, 1931, and the whole thereof; and from the judgment rendered in the above-entitled action, but being case No. D-92871, in favor of the defendant and against the plaintiff, on the 19th day of March, 1931, and entered in Book 773, page 188, on the 28th day of March, 1931, and from the whole there-

of; and from the judgment rendered in the above-entitled action, but being case No. 306434, in favor of the defendant and against the plaintiff, on the 19th day of March, 1931, and entered in Book 772, page 150 on the 27th day of March, 1931, and from the whole thereof; and from the order denying plaintiff's motion for new trial entered on the 19th day of May, 1931 in Book 61, page 3, and the whole thereof."

Since the appeal was taken, Thomas N. Kellett, appellant's former husband and the defendant in all of the cases mentioned, died, and his representative has been substituted as respondent.

[1,2] The first question presented is to determine from what order or judgment appellant has appealed in case D-57350. One day after the order and the two judgments were filed determining the rights of the parties on the motion in case D-57350 and the issues in cases 306434 and D-92871, the final decree of divorce in case No. D-57350 was filed. This decree was apparently filed without reference to the trial of the issues referred to, except as appellant's motion may have delayed such action, being signed by another judge and reciting that "now upon the court's own motion it is adjudged that plaintiff is granted a final judgment of divorce from defendant." The notice of appeal specifically states that appellant appeals from the order denying her motion, and from the plain terms of the notice and the record before us, it is insufficient as a notice of appeal from the judgment. As an appeal does not lie from an order made before judgment, the notice is also ineffectual as an appeal from the order denying appellant's motion seeking to prevent the entry of the final decree of divorce.

By the next specification the appellant attempts to appeal from an order stated to have been made in case No. D-65544. The record shows no such order made in that case on the date stated or at any other time.

[3] The two following specifications recite that the appellant appeals from the judgments in cases numbered D-92871 and 306434. As has been stated, there is only one notice of appeal, which is entitled and filed in the divorce action. An appeal is taken by filing a notice of appeal. Section 940, Code Civ. Proc. "The notice of appeal is a necessary part of the record in order that this court may be enabled to

assume jurisdiction of the appeal." Nevin v. Mallon, 136 Cal. App. 571, 572, 29 P.(2d) 303, 304. While it is true that when actions are consolidated, they are thereafter treated as a single action (1 Cal. Jur. 374), we think that the record here does not show such a consolidation. On the contrary, it appears that upon the suggestion of the trial judge, the cases were tried together as a matter of convenience. This is a common practice in trial courts, but when this course is followed the actions are not consolidated in the statutory sense of that term.

The suggestion of the trial judge, at the commencement of the hearing of appellant's motion, was that the cases should be consolidated "for the purpose of trial." A statutory consolidation is for all purposes thereafter, with a single set of findings to be made as the basis of a single judgment. Such a consolidation was certainly not contemplated by the judge in view of his further statement that "then I will give a decision in each and every one of them." The minute order recites that it is stipulated "that cases D-65544, D-92871 and 306434 be consolidated and tried with case No. D-57350, and that all testimony taken apply to either case, so far as competent, relevant and material." The language of the written stipulation seems also to contemplate a consolidation for the purposes of trial only. It is significant, although not controlling in this connection to note the order denying appellant's motion filed in case No. 57350, and the findings of fact and conclusions of law and the judgment in each of cases D-92871 and 306434. These indicate that the cases were considered by the court as having been tried together but not consolidated as one action. And not only did appellant's counsel make no objection to the rendition and entry of separate judgments, but he filed a separate notice of intention to move for a new trial in each case. This clearly shows that he did not consider that the cases had been consolidated. And the ruling of the court on the motions was "that said motion be and the same is hereby denied in each case."

We, therefore, hold that the cases were not consolidated within the meaning of section 1048 of the Code of Civil Procedure, and that no notice of appeal having been filed in cases D-92871 and 306434, there is nothing before us in those cases. This

conclusion would also apply to case D-65544 if the record showed any judgment or order from which an appeal might be taken.

[4] The remaining specification in the notice of appeal refers to the order denying appellant's motion for a new trial. "An appeal does not lie from an order denying a motion for a new trial." *Burk v. Extrafine Bread Bakery*, 208 Cal. 105, 114, 280 P. 522, 526.

For the foregoing reasons the appeal is dismissed.

We concur: HOUSER, P. J.; YORK, J.



9 Cal.App.2d 629

KELLETT v. MARVEL.

Civ. 10281.

District Court of Appeal, Second District,
Division 1, California.

Nov. 1, 1935.

Rehearing Denied Nov. 25, 1935.

Hearing Denied by Supreme Court
Dec. 30, 1935.

1. Divorce ☞83

Action for divorce is purely personal action, which does not survive death of one of parties.

2. Divorce ☞239

Application for alimony can be made only when action for divorce is pending (Civ. Code, § 137).

3. Appeal and error ☞333

Appeal from order in divorce action denying wife alimony or attorney's fees must be dismissed upon death of husband (Civ. Code, § 137).

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Marion Clara Kellett against O. R. Marvel, administrator of the estate of Thomas N. Kellett, deceased, substituted for Thomas N. Kellett, deceased. From an order, the plaintiff appeals.

Appeal dismissed.

R. C. W. Friday, J. Paul Elliott, and James R. Jaffray, all of Los Angeles, for appellant.

Neil G. Locke, of Los Angeles, for respondent.

EDMONDS, Justice pro tem.

This appeal concerns an order made in the divorce action (superior court No. D-57350), which is the principal case involved in another appeal between the same parties this day decided (Cal. App.) 51 P. (2d) 183.

An interlocutory decree of divorce which also adjudicated property rights of the parties was entered in November, 1927, and a final decree was entered in March, 1931. In February, 1934, appellant secured an order requiring her husband to show cause why he should not be required to pay certain sums as attorney's fees for prosecuting appeals from orders made after judgment, and for appellant's support. A hearing was had on March 7, 1934, at which time appellant's application was denied and a minute order made to that effect. On March 14th an order making recitals at length concerning the rights of the parties as fixed by the litigation up to that time and denying appellant any alimony or attorney's fees was signed and filed. This appeal is from the ruling on the motion. The notice of appeal recites that appellant appeals from each of the orders mentioned and also from an order asserted to have been made on April 16, 1934, denying appellant's motion for a new trial. No order such as the last described appears in the transcript.

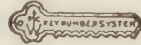
Appellant's former husband died in November, 1934, and his representative has been substituted as respondent in this proceeding. It is now urged that the appeal must be dismissed by reason of the death of Mr. Kellett.

[1-3] An action for divorce is a purely personal action. It does not survive the death of one of the parties. *Kirschner v. Dietrich*, 110 Cal. 502, 42 P. 1064; *Begbie v. Begbie*, 128 Cal. 154, 60 P. 667, 49 L. R. A. 141; *Gloyd v. Superior Court*, 44 Cal. App. 39, 185 P. 995. An application for alimony can be made only when the action for divorce is pending. Section 137, Civ. Code. "It is a collateral proceeding or episode within the action, authorized for a particular purpose, but dependent for its maintenance upon the existence of the action." *Hite v. Hite*, 124 Cal. 389, 398, 57

P. 227, 231, 45 L. R. A. 793, 71 Am. St. Rep. 82.

The appeal must, therefore, be dismissed, and it is so ordered.

We concur: HOUSER, P. J.; YORK, J.



**MITCHELL CAMERA CORPORATION v.
FOX FILM CORPORATION.***

Civ. 10039.

District Court of Appeal, Second District,
Division 2, California.

Nov. 5, 1935.

Rehearing Denied Nov. 26, 1935.

Hearing Granted by Supreme Court
Jan. 2, 1936.

1. Sales ☞3

Agreement is "manufacturing contract" where it calls for manufacture of article for vendee according to his special requirements so that when made it will not be suitable for general trade of vendor, and agreement is "contract for sale of goods" where it calls for sale of article then existing or such as vendor, in ordinary course of its business, manufactures or procures for general market whether on hand or not (Civ. Code, § 1624, as amended by St. 1905, p. 611; Code Civ. Proc. § 1973, as amended by St. 1907, p. 563).

[Ed. Note.—For other definitions of "Manufacturing" and "Sale," see Words & Phrases.]

2. Frauds, statute of ☞84

Agreement by which motion picture company instructed camera company to manufacture fifty 70mm cameras at price of more than \$200 was "contract for sale of goods" which was required to be in writing under statute of frauds, and was not "manufacturing contract," where camera company manufactured cameras for others than motion picture company and cameras were suitable for general trade of camera company (Civ. Code, § 1624, as amended by St. 1905, p. 611; Code Civ. Proc. § 1973, as amended by St. 1907, p. 563).

3. Frauds, statute of ☞144

To estop defendant from relying on statute of frauds, there must be irreparable change of position on part of plaintiff independent of mere part performance of contract and defendant must have made fraudulent representations (Civ. Code, § 1624, as

☞For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 64 P.2d 946.

amended by St. 1905, p. 611; Code Civ. Proc. § 1973, as amended by St. 1907, p. 563).

4. Frauds, statute of ☞144

In seller's action on oral contract for sale of goods of value in excess of \$200, buyer was not estopped from relying on defense of statute where seller did not change its position other than by part performance of contract and buyer made no fraudulent representations (Civ. Code, § 1624, as amended by St. 1905, p. 611; Code Civ. Proc. § 1973, as amended by St. 1907, p. 563).

5. Work and labor ☞26

In action for services performed and materials furnished, plaintiff must prove rendition of services, or furnishing of materials at request of defendant, intent to charge defendant, and acceptance or retention of benefits by defendant.

6. Work and labor ☞3, 4(1)

In action for services performed and materials furnished, recovery could not be had where defendant did not accept or retain any benefits.

7. Appeal and error ☞843(3)

Alleged erroneous rulings in admission and exclusion of evidence which was not pertinent to issues would not be considered.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by the Mitchell Camera Corporation against the Fox Film Corporation. From an order granting defendant's motion for nonsuit, plaintiff appeals.

Affirmed.

Call & Murphey, of Los Angeles (Roy C. Bonebrake, of Los Angeles, of counsel), for appellant.

Alfred Wright and Gordon Hall, Jr., both of Los Angeles, for respondent.

McCOMB, Justice pro tem.

This is an appeal from an order granting defendant's motion for a nonsuit to the first, second, third, fourth, fifth, sixth, ninth, and tenth causes of action in the complaint as amended.

Plaintiff on this appeal does not urge error in the granting of the motion as to the first, second, and third causes of action.

The fourth and fifth causes of action are upon the theory that defendant, through a duly authorized agent, entered into a contract with plaintiff to *manufacture* especially for the defendant certain cameras not suitable for the general trade.

The sixth cause of action is a common count for labor and services performed and materials furnished by plaintiff at the special instance and request of defendant.

The ninth and tenth causes of action are upon the theory that plaintiff entered into a contract with defendant for the *sale* of goods as distinguished from a manufacturing contract. The plaintiff prayed for damages in the sum of \$367,148.16.

Viewing the testimony most favorably to plaintiff (Newson v. Hawley, 205 Cal. 188, 189, 270 P. 364), the facts in the instant case are:

On or about the 26th day of October, 1929, E. I. Sponable, technical engineer in charge of designing and obtaining cameras for Fox Case Corporation, accompanied by Keith Weeks, executive manager of West Coast Studios of defendant, went to the Los Angeles plant of plaintiff and in conversation with officers of plaintiff corporation instructed plaintiff to manufacture fifty 70mm cameras known as Grandeur cameras for defendant. Shortly thereafter plaintiff commenced the manufacture of said cameras. Ten of the cameras were finished and the balance partly completed. The cameras were never delivered to nor accepted by defendant.

There are three questions which are determinative of this appeal.

First. Was the alleged contract (a) a manufacturing contract or (b) a contract to buy and sell personal property at a price of \$200 or more?

Second. If the alleged contract was a contract to sell personal property at a price of \$200 or more, is the defendant estopped from relying upon the statute of frauds as a defense?

Third. Did the evidence establish facts sufficient to warrant a recovery on the common count for labor and services performed and materials furnished?

[1,2] As to the first question, to be classed as an agreement to *manufacture*, the article must be made for the vendee according to his special design or requirements, so that when made, it will not be suitable for the general trade of vendor (Golden Eagle Milling Co. v. Old Homestead Bakery, 59 Cal. App. 541, 543, 211 P. 56), and a contract for the sale of an article then existing or such as the vendor in the ordinary course of his business manufactures or procures for the general

market, whether on hand at the time or not, is a contract for the sale of goods (Golden Eagle Milling Co. v. Old Homestead Bakery, 59 Cal. App. 541, 544, 211 P. 56). Plaintiff in the instant case manufactured the Grandeur cameras for others than defendant and they were suitable for plaintiff's general trade. This is well demonstrated by evidence that as early as February, 1928, defendant asked plaintiff to agree not to sell Grandeur cameras to others. Plaintiff wrote in reply a letter saying in part as follows:

"If this camera were entirely of your design, we would readily agree to something like that, but since it embodies *all of our patented features*, we cannot close the door to ourselves for other business, which offers the avenue of revenue through these patents. On earnest thought, we know you will agree with us, that even though we did make this guarantee to you and lived up to it, it would not protect you *as every other manufacturer would be permitted to do what we were forbidden to do* and cameras would be made just the same, but *we* would be stopped from sharing in this business. The building of cameras is *our life*, and we cannot tie ourselves up into a contract that would kill us off. * * * " (The italics in the foregoing letter is that of the plaintiff.)

There is evidence that plaintiff in fact sold Grandeur cameras on two different occasions to competitors of defendant.

The contract was one for the purchase and sale of personal property of a value in excess of \$200 and not a manufacturing contract. Therefore the nonsuit was properly granted as to the fourth and fifth causes of action alleged in the complaint as amended.

Turning to the second question, since the alleged contract was one for the sale of personal property of a value in excess of \$200, it was one that must be evidenced by a note or memorandum in writing. Section 1624, Civ. Code, prior to 1931 Amendment; section 1973, Code Civ. Proc., prior to 1931 Amendment. Plaintiff has failed to direct our attention to any evidence of a note or memorandum containing the essential terms of the contract expressed with such a degree of certainty as to show the intention of the parties without recourse to parol evidence. (Zellner v. Wassman, 184 Cal. 80, 85, 193 P. 84; Breckinridge v. Crocker, 78 Cal. 529, 535,

21 P. 179; Gordon v. Perkins, 108 Cal. App. 336, 342, 291 P. 644. Mr. Justice Plummer in Gordon v. Perkins, *supra*, approves the rule as thus stated, 108 Cal. App. 336, at page 342, 291 P. 644, 646:

"To be sufficient as a note or a memorandum under the statute of frauds, a writing must be complete in itself, leaving nothing to rest in parol. The entire agreement must be expressed in the writing. * * * The general rule that a contract which is not entirely in writing is to be treated as a parol or verbal contract, is applicable in determining whether the contract is within the inhibition of the statute of frauds. The memorandum must contain all the essential elements or material parts of the contract. * * * The memorandum required by the statute of frauds must show the subject matter of the agreement and so describe it as to render it capable of certain identification."

As the evidence fails to disclose a sufficient note or memorandum in writing of the agreement of the parties to satisfy the requirement of the statute of frauds, it is necessary to determine the second question, i. e., Is defendant estopped from relying upon this defense?

[3] There are two elements essential for an estoppel.

First, there must be an irreparable change of position upon the part of plaintiff independent of mere part performance of the contract. Seymour v. Oelrichs, 156 Cal. 782, 793, 106 P. 88, 134 Am. St. Rep. 154.

Second, there must be fraud, that is, the party relying upon the defense of the statute of frauds must have made a fraudulent representation, e. g., as in Seymour v. Oelrichs, *supra*, where the fraudulent representation was that the oral contract would be reduced to writing. Zellner v. Wassman, 184 Cal. 80, 87, 193 P. 84.

[4] In the instant case, both of the foregoing elements of estoppel are lacking, as the sole evidence of change in plaintiff's position was that it partly performed the contract and there was no evidence that defendant ever promised to reduce the alleged oral agreement to writing or made any other fraudulent representations. Therefore, the statute of frauds was a complete defense to the ninth and tenth causes of action alleged in the complaint as amended, and the nonsuit was properly granted as to these counts.

[5] The remaining question to be determined is whether there was sufficient evidence to warrant a recovery on the common count for labor and services performed and materials furnished. In order to recover on this count, it was necessary for plaintiff to prove the following elements:

First, the rendition of services or furnishing of materials at the request of defendant; second, intent to charge defendant; and, third, acceptance or retention of benefits by the defendant. 27 Cal. Jur 199 et seq.

[6] For the purpose of the instant case, we assume that there was evidence of the first two elements hereinbefore mentioned, however, there was absolutely no evidence of the acceptance or retention of benefits by the defendant. Therefore, the motion for a nonsuit was properly granted as to the sixth cause of action in the complaint as amended.

[7] Plaintiff urges error in the rulings of the trial court in the admission and exclusion of evidence. Suffice it to say that none of the evidence received or rejected over plaintiff's objection had any bearing on the points we have heretofore discussed. Hence it is unnecessary for us to make further comment upon these alleged errors. An examination of the lengthy record discloses that the learned trial judge was extremely patient with counsel and careful in his rulings during the course of the long and tedious trial.

The order appealed from is affirmed.

We concur: CRAIL, P. J.; WOOD, J.



10 Cal.App.2d 1

MAYER v. HAZZARD et al.
Civ. 10440.

District Court of Appeal, Second District,
Division 2, California.
Nov. 4, 1935.

1. Landlord and tenant ⇨133(3)

In action by lessee of rear fifty feet of building against persons who had leased entire premises subject to plaintiff's lease for

interference with plaintiff's use of leased property, complaint *held* to state cause of action.

Complaint alleged promise by lessors that plaintiff should have access to rear fifty feet of building through door opening on specified street and through and across front part of building; that plaintiff took possession of property, maintaining office at entrance on designated street; that defendant received lease from original lessors subject to plaintiff's lease covering rear part of building, with full knowledge of conditions thereof and of plaintiff's use of property; that defendant promised to comply with terms and conditions of lease; and that defendant closed entrance on designated street and erected partition between part of building leased by plaintiff and front part of building, thereby forcing plaintiff to use alleyway for his business to his damage.

2. Landlord and tenant ⇨133(3)

In action by lessee of rear fifty feet of building against person who had leased entire premises subject to plaintiff's lease for interference with plaintiff's use of leased property by closing of entrance at front of building which had been used by plaintiff, plaintiff *held* not required to allege that entrance through front of building was reasonably necessary to use of property covered by plaintiff's lease.

3. Landlord and tenant ⇨124(2)

Rights of ingress and egress by usual way pass to tenant, although not specifically mentioned in lease, or word "appurtenances" be not used in lease, under general rule that those rights essential to use of demised premises pass as appurtenant thereto.

4. Landlord and tenant ⇨124(2)

Tenant is entitled to maintenance of entrance which is necessary to full enjoyment of his use of property, although it may not be only means of access.

5. Landlord and tenant ⇨124(2)

Implication passing easements under lease may arise from reasonable necessity or manifest intention of parties.

6. Evidence ⇨177

Report compiled by public accountant made up from plaintiff's books *held* admissible where records kept by plaintiff consisted of many invoices and cards, of which originals were in court and which defendant had full opportunity to examine (Code Civ. Proc. § 1855, subd. 5).

7. Landlord and tenant ⇨133(3)

Instruction that if defendant leased entire premises with knowledge of plaintiff's

use of entrance in front part of building which was necessary for full enjoyment of plaintiff's lease, defendant had duty to keep such entrance open for plaintiff, and that tenant is entitled to use of all entrances essential to enjoyment of part of building rented to him, which were open to his use at time of making lease, although not sole means of access held proper.

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

Action by Al Mayer against I. G. Hazzard, D. W. Neet, and another. Judgment for plaintiff, and defendant D. W. Neet appeals.

Affirmed.

Hansen & Cope and Archie G. Cope, all of Long Beach, for appellant.

W. Ward Johnson, of Long Beach, for respondent.

WOOD, Justice.

By a written lease defendants Hazzard leased to plaintiff for a term of one year from January 15, 1933, the rear 50 feet of the premises located at 126 Magnolia avenue, Long Beach, said premises having a total depth of 206 feet and a width of 50 feet. The lessors maintained a storeroom in the front part of the premises and plaintiff maintained an automobile repair shop in the space covered by the lease. Subject to plaintiff's lease, the Hazzards leased the entire premises to defendant Neet, appellant herein, on May 6, 1933. The action is for damages for the interference by appellant with plaintiff's use of the leased property. The case was tried before a jury, which returned a verdict for plaintiff, and from the judgment entered thereon defendant Neet appeals.

[1-4] Appellant's contention that the complaint does not state a cause of action cannot be upheld. It is set forth in the complaint that the lessors promised that plaintiff should have access to the rear 50 feet of the storeroom through a door opening on Magnolia avenue and through and across the front 156 feet of the storeroom to the portion leased by plaintiff; that plaintiff took possession of the leased property, maintained an office at the Magnolia avenue entrance, received customers through said entrance, and secured business from owners of automobiles stored

and parked in the front portion of the storeroom. It is further set forth that defendant Neet received a lease from defendants Hazzard subject to plaintiff's lease covering the rear portion, with full knowledge of the conditions of said lease and of plaintiff's use of the property by having means of ingress and egress for customers through the front portion of the premises, and that defendant Neet promised to comply with all of the terms and conditions of the lease. Appropriate allegations are made of the fact that defendant Neet closed the Magnolia avenue entrance and erected a partition between the portion of the premises leased by plaintiff and the front part of the storeroom thereby forcing plaintiff to use an alleyway for his business, together with allegations covering the damages sustained. Appellant argues that plaintiff should have set forth in his complaint that the entrance through the Magnolia avenue frontage was reasonably necessary to the use of the property covered by the lease. Such an allegation was not necessary. Rights of ingress and egress by the usual way pass to the tenant, although not specifically mentioned in the lease; or the word "appurtenances" be not used, under the general rule that those rights essential to the use of the demised premises pass as appurtenant thereto. A tenant is entitled to the maintenance of an entrance which is necessary to the full enjoyment of his use of the property, although it may not be the only means of access. 36 Cor. Jur. 33.

[5] In contending that the evidence does not sustain the verdict, appellant cites the case of *Harrison v. Ziegler*, 51 Cal App. 429, 196 P. 914, 915. In that case the lessee sought to enjoin the lessor from interfering with the use of a toilet and lavatory located in the rear of the building leased. The room occupied by the lessee was used as a restaurant and was equipped with separate and adequate toilet and lavatory facilities so that the additional toilet and lavatory in the rear of the room adjoining the restaurant was not reasonably necessary for the full enjoyment of the premises leased and would not diminish the business of said restaurant. That case is distinguishable from the case before us in that here the evidence discloses, and the jury by its verdict found, that egress and ingress through the Magnolia avenue entrance and the front part of the premises were not merely a convenience, but

were necessary to the beneficial use of the leased property. The rule of law stated in *Harrison v. Ziegler*, supra, bears out the contention of respondent: "The use of the door, passageway, and toilet facilities was not expressly included, nor even alluded to, in the lease. Nothing whatever is mentioned but 'the room known as the "Valencia Cafe."' Did the right to use the door, passageway and toilet facilities pass to the appellants with the room known as the Valencia Cafe by necessary implication? Rights and easements may and do pass to lessees by implication; 'but, where the express words of the grant are not sufficient, the implication which supplies those words flows either from a reasonable necessity, or, considering all the circumstances from the manifest intention of the parties.'"

[6] The trial court admitted in evidence over the objection of appellant a report compiled by a public accountant made up from plaintiff's books. The records kept by plaintiff consisted of many invoices and cards, the originals of which were in court, appellant having had full opportunity to examine them. Under the provisions of subdivision 5 of section 1855, Code of Civil Procedure, the auditor's report was admissible.

[7] Complaint is made of certain instructions given by the court to the jury. In particular, appellant claims that the trial court "virtually crucified the defendant" in giving the following instruction: "If you believe from the evidence that the Magnolia avenue entrance to 126 Magnolia was used by the plaintiff on January 15, 1933, when he made his lease with Hazzard and that said entrance was necessary for the full enjoyment of the portion of the premises leased to the plaintiff, and that the defendant Neet was fully aware of these facts when he took his lease from Hazzard on May 6, 1933, I then instruct you that it was incumbent upon the defendant Neet to keep that entrance open for the plaintiff even though you may believe that in order to do so defendant Neet would have had to employ more help in conducting his business in that location. You are instructed that the tenant of a building is entitled to the right to the use of all doors, entrances and passageways essential to the enjoyment of the portion of the building rented to him, and which were open to his use at the time of the making of the lease. A tenant in a building or

portion thereof, is entitled to have maintained an entrance which is necessary thereto to the full enjoyment of his use of the premises leased to him, although that entrance may not be the only means of access."

The instruction just quoted clearly and fairly states the law. We find no error in the proceedings, the jury was properly instructed, and the evidence supports the verdict.

The judgment is affirmed.

We concur: CRAIL, P. J.; GOULD, Justice pro tem.



9 Cal.App.2d 760

YOUNG et al. v. BOY SCOUTS OF AMERICA et al.
Civ. 1926.

District Court of Appeal, Fourth District,
California.
Nov. 4, 1935.

Hearing Denied by Supreme Court
Jan. 2, 1936.

1. Evidence ⇨34, 48

Court must take judicial notice of act of Congress under which Boy Scouts of America was organized, and of constitution, by-laws, and annual reports of organization filed with Congress in accordance with act of Congress (36 USCA § 21 et seq.; Code Civ. Proc. § 1875).

2. Charities ⇨45(2)

Boy Scouts of America and Imperial Yuma Area Council of Boy Scouts of America held "charitable institutions," and not liable to their beneficiaries for negligence of their agents unless negligent in selecting agents, in view of act of Congress under which Boy Scouts was organized, and of allegation that Imperial Yuma Area Council was organized and operating in accordance with plan provided for in constitution and by-laws of Boy Scouts (36 USCA § 21 et seq.).

[Ed. Note.—For other definitions of "Charitable Institution," see Words & Phrases.]

3. Evidence ⇨52

Allegations of complaint which conflict with facts of which court must take judicial notice must be disregarded.

4. Charities ⇨45(2)

Charitable organization is not liable to beneficiary thereof for negligence of its agent unless negligent in selecting agent.

5. Charities ⇨45(2)

For charitable corporation to be liable for agent's negligence on ground of negligence in selecting agent, incompetence of agent, known to his superior, must have had causal relationship to injury.

6. Charities ⇨45(2)

Boy Scouts of America and Imperial Yuma Area Council of Boy Scouts of America held not liable for injuries boy scout sustained, while riding bicycle in group in charge of crippled scoutmaster, when on-coming automobile on wrong side of road struck boy scout, on ground of negligence in selecting crippled scoutmaster, where scoutmaster of perfect physique could not have timely removed boy scout from path of on-coming automobile.

7. Automobiles ⇨245(52)

Whether scoutmaster's negligence in riding bicycle without lights on right-hand side of pavement after dark and in commanding boy scout to follow him on another bicycle without lights was a proximate cause of accident caused when driver of on-coming automobile crossed to wrong side of road and struck boy scout held for trier of facts (St. 1923, pp. 546, 550, §§ 99, 105).

8. Automobiles ⇨245(82)

Whether minor bicyclist was contributorily negligent, as regards injury sustained when struck by on-coming automobile driven on wrong side of road, in riding after dark without lights held for trier of facts (St. 1923, pp. 546, 550, §§ 99, 105).

Appeal from Superior Court, Imperial County; R. D. McPherrin, Judge.

Action by Harold P. Young, by his guardian ad litem, Harold S. Young, and by another against the Boy Scouts of America and others. Judgment for defendants, and plaintiffs appeal.

Affirmed in part and reversed in part.

A. Fairchild, of San Diego, and Maurice C. Atchison, of Calexico, for appellants.

Harvey H. Atherton, of San Diego, and S. L. McCrory, of El Centro, for respondents.

BARNARD, Presiding Justice.

This is an action for damages for injuries suffered by the plaintiff Harold P. Young. Demurrers interposed by the several de-

fendants were sustained, and from the ensuing judgment the plaintiffs have appealed.

The amended complaint alleged that the Boy Scouts of America is a corporation organized and existing under an act of Congress; that it is engaged in the mental and physical training of boys; that it is also engaged in the business of selling certain clothing and other equipment to its members for profit and in publishing two magazines; that it was carrying on its business in California and particularly in Imperial county; that among the officers of said corporation are scoutmasters whose duty it is to personally supervise, instruct, and direct the movements of its members while engaged in scout work; that said corporation delegated the power to the other corporation defendant, as its agent, to promote boy scout activities in Imperial county by organizing boy scout troops and local troop committees, providing leadership, recommending the appointment of scoutmasters, and supervising and directing the activities of those engaged in boy scout work in said county; that the last-named corporation defendant is operating as provided in the charter, constitution, and by-laws of the first-named corporation and as its agent in said county; that as such agent it appointed and recommended that the defendant Henry Webster be commissioned as scoutmaster, that by reason thereof the first-named corporation appointed and commissioned the said Webster to be the scoutmaster for Troop 13 in said county; that the said agent failed to use due care in the selection and recommendation of a competent scoutmaster and the defendant Boy Scouts of America, with full knowledge of the facts, commissioned the said Webster as a scoutmaster without using due care in his selection when it knew that he was incompetent in that he was not an able-bodied man, but was a cripple caused by infantile paralysis when he was a child; that he walked with great difficulty, was unable to ride a bicycle as a normal person, and was unable to march with his troop or give first aid or do many other things required of a scoutmaster in the performance of his duties.

It is then alleged that the plaintiff Harold P. Young was of the age of twelve years and a regular boy scout duly enrolled in Troop 13 at Calexico in said county; that on January 13, 1934, the said Webster, while acting as the agent of the defendant corporation and as their scoutmaster, commanded the said Harold P. Young and other boy

scouts to proceed on bicycles to a point about twelve miles from said city of Calexico for the purpose of taking certain scout tests; that on the return to Calexico the said Webster rode a bicycle along a paved highway and commanded Harold P. Young and another boy scout to follow him in formation upon said highway upon their bicycles, which they did; that while so returning it became dark, the party being delayed because of the physical disability of the said Webster to ride his bicycle; that the said Webster and the boys had no headlights upon their bicycles; that the said Webster, knowing the danger, commanded the said plaintiff and the other boys to thus proceed in formation without lights in violation of sections 99 and 105 of the California Vehicle Act (St. 1923, pp. 546, 550), which they did; that the said Webster failed to obtain lights at a gas service station where they stopped; that the said Webster failed to instruct the said plaintiff against the dangers of thus traveling or to warn him of the approach of automobiles; that while so returning and about the hour of 6 o'clock p. m., and while they were thus traveling in formation and on the right-hand side of the paved highway with the scoutmaster in the lead, the defendant Chavez driving an automobile owned by the defendant Sandoval, and coming in the opposite direction, negligently drove said automobile on the left and wrong side of said paved highway and into and against the plaintiff Harold P. Young, causing the injuries complained of.

It is then alleged that the two corporation defendants were further negligent in that they knew that the defendant Webster was physically defective and incompetent in that he was inexperienced in the handling of boys, was physically a permanent invalid, and physically unable to safely direct the movements of his own bicycle or to warn the minor plaintiff of danger or to alight from his bicycle with the speed of a physically normal person and remove the plaintiff Harold P. Young from the path of the automobile which struck him, and that the accident to this plaintiff could have been avoided by the use of ordinary care which care the said scoutmaster was physically unable to exercise.

[1-3] In our opinion, the complaint fails to state a cause of action against the two corporation defendants. The Boy Scouts of America was organized under an act of Congress, June 15, 1916 (36 USCA § 21 et seq.), providing that its constitution and by-

laws be filed with and that regular annual reports be made to that body. We must take judicial notice of that act of Congress and of the constitution and by-laws and reports so filed. Code Civ. Proc. § 1875; *Sheehan v. Vedder*, 108 Cal. App. 419, 292 P. 175. We not only have such knowledge of the form of organization, purposes, and method of operation of the first-named corporation defendant, but, as alleged, the second-named corporation defendant was organized and is operating in accordance with the plan provided for in said constitution and by-laws. With this knowledge before us, it must be held that these corporation defendants are eleemosynary and charitable institutions. In re Estate of Dol, 186 Cal. 64, 198 P. 1039; *Tillinghast v. Council, etc.*, 47 R. I. 406, 133 A. 662, 46 A. L. R. 823; *Stiles v. Des Moines Council, etc.*, 209 Iowa, 1235, 229 N. W. 841. Any allegations of the complaint which conflict with facts of which we must take judicial notice must be disregarded. *Bell v. Southern Pacific Co.*, 189 Cal. 421, 208 P. 970; *French v. Senate*, 145 Cal. 694, 80 P. 1031, 69 L. R. A. 555, 2 Ann. Cas. 756; *Loranger v. Nadeau*, 215 Cal. 362, 10 P.(2d) 63, 84 A. L. R. 1264.

[4] It seems to be well settled in this state that an eleemosynary and charitable organization is not liable to a beneficiary thereof for the negligence of its agents and servants unless it has failed to use due care in the selection of such agents. *Thomas v. German Gen., etc., Soc.*, 168 Cal. 183, 141 P. 1186; *Stewart v. California Medical, etc., Ass'n*, 178 Cal. 418, 176 P. 46; *Ritchie v. Long Beach Community Hospital Ass'n*, 139 Cal. App. 638, 34 P.(2d) 771.

[5, 6] In so far as the defendant corporations are concerned, this case is predicated upon the theory that the local council was the agent of the national organization, that the scoutmaster was the agent of both, that the scoutmaster was negligent in riding his bicycle along the right-hand side of a paved highway without a light and permitting the minor plaintiff to follow him in the same manner, that this negligence was a proximate cause of the injuries complained of, and that the employers of the scoutmaster were negligent in choosing him because of his known physical infirmity.

It may well be doubted whether such a scoutmaster is the agent and servant of these organizations in the sense involved in those cases which have held a charitable organization liable for the negligence of its servants when proper care in selection has

not been exercised. In such cases the servant, whose negligence is imputed to the organization, has been one employed by it to perform certain duties, although these duties may have been incidentally for the benefit of the beneficiary. Strictly speaking, the boy scouts' organization does not perform acts or carry on a service in the sense in which a hospital or similar institution does. The national organization and the local council furnish a program, train leaders in boys' work, and encourage individuals in the various communities to carry on certain work of local benefit, but these organizations do not directly carry out these activities. The local councils assist along these lines, but the actual work in the respective communities is performed by local scoutmasters under the direction of local troop committees. A scoutmaster is appointed on the recommendation of this troop committee and not on the recommendation of the local council, and he is responsible solely to this local committee. The troop committee and the scoutmaster are volunteer workers whose services are given to the community rather than to the organization which is, in practical effect, merely an adviser rather than an employer.

If, however, we here assume that this scoutmaster is to be considered as the servant and agent of the defendant corporations and, further, that the latter are liable for his negligence if proper care was not used in his selection, the important fact remains that this complaint indicates no causal relation between any lack of care shown in choosing this scoutmaster and the accident here in question. In order to impose liability on a charitable corporation, the incompetence of an agent, known to his superior, must have had something to do with causing the injury.

While the complaint alleges that this scoutmaster was inexperienced in the handling of boys, it goes on to allege the form of incapacity relied on, which was physical, and it is then particularly alleged how it is claimed this lack of physical capacity on the part of the scoutmaster contributed to this accident. Boiled down, the charge is that this scoutmaster was unable to quickly alight from his bicycle and remove the minor plaintiff from the path of the automobile which struck him, that he could have avoided this accident had he been able to take such action, and that he was thus prevented from exercising ordinary care by reason of his infirmity. As a practical matter, the allegation is not that this physical

disability of the scoutmaster had any part in causing the injury, but that it prevented him from removing the boy from a dangerous situation caused by some one else.

Under the facts alleged, we think any physical disability from which the scoutmaster suffered is too remote to be taken as a cause, proximate or otherwise, of the injury to this plaintiff. Incidentally it appears from the complaint that the scoutmaster was able to ride his bicycle twelve miles to the place where certain scout tests were given, and at least a part of the way back. The scoutmaster in the lead and the boys behind him were riding on the right-hand side of the paved highway. The approaching automobile came over to its left and wrong side of the road and struck the boy who was riding behind the scoutmaster. Had the scoutmaster been of perfect physique, he could not have alighted and gone back and taken the boy from another moving bicycle in time to have removed that boy from the path of an automobile which had come over to the wrong side of the road after it had passed him. It cannot be inferred that a man without the disability suffered by the scoutmaster could have performed so superhuman a task as that which the appellant alleges and now argues would have prevented the accident. Under the circumstances of this case, any alleged negligence in choosing this scoutmaster could have had nothing to do with this accident and the demurrer was properly sustained as far as these corporation defendants are concerned.

[7] With respect to the liability of the defendant Webster, it is sufficiently alleged that he was riding a bicycle on the right-hand side of the pavement after dark without a light and that he had commanded the minor plaintiff to follow him on another bicycle, which was also without a light. While it seems unlikely that his negligence in this regard was a proximate cause of this accident, in which the driver of the approaching automobile crossed over to his left and wrong side of the road, there may be other facts which affect the matter and it cannot be said, as a matter of law, that any such negligence could not have been a proximate cause of the accident. This matter presented a question of fact which required consideration as such.

[8] Whether or not the minor plaintiff, in riding his bicycle after dark without a light, was guilty of contributory negligence which was a proximate cause of his injuries was also a question of fact and not one of

law. That being true, the demurrer of the defendants Chavez and Sandoval should have been overruled and the question of their liability determined after issue joined.

That part of the judgment in favor of the corporation defendants is affirmed and that part of the judgment in favor of the individual defendants is reversed.

We concur: MARKS, J.; JENNINGS, J.



10 Cal.App.2d 10

HARTING v. CEBRIAN
Civ. 9603.

District Court of Appeal, First District,
Division 2, California.
Nov. 5, 1935.

Hearing Denied by Supreme Court
Jan. 2, 1936.

1. Bills and notes ⇨139(3)

Contract to forbear for period of 90 days, implied in renewal note stating "ninety days after date we promise to pay," held sufficient consideration to support renewal note.

2. Bills and notes ⇨494

Promisor defending action against him on note on ground note was placed in hands of promisee on condition that note would not take effect until it had been signed by another was bound to prove an agreement to that effect.

3. Bills and notes ⇨537(4)

Whether promisor, sued on note, had proved alleged agreement note was placed in hands of promisee on condition that it would not take effect until it had been signed by another, was question of fact.

4. Bills and notes ⇨516

In action on note, testimony of promisee to effect that he promised to attempt, and had attempted, to get signature of second party, held insufficient to prove contended agreement that defendant-promisor had placed note in hands of promisee on condition that it would not take effect until it had been signed by second party.

5. Sales ⇨52(7)

Evidence that seller of race horse honestly, believing that horse had great possibilities, had made strong statements as to what kind of horse the animal was, held insufficient to sustain buyer's claim that seller

had made false representations concerning horse.

6. Bills and notes ⇨518(2)

Evidence held insufficient to establish that party signing renewal note as promisor was an accommodation party (Civ. Code, § 3110).

7. Evidence ⇨345(1)

No certain words are necessary to create a valid certificate attesting a purported copy of a document as a "certified" copy (Code Civ. Proc. § 1923).

To "certify," as that term is ordinarily used with reference to documents or papers, is to affirm or to assert in writing the correctness or identity of the designated instrument.

[Ed. Note.—For other definitions of "Certify," see Words & Phrases.]

8. Evidence ⇨345(2)

In action by federal receiver on note payable to party in receivership, copies of orders of United States District Court, appointing plaintiff receiver of promisee and authorizing and directing receiver to commence actions, signed by judge and dated, followed by words, "Certified: S. W. Stacy Clerk by Spencer Finnell, D. C.," and seal of court, held properly admitted as certified copies (Code Civ. Proc. § 1923).

9. Receivers ⇨173

Where order appointing federal receiver contained broad language authorizing and directing commencement of actions, no further order was necessary to authorize institution of action on note payable to party in receivership.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by Joseph E. Harting, receiver of Himyar Stud and another, against Edward Cebrian. Judgment for plaintiff, and defendant appeals.

Affirmed.

Hartley F. Peart and Gus L. Baraty, both of San Francisco (Howard Hassard, of San Francisco, of counsel), for appellant.

F. J. Kilmartin and Knight, Boland & Riordan, all of San Francisco, for respondent.

STURTEVANT, Justice.

As receiver of Philip T. Chinn, the plaintiff sued to recover a judgment on a

promissory note. The defendant appeared and filed an answer in which he denied the material allegations of the complaint and also pleaded an affirmative defense claiming that the note in suit was given in part payment for certain horses which the owner, Philip T. Chinn, misrepresented. The action was tried before the trial court sitting without a jury. The trial court made findings in favor of the plaintiff on all material issues. From the judgment entered on said findings the defendant has appealed.

The defendant attacks many of the findings. He claims that there was no consideration for the note in suit and that said document was delivered conditionally and that the condition precedent was never performed. The parties do not seem to be disagreed on the rules of law but present the controversy on questions of fact.

[1] On the 14th day of February, 1927, Philip T. Chinn sold and delivered to Edward Cebrian and S. W. Richards two race horses. For one horse, Black Tony, the sales price was \$2,500. For the other horse, The Freshman, the sales price was \$8,000. The defendant, Edward Cebrian, drew his check for \$5,250 and delivered it to the vendor. At the same time Edward Cebrian and S. W. Richards made and delivered their joint promissory note in the sum of \$5,250 to the vendor. From time to time that note was renewed by the makers. Mr. Cebrian says it was renewed six or seven times. Except as noted below, when a renewal note was executed the older note was returned to Mr. Cebrian and was destroyed. At the time of the trial the plaintiff produced and offered in evidence as Exhibit 2, a note, which is as follows:

"\$5,617.50 November 27, 1929.

"Four months after date we promise to pay to the order of Phil T. Chinn, Five Thousand Six Hundred and Seventeen and 50/100 Dollars Payable at First National Bank & Trust Co., Lexington, Ky. Value received Six percent interest from Date.

"Edward Cebrian
"S. W. Richards

"No. ——— Due ———"

He also produced and offered in evidence as Exhibit 1 another note, to wit, the note in suit, which is as follows:

"\$5,954.55

November 27, 1930

"Ninety days after date we promise to pay to the order of Phil T. Chinn Five Thousand Nine Hundred and Fifty-four and 55/100 Dollars with interest from date at the rate of six per cent per annum. Value received negotiable and payable at First National Bank & Trust Co., Lexington, Ky.

"Edward Cebrian

"No. ——— Due ———"

Before proceeding it may be recited that Mr. Richards travels from one race course to another where he engages in developing and running race horses. Mr. Chinn resides at Lexington, Ky., but from time to time visits certain race courses. Mr. Cebrian resides in San Francisco and his occupation is much the same as Mr. Chinn's. All three men were more or less in touch with each other through correspondence, racing journals, and meetings at various tracks.

In November, 1930, Mr. Cebrian was staying at the Phoenix Hotel in Lexington, Ky. Speaking of that occasion Mr. Chinn testified: "I saw Mr. Cebrian and talked with him with reference to paying the note of November 27, 1929, which he and Mr. Richards had signed. He told me that he was unable to pay the note at that time and I told him that the bank was insisting that the note be paid or substantial payment made on the note. Mr. Cebrian told me that he could not do this at this time but he would renew the note and would try to take it up within the next three or four months. I left him after this conversation and then had the note prepared at my office and took it back to his hotel. Mr. Cebrian was not there and I left the note in an envelope for him and think he left Lexington that evening. However he returned the note to me within a day or two. My best recollection is that the note came back from Chicago, but I am not certain as to what point it was mailed from to me by Mr. Cebrian. * * * When I saw Mr. Cebrian in the Phoenix hotel and talked to him about the paying of the note and told him that the bank insisted that it be paid or a substantial payment made on it, Mr. Cebrian asked me as to whether I was going to get Mr. Richards to sign the note. I told him that I did not know where Mr. Richards was but I would endeavor to get in touch with him and if I did would en-

deavor to have him sign the note. I told Cebrian that he also should try to locate Richards and have him sign the note.

* * * Cebrian did not tell me that he was not going to pay the note and I would have to get after Richards, but he did say that he wanted me to get Richards to sign the note so that Richards would have to pay his one-half of it. I told him that I did not know where Richards was, if I could locate him I would endeavor to get him to sign it but told him I was looking to him as well as Richards for the payment of the whole note. I meant by that it was their joint note, both of them were liable to me for it and if I couldn't get it out of one I wanted the other one to pay it. * * * I have seen Mr. Richards since November, 1930. I told him that Mr. Cebrian had renewed the note and that Cebrian wanted him to sign it. Richards said he was perfectly willing to sign it but that he was broke and that it would not help the note or Mr. Cebrian any for him to sign it. That conversation was after the receiver was appointed. Richards promised he would take it up with the receiver as well as Cebrian. My recollection is that at the time I went into the hands of a receiver the note was up at the bank as collateral on some paper that I had discounted at the bank. After the receiver had been appointed he brought the note to me and talked to me about collecting it from Mr. Cebrian.

* * * The note of November 27, 1930, was a renewal note. * * * The original note had been renewed at regular intervals. I don't know the exact dates. They were prompt in renewing the note. * * * I knew that S. W. Richards and Edward Cebrian were purchasing the two horses together. * * * Mr. Cebrian gave me a check for around \$5,000. At the same time a note was executed by Mr. Cebrian and Mr. Richards. * * * The note was given by Richards and Cebrian as a part payment of the purchase of the two horses from me, one of them was The Freshman and the other a horse whose name I don't recall. They were both bought by Cebrian and Richards together and the note was a joint obligation on their part for the unpaid purchase price of these horses. * * * I made every endeavor to get Mr. S. W. Richards to sign the note dated November 27, 1930. He did not refuse to sign it at any time, he promised to get in communication with Mr. Cebrian. My purpose in retaining the

note dated November 27, 1929, was to make it valid until we could get the note properly endorsed."

To the deposition of Joseph E. Harting, the receiver, plaintiff's Exhibit 1, set forth hereinabove, was attached and marked "Exhibit A." The other note was attached and marked "Exhibit B." At the time of giving his deposition both notes were shown to him and identified. Referring to them Mr. Harting testified as follows: "At the time I became receiver for Colonel Philip T. Chinn and Himyar Stud I took into my possession both of these notes. I held Exhibit 'B' because that man hadn't signed it, I was holding it for collateral until this man signed it and I was going to return the other note. In other words, I held the first note to keep the liability alive against Mr. Richards."

In testifying regarding the circumstances under which he executed the note dated November 27, 1930, Mr. Cebrian stated the conversation held between him and Mr. Chinn was as follows: "Well, Mr. Chinn said that the bank was pressing him for the notes; that they wanted him to cash up; and I told him, 'Well, I don't feel responsible for this note. You know, I signed the original as an accommodation to you, and I am not upon this note;' and he said, 'Well, will you renew it?' 'Well,' I said, 'I will do the same as I did before; you get Richards' signature to it, and I will sign it, too.' So he said, 'I will leave it for you, and have you—you will first sign it, and I will get Richards' signature.' * * * He sent the note up to me with the clerk, and I was busy at the time, so I just took it along with me. * * * When I got to Chicago I signed it and put it in an envelope and mailed it to Mr. Chinn. * * * Now with reference to the prior renewals of the \$5,250 obligation there might have been six or eight. It was at irregular intervals. They were signed by myself and the other maker, S. W. Richards. When they were signed Mr. Chinn would mail me the prior one after he got Mr. Richards' signature on the renewal. * * * They were signed by myself and Mr. Richards—all of them. Some of them Mr. Chinn would mail me and they would be sent to me to sign—I was out here in San Francisco, and I would mail it back to him and he would get Richards' signature on it and then mail me the canceled one.

* * * Some times we met and some-times he would mail me a note, a blank note, I mean it wasn't filled out or look like that one there, and I would sign it and return it to him and he would get Mr. Richards' signature to it and then he would return me the canceled note. He told me that he was using the Richards' note, for he needed it as security in the bank and it was an accommodation for me that I renewed it at the time." As stated above, the defendant claims there was no consideration for the note sued on. The facts show that Plaintiff's Exhibit 1 was at least an implied contract to forbear for the period of ninety days. That fact alone constituted a sufficient consideration to support the instrument. *Humboldt Sav. & Loan Soc. v. Dowd*, 137 Cal. 408, 412, 70 P. 274.

[2-4] To the claim of the defendant that the note in suit was placed in the hands of Mr. Chinn on the condition that it would not take effect until it had been signed by S. W. Richards, the plaintiff asserts that the defendant was bound to prove an agreement to that effect. That is clearly a sound legal proposition. As to whether the agreement was proved or not proved in the instant case was a question of fact. If the trial court believed the testimony given by Mr. Chinn, and from its findings we must assume that it did, then it would follow that the agreement was not proved. That witness testified that he promised to attempt to get the signature of S. W. Richards and furthermore that he did make the attempt.

[5] The defendant complains because the trial court did not make findings sustaining his claim that Mr. Chinn made false representations of and concerning one of the horses, The Freshman. We think the point may not be sustained. The vendor highly praised that horse. He made strong statements as to what kind of a horse the animal was. At the time of the sale the horse was three years old. The testimony shows that the owner thought there were great possibilities in him. His statements were, and must have been, received as expressions of his opinion. The record contains nothing showing that those opinions were not honestly entertained.

[6] Again it is claimed that the defendant was an accommodation party; but, under the facts we think it is clear

that he was not shown to be such. Civ. Code, § 3110.

[7-9] The plaintiff offered in evidence, and over the objection and exception of the defendant the trial court admitted, what purports to be a copy of the order of the District Court of the United States for the Eastern District of Kentucky, appointing Joseph E. Harting receiver of Himyar Stud and Philip T. Chinn. The objection was based on the claim that the document was not properly certified. Code Civ. Proc. § 1923. Counsel do not cite us to a decision of a court of review in this state construing that section. In nearly every jurisdiction there are similar statutes. No certain words are necessary to create a valid certificate attesting a purported copy as a "certified copy." 11 C. J. 78; *Sawyer v. Lorenzen & Weise*, 149 Iowa, 87, 127 N. W. 1091, 1093, Ann. Cas. 1912C, 940. In the cited case the Supreme Court of Iowa said: "We have then only to consider whether the paper filed with the auditor is within the meaning of the law a 'certified copy' of the resolution. It certainly purports to be a copy, and the only feature which can give rise to doubt as to its sufficiency is whether it is properly certified. The recorder is the official custodian of the town records, and as such his certificate to the correctness of the copy is all that is required. Code, §§ 4630, 4635, 4643. To be sufficient it is not necessary that the word 'certificate' or 'certify' should be employed. To 'certify,' as that term is ordinarily used with reference to documents or papers, is to affirm or to assert in writing the correctness or identity of the designated instrument."

A similar point was made regarding the admission in evidence of an order of the District Court of the United States for the Eastern District of Kentucky authorizing and directing this plaintiff to commence this action. That order was signed by the judge and was dated February 24, 1931. It was followed by the words: "Certified: S. W. Stacy Clerk by Spencer Finnell, D. C. (Seal of United States District Court, East. Dist. Ky., United States of America.)" It is contended that said order was not certified to be a correct copy. On the authority of the *Sawyer Case*, supra, we think the objection was not well founded. The order appointing the receiver contained broad language authorizing and direct-

ing the commencement of such actions. Under such circumstances no further order was necessary. *Title Insurance & Trust Co. v. Grider*, 152 Cal. 746, 749, 94 P. 601.

It follows that the judgment appealed from should be affirmed. It is so ordered.

We concur: NOURSE, P. J.;
SPENCE, J.



9 Cal.App.2d 607

HARDER v. DENTON, City Clerk.
Civ. 5546.

District Court of Appeal, Third District,
California.
Oct. 28, 1935.

1. Municipal corporations ⇨44

Legislature had no authority to pass laws limiting, altering, or amending provisions of city charter after its adoption, providing charter contained no unconstitutional provisions (Const. art. 11, §§ 8, 11, 8½, subd. 4).

2. Elections ⇨197

Clerical officer at polls may not limit or abridge rights of voter.

3. Elections ⇨172

Provision of city charter that names of all regularly nominated candidates shall be printed on official ballots in alphabetical order of surnames held mandatory (Const. art. 11, §§ 8, 11, 8½, subd. 4).

4. Statutes ⇨64(1)

If portion of section of act is not dependent or correlated to any other portion thereof, and there is no constitutional objection to such portion, portion is unaffected by invalidity of other portions of sections or other sections of act.

5. Statutes ⇨64(4)

Portion of section of city charter requiring printing of names of all regularly nominated candidates on official ballots in alphabetical order held valid, notwithstanding portion of same section providing for proportional system of voting had been declared unconstitutional (Const. art. 11, §§ 8, 11, 8½, subd. 4).

Petition for a writ of mandate by Abraham J. Harder against H. G. Denton, as Clerk of the City of Sacramento.

Writ granted.

H. N. Dyke, of Sacramento, for petitioner.

Hugh B. Bradford, City Atty., of Sacramento, for respondent.

Mr. Justice PLUMMER, delivered the opinion of the court.

The Constitution of the state of California, article 11, § 8 thereof, the section having to do with adoption of a city charter and its approval by the Legislature, provides as follows: "The Legislature shall by concurrent resolution approve or reject such charter as a whole, without power of alteration or amendment; and if approved by a majority of the members elected to each House it shall become the organic law of such city, or city and county and supersede any existing charter and all laws inconsistent therewith."

Subdivision 4, section 8½, of article 11, scheduling the powers that may be set forth in a city charter, specifies that the city charter may provide: "For the manner in which and the times at which any municipal election shall be held and the result thereof determined; for the manner in which, the times at which, and the terms for which the members of all boards of election shall be elected or appointed, and for the constitution, regulation, compensation and government of such boards, and of their clerks and attaches, and for all expenses incident to the holding of any election."

Section 11 of article 11 reads: "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

[1] By the first excerpt from section 8 of article 11 of the Constitution which I have read, after the adoption of the charter by the voters of the city of Sacramento and its approval by the Legislature, the Legislature possessed no authority thereafter to pass any law which would limit, alter, or amend any of the provisions of the city charter. That becomes the fundamental law of the city. True, if there is anything in the charter which is violative of any constitutional provision, that portion

of the charter, of course, is void, even though ratified by the people and approved by the Legislature.

[2] Preliminarily, I may state that the elective franchise is a sacred right. Every elector of the city is interested in the maintenance of that right. Every elector of the city is also interested in seeing that the persons for whom he intends to vote may have a fair opportunity to win the election. When any act is taken which interferes with that right, which limits that right, or subjects that right to the wish or desire of a clerical officer, the exercise of that power is not discretionary, it is not directory, it is mandatory, for the simple reason that no clerical officer possesses the right or the power or the authority to limit or in any way by his acts abridge the rights of an elector. If a method of action is pointed out for the clerical officer which subserves the rights of the electors, the privilege of the clerical officer to limit that right does not exist.

[3] So much for the claimed directory provision of section 273 of the charter of the city of Sacramento, that provision for the arrangement of the names upon the ballot, the full names of all regularly nominated candidates shall be printed on the official ballots in the alphabetical order of the surnames. True, that does not relate to the sample ballots. We are having to do with the official ballot, and the language of the section under the provisions of the Constitution which I have read becomes and is the fundamental law of the city of Sacramento unless it has been abrogated by some decision of the court or by an amendment duly ratified by the voters of the city and approved by the Legislature. Has that been done?

In determining the force and effect of a decision, it is necessary to inquire into the questions which are presented for the court to determine. Frequently in an opinion by the court there is language which is simply the opinion of the writer of the opinion and does not decide the questions which are presented to the court and therefore does not become the law of the case which it decides. They are simply opinions of the writer, and frequently there enter into opinions words, sentences, and sometimes whole paragraphs not necessary to an opinion and not based on questions presented to the court for determination. In the case of *People v. Elkus*, 59 Cal.

App. 396, 211 P. 34, which seems to be relied upon by both parties, an examination leads to the conclusion that the court had before it simply one question, and that is whether the proportional system of voting, or the Hare system, as it is commonly called, as set forth in the charter, was a valid provision or whether it controverted provisions of the Constitution. After considering the question at great length and citing numerous authorities holding that the proportional system of voting as incorporated in section 273 of the charter violated the constitutional or fundamental rights of the electors, the court decided that that portion of section 273 of the charter of the city of Sacramento was unconstitutional and void. Without going further into the facts of that case, I will simply state an examination supports absolutely just what I have stated. So we turn to *People v. Elkus*, 59 Cal. App. 396, page 407, 211 P. 34, 39, to ascertain just what the court held, what it decided, what became the law of that case. It is as follows: "It must be held that the proportional representation system of voting provided for in the charter is violative of the elector's constitutional right to vote at all elections. The power of the people of the state, by constitutional amendment, to authorize municipalities to adopt the Hare system of voting is not doubted, but it is clear that they have not done so. In reaching this conclusion, full consideration has been given to the principle that all laws are presumed to be constitutional and that they are to be declared invalid only when they clearly appear to be so. The court has also given consideration to the practical effect of holding the proportional representation system of voting unconstitutional."

That is what the court decided in the case of *People v. Elkus*. The language upon which the respondent in this case relies is no part of the decision of the court. That language is simply the opinion of the writer of the decision from which I have just been quoting. Now, I do not reflect in the least upon Presiding Justice Finch. He was an able lawyer and a good judge, but inserted language which has nothing to do with this case. He simply says: "Future elections of council members may be conducted under the general laws of the state, if the charter be not amended to provide a different procedure," etc.

I do not need to read any further from it. The case did not call for any recommendation on the part of the court. It called for a decision as to the constitutionality or unconstitutionality of section 273. By the language which I have quoted it is clear and decisive that the intention of the court and the purpose of the court was to declare void and unconstitutional the proportional system of voting.

Now let us consider sections 273 of the charter. The first paragraph reads: "The full names of all regularly nominated candidates shall be printed on the official ballots in the alphabetical order of the surnames."

That is a distinct, separate, and plain provision as to the manner in which the official ballots shall be printed. Following that is set forth in distinct paragraphs the proportional system of voting and how the ballots shall be counted, which under the decision of *People v. Elkus* was held to be unconstitutional for the reason that it violated the fundamental right of an elector to vote.

[4] There are two subjects in the section: (1) Separate and distinct, the printing of the ballot; and (2) separate and distinct, the proportional system of voting. They are not correlated; they are not dependent one upon the other. They are just as distinct and separate as though they were embodied in separate and distinct sections of the charter. It is a fundamental rule of decisions on constitutional questions that, if a portion of a section or a portion of a law stands alone—I mean a portion of an enactment stands alone—is not dependent upon or correlated to any other portion either of the act or of the section; and there are no constitutional objections to the portion so set forth, it is unaffected by the decision which holds other portions of the section invalid or other sections of the act invalid. This question was before the Supreme Court of this state in the case of *McCabe v. Jefferds*, 122 Cal. 302, 54 P. 897, 898. That was a case where, after providing for county government, fees, etc., there was a provision added: "This section shall take effect immediately." The Supreme Court held that provision, that part of the act, void; it had nothing to do with the first, it had nothing to do with compensation.

It simply provided for the time of the act going into effect. The court declared that portion void. I quote from that decision where they quote from *Cooley on Constitutional Limitations* (4th Ed., p. 215): "The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall. The point is not whether they are contained in the same section,—for the distribution into sections is purely artificial,—but whether they are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained."

The same principle was enunciated in this court in the case of *Cook v. Mason*, 103 Cal. App. 6, 283 P. 891, concurred in by Justice Thompson and Presiding Justice Finch. The decision was written by Judge Jamison acting as a pro tempore justice. A later case is that of *People v. Deletorre*, 124 Cal. App. 559, 12 P.(2d) 1068, in which they take up and cite practically all of the decisions having to do with constitutional questions in finding a portion of the section or act invalid and sustaining other portions. I simply refer to that case without taking time to cite the authorities.

[5] Under the decisions which I have just read, it is clear that the first provision of section 273 which provides for the printing of the official ballot is entirely separate and distinct from voting the ballot, and it must be held the decision of *People v. Elkus* only eliminated the proportional part of the section and left in full force and effect the first paragraph of section 273 providing for the printing of the official ballot, and, so holding, the decision of the court must be that the respondent has no power or authority to print the ballot other than in accordance with the provisions of the first paragraph of section 273, and the writ of mandate is granted.

We concur: PULLEN, P. J.;
THOMPSON, J.

10 Cal.App.2d 116

**GALT COUNTY WATER DIST. et al. v.
EVANS.
Civ. 5547.**

District Court of Appeal, Third District,
California.
Nov. 9, 1935.

1. Waters and water courses ☞183½

County water district *held* not precluded by its annexation to municipal utility district from exercising power to incur bonded indebtedness (St. 1913, p. 1049, as amended; St. 1931, p. 71, § 12a).

2. Municipal corporations ☞64, 64½

Legislature, in absence of constitutional restrictions, had absolute power over organization, dissolution, extent, powers, and liabilities of municipal corporations and determines effect of consolidation or annexation.

Original proceeding by the Galt County Water District of Sacramento County and others against T. D. Evans, as secretary of the Galt County Water District, for mandamus.

Writ issued.

Hinsdale, Otis, Johnson & Hughes, of Sacramento, for petitioners.

Everett M. Glenn, of Sacramento, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

The Galt County Water District and its directors seek by this proceeding to compel the secretary of the district to execute certain bonds heretofore authorized for the purpose of acquiring waterworks, canals, conduits, and reservoirs, and also storage rights, lands, and equipment useful or necessary to convey and make use of water for irrigation, power and other purposes.

No question is presented as to the validity of the organization or formation of the district nor the steps taken to incur a bonded indebtedness for the purposes stated above.

The answer of the respondent and the complaint of the intervener and the demurrers of petitioners thereto present but a single question for the determination of this court, namely, Does the fact that in 1935 the Sacramento Municipal Utility District annexed the Galt County Water District preclude the Galt County Water District from the exercise of the power to incur

a bonded indebtedness granted by the Act of June 10, 1913. Stats. 1913, p. 1049, as amended, Act 9124, p. 5052, Deering's Gen. Laws 1931.

[1,2] Respondent and intervener cite and rely upon the case of *In re Sanitary Board of East Fruitvale Sanitary District*, 158 Cal. 453, 111 P. 368, 370. That was a proceeding instituted by the sanitary board of the East Fruitvale Sanitary District pursuant to section 18 of an act for the formation of sanitary districts, Stats. 1891, p. 223, to determine the right of the board to issue bonds, and the validity thereof.

From the petition, it appeared that the East Fruitvale Sanitary District was organized in May, 1909, under the provisions of said act, the territory comprising the district being in the county of Alameda. Following the organization, the sanitary board initiated proceedings for the construction of a sewer system and the issuance of bonds in payment thereof. An election was called, and at such election the requisite two-thirds vote was cast in favor of the issuance of the bonds. Following this election, and prior to the order of the sanitary board directing that bonds be issued in accordance with the vote of the electors of the district, an election was held for the purpose of annexing to the city of Oakland certain adjacent territory embraced within the East Fruitvale Sanitary District, and the vote cast being in favor thereof, the territory became a part of the city of Oakland. Thereupon the city of Oakland challenged the right of the sanitary board to issue the bonds previously voted by the East Fruitvale Sanitary District. Upon the hearing of the issues thus presented, the trial court found in favor of the sanitary district and held that the same had not been dissolved by reason of said annexation. However, on appeal, the Supreme Court held that upon the completion of the annexation the powers of the sanitary district and of the district sanitary board ceased.

It is to be noted, however, that the Annexation Act, under which the territory of the East Fruitvale Sanitary District was annexed to the city of Oakland, Stats. 1889, p. 358, expressly provided that from and after the date of the filing the document showing returns of the annexation election in the office of the secretary of state, the annexation of said territory so proposed to be annexed shall be deemed to be and shall

be complete, and that thenceforth such annexed territory shall be to all intentions and purposes a part of such municipal incorporation.

In 1931 (St. 1931, p. 70), the Legislature enacted a statute amending chapter 592, Statutes of 1913 (page 1049), to provide for the incorporation and organization and management of county water districts, etc., and adding a new section thereto known as section 12a (page 71), which amendment provides that: "Any district organized under the provisions of this act may be annexed to or included within the territory of any municipal utility district organized under the provisions of that certain act entitled 'An act to provide for the organization, incorporation, and government of municipal utility districts, authorizing such districts to incur bonded indebtedness for the acquisition and construction of works and property, and to levy and collect taxes to pay the principal and interest thereon,' approved May 23, 1921, as amended, and such annexation or inclusion shall not destroy the identity or legal existence of any district organized under this act, notwithstanding the identity of purpose or substantial identity of purpose of the municipal utility district to which or into which any district organized under this act is included or annexed."

It is further provided in the same section: "If such annexation or inclusion shall be made pursuant to any agreement or contract entered into in accordance with the provisions of this act whereby the properties or assets of any district organized under this act are transferred such district shall, nevertheless, in the case of such annexation or inclusion, continue its legal existence, with all powers of a county water district under the terms of this act, until otherwise dissolved pursuant to any law now or hereafter enacted for that purpose."

As was clearly pointed out in *Re Sanitary Board of East Fruitvale Sanitary District*, supra: "In the absence of any constitutional restriction, the Legislature has absolute power over the organization, the dissolution, the extent, the powers, and the liabilities of municipal and other public corporations established as agencies of the state for purposes of local government. In *re Madera Irrigation District*, 92 Cal. 296, 28 P. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106.

"What shall be the effect of the enlargement or diminution of the boundaries of

such corporations, or of the consolidation of two into one, or of the annexation of the territory of one to another, is a question to be answered by a determination of the legislative intent."

We may fairly assume that the Legislature, having in mind a situation similar to that discussed in *Re Sanitary Board of East Fruitvale Sanitary District*, deliberately proposed to correct the condition there pointed out and enacted the amendment referred to and has accordingly exercised its power and expressed its legislative intent.

Reference was made in *Re Sanitary Board of East Fruitvale Sanitary District*, supra, to the case of *Woodward v. Fruitvale Sanitary District*, 99 Cal. 554, 562, 34 P. 239, and *In re Werner*, 129 Cal. 567, 62 P. 97, questioning indirectly the constitutionality of the formation of a sanitary district which could exercise jurisdiction over any part of the territory included within a municipal corporation. That question is not here involved for several reasons, one of which being that we are here not concerned with municipal corporations, but with public corporations inferior in power and scope to a municipal corporation.

It is therefore the order of this court that the writ of mandate issue as prayed for.

We concur: THOMPSON, J.; PLUMMER, J.



10 Cal.App.2d 224

EARLEY v. WOLF.

Civ. 5327.

District Court of Appeal, Third District,
California.

Nov. 16, 1935.

Hearing Denied by Supreme Court
Jan. 13, 1936.

1. Appeal and error ⇨931(1)

Appellate court must accept all evidence and reasonable inferences tending to sustain finding, and resolve all conflicts in support thereof.

2. Automobiles ⇨244(56)

Evidence that automobile guest was in kitchen and did not see host, who was in living room, drink whisky, and that host subsequently drove about five miles without happening of anything unusual, held to sustain finding that guest did not know of host's intoxication.

3. Appeal and error ⇨1008(1)

Fact finding of court in trial without jury is conclusive on appeal.

4. Damages ⇨130(1)

\$4,500 for fractured pelvis and other injuries confining plaintiff to fracture frame bed for 43 days in hospital and for about same period at home and causing pain 1½ years after accident held not excessive.

Appeal from Superior Court, Lake County; Benjamin C. Jones, Judge.

Action by Ina Goldie Earley against Lester Wolf. Judgment for plaintiff, and defendant appeals.

Affirmed.

J. Hampton Hoge, of San Francisco, and Mannon & Brazier, of Ukiah (A. Dal. Thomson, of San Francisco, of counsel), for appellant.

Elliott Johnson and Marshall Rutherford, both of Oakland (D. W. Brobst, of Oakland, of counsel), for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Plaintiff brought this action against defendant to recover damages for personal injuries sustained by her in an automobile accident, which occurred on the night of April 1, 1933, on the highway bordering the northern shore line of Clear Lake.

Plaintiff was riding as a guest of defendant when the accident occurred. It is alleged in her complaint, and the trial court found, that the accident and the resulting injuries to her were proximately caused by the intoxication of defendant. By reason thereof a judgment was accordingly rendered in favor of plaintiff, awarding to her damages in the sum of \$4,500.

Appellant bases his appeal upon two grounds: First, that the evidence is insufficient to support the finding of the trial court that plaintiff did not know that the defendant was intoxicated; and, secondly, that the damages awarded are excessive.

[1] We need not here quote the statement of the rule so clearly expressed by the court speaking through Mr. Justice Sloss in *Bancroft-Whitney Co. v. McHugh*, 166 Cal. 140, 134 P. 1157; but it is sufficient to say that an appellate court in examining the sufficiency of the evi-

dence to support a questioned finding must accept as true all evidence, and inferences reasonably based thereon, that tend to establish the correctness of the finding and resolve all conflicts in support thereof.

[2,3] With that in mind we find the following facts in the record: Plaintiff met the defendant at the Ferry in San Francisco and was taken by him in his car to the cabin or lodge of a mutual friend on the shores of Clear Lake in Lake county, where the son of plaintiff, a guest, was awaiting them. During that ride defendant drove in a careful and prudent manner. They arrived at the cabin about 7:30 o'clock in the evening. Upon her arrival plaintiff found the kitchen in great disorder and she immediately began to clean it up and prepare the evening meal. Supper was served about 8:30 or 9 o'clock; but on account of the small dining room there was not room for all of those present, about nine in number, to be seated at the table at the same time, so plaintiff waited until the others were through and had her supper by herself. While plaintiff was clearing the kitchen and preparing the supper, the rest of the party were in another room singing and playing the piano. Drinks, consisting of whisky highballs, were mixed and served in the living room, but plaintiff testified positively that she did not see appellant drink either before or after supper, nor did she observe anything in defendant's acts or conduct that would indicate to her that he was under the influence of intoxicating liquor. Defendant admits having had three or four whisky highballs before supper and two or three similar drinks after supper. The kitchen did not open directly into the living room, and it was necessary to pass through a small room to get from the kitchen to the living room; the connecting doors, however, remained open at all times. Before supper plaintiff was in the living room only occasionally, and there is testimony that one could not see what was taking place in the living room from the kitchen. So if there was any drinking by defendant, plaintiff was not in a position to observe it. After supper it was proposed that the party go to a dance being held some miles distant. Two cars were available, a coupé which accommodated three, and the rest of the party, including plaintiff, entered the sedan driven by defendant. In the front seat of the sedan were

plaintiff, her son, and defendant, who was driving. After the car proceeded about five miles along a narrow winding road without the happening of anything unusual, they entered a wide paved highway. Plaintiff testified the first unusual thing she noticed was after they had reached this main highway that defendant gave a deep sigh and leaned back in his seat and seemed, as plaintiff expressed it, to relax. He did this a second time, and then he removed his right hand from the steering wheel while traveling approximately forty miles per hour on a strange road at night, on a slight curve, taking his eyes momentarily off the highway, and proceeded to adjust the dial of the radio attached to the steering post of the car. The car then ran off the paved portion of the highway onto the graveled shoulder, and defendant, attempting to turn it back on the pavement, apparently swung the wheel too far to the other side and struck a tree, causing the death of plaintiff's son and inflicting upon plaintiff the injuries here complained of.

Under the foregoing facts appellant claims plaintiff was guilty of contributory negligence as a matter of law in riding with a driver she knew, or should have known, was under the influence of intoxicating liquor, and that the damages awarded were excessive. The court found that plaintiff was without knowledge that defendant was intoxicated at the time she entered his automobile prior to the happening of the accident, and that she had no opportunity to leave the automobile after it became apparent that defendant was losing control of the same by reason of intoxication.

We believe that the summary of the evidence we have set forth fully justifies the court in reaching the conclusion it did. Whether or not a reviewing court could or would reach a different conclusion is immaterial. The trial court performed its duty, and that is conclusive here.

[4] Upon the contention that the damages awarded to plaintiff are grossly excessive we likewise cannot agree with appellant. No X-rays, it is true, were introduced to support the claim as to the various fractures of the pelvis and the injuries to the sacrum; but it is apparent from the testimony of Dr. Calahan, called as a witness by defendant, that the plaintiff sustained a fractured pelvis. It is true

also the physician who attended plaintiff while confined in the hospital was not called as a witness on account of his own illness, but other evidence produced was sufficient to establish the necessary facts of injury.

As further evidence of the injury sustained by plaintiff, it appears that she was confined to a fracture frame bed in the San Francisco hospital for forty-three days and remained in that bed at home until June 28, 1933. At the time of the trial, some one and a half years after the accident, she testified she was suffering with pain in her back and that she was unable to perform the work she did prior to the accident. The trial court having accepted as true this testimony, the award of \$4,500 was certainly not excessive.

The record therefore clearly sustains the findings and award of the trial court, and the judgment should be affirmed; it is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.



10 Cal.App.2d 207

DICKINSON et al. v. ELECTRIC CORPORATION.
Civ. 10513.

District Court of Appeal, Second District,
Division 2, California.

Nov. 15, 1935.

Hearing Denied by Supreme Court
Jan. 13, 1936.

1. Landlord and tenant ⇨217(1)

Upon tenant's surrender of premises before expiration of term, landlord may, unless lease provides to contrary, sue for installments of rent as they fall due, or re-enter and relet premises and recover as damages, at expiration of original term, difference between rental fixed in lease and rental secured on reletting, such remedies being inconsistent.

2. Landlord and tenant ⇨217(1)

Generally, landlord's re-entry and reletting of premises constitute an election to sue for damages.

3. Landlord and tenant ⇨217(1)

Where lease provided that landlord's re-entry for breach of lease and reletting should not terminate lease unless landlord elected

to do so by written notice, which was not given, landlord's assignees, who re-entered, held entitled to sue tenant for accrued rent less amount received for reletting portion of premises.

4. Election of remedies ¶12

Where federal receiver for tenant repudiated lease, filing of claim in receivership proceeding for rents for balance of term, which was disallowed, held not election to terminate lease, nor bar to action against tenant for accrued rents, since claim was against fund in hands of receiver and without legal foundation.

5. Election of remedies ¶12

Assertion of supposed, but nonexistent, right does not estop party from pursuing rightful remedy.

6. Election of remedies ¶7(3)

Filing of invalid claim against fund in hands of receiver does not debar enforcement of personal liability of party primarily liable.

7. Landlord and tenant ¶184(2)

Where lease had not been terminated, landlord's assignees recovering judgment for accrued rents held not required to apply cash deposit for additional security against judgment, but entitled to retain deposit for such security until discharge of all obligations of lease as therein provided.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by Belle Dickinson and another against the Electric Corporation. From a judgment for plaintiffs, defendant appeals.

Affirmed.

Philbrick McCoy, of Los Angeles, for appellant.

E. C. Pyle, of Los Angeles, for respondents.

GOULD, Justice pro tem.

Plaintiffs' assignor, as lessor, leased to defendant certain premises for a period of fifteen years ending December 29, 1939, for a gross rental of \$360,000 payable in monthly installments of \$2,000 each, which rental was reduced by mutual agreement to \$1,200 per month for a period commencing April 23, 1932, and continuing until May 29, 1933, when plaintiffs gave notice to defendant that they elected to and did restore the \$2,000 per month rate provided

in the lease. Defendant corporation, by appropriate proceedings in the United States District Court, was placed in the hands of a receiver March 29, 1933. One of the acts of the receiver, taken pursuant to authority of the federal court, was to disaffirm and repudiate said lease as of May 2, 1933, and thereafter said receiver vacated said premises May 22, 1933, paying to plaintiffs rental for the portion of the month up to the date of abandonment, at the rate of \$1,200 per month. Plaintiffs thereafter notified defendant by writing dated May 23, 1933, that they would within ten days "re-enter said premises and remove the contents and take possession of said premises, and re-let the same, or any part thereof, at such rental and upon such terms and conditions as they may deem proper, and apply the proceeds thereof, less the expenses, including the regular agent's commission so incurred, upon the amount due from your corporation, and shall hold your corporation for any deficiency." This notice further stated that acceptance of the keys to said premises "shall not operate as a termination of said lease." Plaintiffs further alleged that they had endeavored but had been unable to relet said premises since defendant vacated the same.

Prayer was for three separate items: (1) An alleged shortage of \$240 in the rental payment made by the receiver when he abandoned the premises; (2) rental at the rate of \$2,000 per month from May 29, 1933, to date of judgment; (3) for the further sum of \$800, being a deduction made by the lessee for the month ending December 29, 1932, in accordance with a provision of the lease that such sum might be deducted annually during the term of said lease from an advance "additional security" deposit of \$12,000, provided the lessee at the time of such deduction could show a net worth of \$100,000, it being alleged that such net worth could not be shown at the date of such deduction.

On the trial plaintiffs prevailed upon all points, including judgment in their favor for twenty-four months' rental at \$2,000 per month with interest thereon, less a credit of \$50 which plaintiffs had received by subletting a portion of said premises for one month subsequent to the commencement of the action. Defendant appeals; and while conceding the binding force of the judgment as to the two items

of \$240 and \$800, respectively, urges that the trial court erred in allowing judgment for rental after surrender of the premises and the re-entry of the landlord. The only possible action which plaintiffs might maintain, appellant argues, would be an action for damages for the difference between the rental reserved in the lease and the amount received by the lessor upon a reletting of the premises, and such action would be premature if initiated before the termination of the lease.

[1,2] The rights of a lessor upon surrender of the demised premises by the lessee prior to the termination of the lease have been defined with exactness by California courts in repeated decisions. If the lessor does not desire to proceed further against the lessee, he may accept the surrender, treat the lease as terminated, and retake possession of the premises. If, however, the lessor desires to proceed further against the lessee, he has (subject only to the important exception hereinafter noted) a choice of but two remedies: (1) He may rest upon his contract and sue for such installment of rent as it falls due, or (2) he may take possession of the premises, relet the same, and recover from the lessee any damages suffered thereby, the measure of damages being the difference between the amount secured on reletting and the amount provided for in the original lease, in which latter case the landlord may not recover in installments, but must bring his action at the expiration of the original term. *Treff v. Gulko*, 214 Cal. 591, 7 P.(2d) 697; *Phillips-Hollman, Inc., v. Peerless Stages*, 210 Cal. 253, 291 P. 178. Under the first alternative the action is upon contract for rent; under the second alternative it is not for rent but for damages for breach of contract. The remedies are inconsistent, and ordinarily, as pointed out by the Supreme Court in *Phillips-Hollman, Inc., v. Peerless Stages*, supra, retaking possession of the premises by the landlord and reletting the same amounts to an election of the second remedy listed above.

The important exception to the rules laid down above is this: That the lease by its terms may be so drawn as to contain provisions by which the application of the rule may be evaded. This is generally recognized in the California cases above noted and in a long line of New York cases therein cited by the court with approval. Our problem in the instant case

resolves itself into a question as to whether the lease involved contains provisions which take it out of the rule.

[3] The action is one for accrued rental and is not brought upon the theory of damages. But appellant argues that because respondents accepted the keys to the premises, retook possession thereof, and notified appellant that they would relet the same and apply the rental so received upon the amount due from him, such actions amounted to an acceptance by the respondents of the surrender, and that they were bound thereby and limited to an action for damages. Quite clearly this argument would be conclusive except for the terms of the written lease herein involved. Respondents did exactly what they were permitted to do under the instrument in question, which provided that such repossession and reletting "shall not operate as a termination of this lease unless the lessor so elects, such election to be evidenced by written notice to the lessee"; and it is to be noted that no such notice was ever given by lessors. The pertinent provisions of the lease relied upon by respondents to establish their right to continuing rentals in spite of the repossession and reletting are very similar to those contained in a lease under review in *Kottler v. New York Bargain House, Inc.*, 242 N. Y. 28, 150 N. E. 591, in which Mr. Justice Cardozo held that the covenants were sufficient to take the case out of the general rule. The *Kottler* Case is quoted by the California Supreme Court with approval in the *Phillips-Hollman* opinion, as are other authorities supporting the same principles. We agree with the trial court in the case before us that the covenants of the lease involved are sufficient to provide for continuing liability by the lessee to pay rent after re-entry by the lessor, and that in the present action for accrued rental under the lease respondents are pursuing a remedy specifically given to them by the contract under review.

[4-6] Before commencing this action, respondents filed a "proof of claim" with the federal receiver of defendant corporation, wherein they sought an allowance of a sum equal to the rents for the balance of the term of the lease. This claim was disallowed. Appellant now urges that the filing of such claim for damages for breach of the lease was tantamount to an election to terminate the lease, and that

therefore the present action for rent upon the lease cannot be maintained. But the action in filing the claim with the receiver was in fact no election of remedies, for the so-called claim was in truth no claim whatsoever. It was an attempt to assert a right which did not exist; and one asserting such supposed right is not thereby estopped from later pursuing his rightful remedy. *Agar v. Winslow*, 123 Cal. 587, 56 P. 422, 69 Am. St. Rep. 84. Moreover, the claim as filed was against a fund in the hands of the receiver, and it has been held that the filing of such a claim does not debar the enforcement of the personal liability against the party primarily liable. 7 Cor. Jur. 337, § 574.

[7] When the lease in question was executed, lessee deposited with lessor the sum of \$12,000 "as additional security for the performance by the lessee" of the covenants of the lease. Certain deductions were made from this fund annually, and there remained in the hands of respondents at the time of trial a balance of \$5,600. Appellant now claims that in any event this amount should be credited against the judgment rendered. We cannot agree with this contention. The lease itself provides what is to be done with the deposit.

It is to be paid back to the lessee under certain conditions at the rate of one-fifteenth of the principal of said deposit in December of each year. There is no provision here, as in the case of *Burke v. Norton*, 42 Cal. App. 705, 184 P. 45, relied upon by appellant, that the guaranty deposit shall be applied on account of damages sustained by breach of the covenants of the lease. Applicable to the instant case is the rule enunciated in *Gallagher v. McMann*, 119 Cal. App. 688, 7 P.(2d) 204, that the lessor is "entitled to retain the deposit until the complete discharge of the obligations which the same is intended to secure." See, also, *Adjustment Corporation v. Marco*, 100 Cal. App. 338, 279 P. 1006. The lease here involved is still in force; it has never been terminated. Until such termination, the lessor is entitled to retain the cash deposited with him as additional security for the performance of the covenants of the lease until the discharge of the obligations of the lease, all according to the terms thereof relating to such deposit.

The judgment is affirmed.

We concur: WOOD, J.; CRAIL, P. J.

4 Cal.2d 590

In re SCHNOOR'S ESTATE.

VOLKMANN et al. v. VINSON et al.

S. F. 15250.

Supreme Court of California.

Nov. 12, 1935.

Rehearing Denied Dec. 12, 1935.

Wills ⚔ 198

Second holographic will which contained no revocation clause and which testatrix later destroyed *held* not to revoke former will so as to prevent probate thereof where second will made substantially same disposition of property, only difference being in quantum of bequest to residuary legatee (Probate Code, §§ 72, 75, 101-103).

In Bank.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Proceedings in the matter of the estate of Emilie D. Schnoor, deceased. From orders admitting to probate a will and granting letters of administration with the will annexed to Albert E. Hill, administrator, Margaret Volkmann and an-

other, contestants, appeal, opposed by Evelyn H. Vinson and another.

Affirmed.

Prior opinion, 45 P.(2d) 275.

Paul A. Lindley, of Oakland, for appellant.

Fitzgerald, Abbott & Beardsley and Edward Kelly, all of Oakland, for respondent Evelyn H. Vinson.

Earl Warren, Dist. Atty., and N. H. Miller, Deputy Dist. Atty., both of Oakland, for respondent Albert E. Hill, administrator with the will annexed.

CONREY, Justice.

On the 16th day of December, 1930, the decedent, Emilie D. Schnoor, executed a holographic will wherein she gave and bequeathed to Evelyn H. Vinson "all my real and personal property." On the 20th day of October, 1932, she executed a second holographic testamentary document, which we may call the second will, and which contained several bequests of personal property and gave the residue again to Mrs. Vinson. The estate included property in addition to that disposed of by the specific gifts made in the second will. The second will did not contain any express revocation of the first will. Shortly after October 20, 1932, the testatrix destroyed said second will.

After the death of the testatrix, the first will was offered for probate, and contests were instituted by a sister and by the brother of decedent. After trial, the court made an order admitting to probate said will of December 16, 1930, and an order granting to the public administrator letters of administration with the will annexed. From these orders, the contestants have prosecuted this appeal.

It is an admitted fact that the second document was destroyed with intent to revoke the same. Appellants contend that both wills were revoked and that the decedent died intestate. If the terms of the second will were such that it constituted a revocation of the first will, necessarily we would conclude that the revocation of the second will did not revive the first. Section 75 of the Probate Code reads as follows: "If, after making a will, the testator makes a second will, the destruction or other revocation of the second will does not revive the first will,

unless it appears by the terms of such revocation that it was the intention to revive and give effect to the first will, or unless, after such destruction or other revocation, the first will is duly republished." We have no evidence of an intention to revive the first will, if, in fact, it had been revoked. The real question is: Did the execution of the second will itself constitute a revocation of the first?

Section 72 of the Probate Code reads as follows: "A prior will is not revoked by a subsequent will, unless the latter contains an express revocation, or provisions wholly inconsistent with the terms of the prior will. In other cases the prior will remains effectual so far as consistent with the provisions of the subsequent will; but the mere naming of an executor in the prior will need not be given effect by the court when the subsequent will is otherwise wholly inconsistent with the terms of the prior will, the intention of the testator in this respect being left to the determination of the court." Since there was no express revocation, we have only to determine whether or not the provisions of the second instrument were "wholly inconsistent with the terms of the prior will." It is obvious that two instruments are not "wholly inconsistent" merely because in some particulars they differ one from the other. In such case they are, as to those particulars, and thus far only, inconsistent. Although not wholly consistent, yet they are not "wholly inconsistent." "Several testamentary instruments executed by the same testator are to be taken and construed together as one instrument. A will is to be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, it must have effect as far as possible." Section 101, Probate Code.

It appears to be the fact, and is so conceded by appellants, that the second will has been rightly construed as one which gave to Mrs. Vinson the residue of the estate, after discharge of the specific legacies provided for in that instrument. In other words, the second will gave to Mrs. Vinson exactly what she would have received if the new provisions had been drafted in the form of a codicil to the first will. Therefore, we think that the second instrument was in effect a codicil and that its execution did

not revoke the first will. It is our opinion that if the second will had not been destroyed, it would have operated as a codicil to the first. Probate Code §§ 101, 102, 103 and 72.

We have not reached the foregoing conclusions without attention to the decisions relied upon by appellants to sustain their contention that because the second will purported to dispose of the whole estate its execution revoked the first. In *Estate of Danford*, 196 Cal. 339, 238 P. 76, 78, the controversy was between Mrs. Danford, the widow of decedent, and one Caroline Mason. There was a first will, and a later will which did not contain any terms of direct revocation of the first. The trial court found in favor of the second will, exclusive of the first. On appeal by Mrs. Mason, this court held that "we cannot say, as matter of law, that the judgment of the lower court is incorrect." The widow, Mrs. Danford, was not mentioned in either one of the wills, but her right to appointment as administratrix with the will annexed was confirmed by the decision. The gifts to Mrs. Mason were, by the first will, one-half of decedent's estate, with appointment of Mrs. Mason as executrix; and by the second will, all the remainder of the estate after satisfaction of substantial gifts of money. No executor was appointed by the second will. Upon consideration of the contents of the two instruments, this court determined that there was "nothing in the context of the two wills of such compelling force as to require their being construed as one instrument."

In *Estate of Iburg*, 196 Cal. 333, 238 P. 74, there was a first will, wherein the testator gave all his property to his friend, John Carlson, naming him as executor. By a later will the testator left all his property to his sister. The latter instrument contained no words of revocation, and did not appoint an executor. This court held that the second will revoked the first and was wholly inconsistent therewith, notwithstanding the fact that the first appointed an executor and in that respect the second will was silent.

The two decisions last mentioned contain very full statements of the law pertaining to the matter before us, and fairly illustrate the questions arising in the

present case. Between this and the *Iburg* Case the contrast is obvious. The differences between the *Danford* Case and the case at bar are less distinct, being differences in degrees of emphasis which may be placed upon the facts. The principles of law which should control the decision are too well established to require further discussion. In their application to the facts of this case, which have been stated, they justify the decision of the lower court.

The orders are affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.



9 Cal.App.2d 701

PRICHARD v. SOUTHERN PAC. CO. et al.

Civ. 10154.

District Court of Appeal, Second District,
Division 2, California.

Nov. 2, 1935.

Hearing Denied by Supreme Court
Dec. 30, 1935.

**1. Commerce ☞8(6)
Courts ☞97(5)**

In action against railroad for death of fireman who was killed while employed on train which was engaged in interstate commerce, federal statute and applicable decisions of federal courts are controlling (Federal Boiler Inspection Act [45 USCA §§ 22-34]).

2. Master and servant ☞265(3)

In action for death of fireman who was killed by fall from locomotive for which he was taking water, plaintiff was required to prove proximate cause of accident (Federal Boiler Inspection Act [45 USCA §§ 22-34]).

3. Master and servant ☞285(7)

In action for death of fireman who was killed by fall from locomotive for which he was taking water from water column located beside railroad, evidence that act of railroad in equipping tender with hook which was too heavy to manipulate spout of water column was proximate cause of accident held insufficient for jury (Federal Boiler Inspection Act [45 USCA §§ 22-34]).

4. Appeal and error ⇨1056(6)

In action for death of fireman who was killed while taking water for locomotive, rejection of evidence which did not serve to establish proximate cause of accident held not prejudicial error, where evidence of proximate cause of accident necessary to establish liability of railroad was insufficient for jury (Federal Boiler Inspection Act [45 USCA §§ 22-34]).

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action by Hallie Clara Prichard, executrix of the last will and testament of Elmer Milton Prichard, deceased, against the Southern Pacific Company, and another, defendants. Judgment for defendants, and plaintiff appeals.

Affirmed.

W. H. Douglass and Henry K. Elder, both of Los Angeles, for appellant.

W. I. Gilbert, of Los Angeles, for respondents.

McCOMB, Justice pro tem.

This is an appeal from a judgment in favor of defendant based upon the trial court's order granting defendant's motion for a nonsuit.

The action is for damages which plaintiff alleges she sustained as a result of the death of her husband, due to injuries received while in defendant's employ as a railroad fireman.

The complaint alleges in:

Count 1 defendant's failure to comply with an order made March 13, 1911, by the interstate commerce commission pursuant to the Safety Appliance Act of Congress;

Count 2 defendant's failure to comply with the provisions of the Federal Boiler Inspection Act (45 USCA §§ 22-34), in that the locomotive tender from which decedent fell was not equipped with sufficient hand rails;

Count 3 defendant's violation of the Federal Boiler Inspection Act in equipping the tender on which decedent was working with a hook too large and heavy for the purpose of manipulating safely the spout of a water column.

Appellant concedes that the motion for a nonsuit was properly granted as to count

1 of the complaint. Therefore we dismiss it without further consideration.

There are two propositions presented for determination. First. Was there sufficient evidence as to the proximate cause of the accident to require the court to submit the case to the jury? Second. Did the trial court commit prejudicial error in its rulings in excluding certain evidence proffered by plaintiff?

In determining the first proposition, the evidence is undisputed. Decedent was a fireman of a locomotive crew engaged in hauling a train in interstate commerce. It was his duty to take water for the locomotive when it was needed. He performed this task on June 8, 1932, by causing the locomotive to stop in a position where the manhole on the top of the tender was opposite a water column located beside the railroad. He then engaged, as was customary, a "hook" ninety-one inches long and seven-eighths inches in diameter, with which the tender was equipped, in a ring dangling from a spout on the water column. He thus pulled the spout over the manhole and took water.

Thereafter, while the water spout was swinging into normal position, the decedent was seen falling from the locomotive tender with his hands in the air. The hook was lying on the ground under or by his side after he fell. When queried as to the cause of the accident, decedent said, "The hook slipped." From the injuries thus received decedent died.

[1] The train on which decedent was employed being engaged in interstate commerce, the federal statutes and applicable decisions of federal courts are controlling *Hoogbruin v. Atchison, T. & S. F. Ry. Co.*, 213 Cal. 582, 586, 2 P.(2d) 992.

[2, 3] In order for plaintiff to prove her case, it was necessary to introduce evidence of the proximate cause of the accident. *St. Louis-S. F. Ry. Co. v. Mills*, 271 U. S. 344, 347, 46 S. Ct. 520, 70 L. Ed. 979. The sole evidence directed to this issue consisted in the proof that it was customary to use the hook to manipulate the water spout; that decedent was seen falling from the locomotive tender with his hands in the air; that the hook was found by his side; and that he said, when asked as to the cause of the accident, "The hook slipped." This evidence is wholly insufficient to support an inference as to the proximate cause

of the lamentable accident. *Pennsylvania R. Co. v. Chamberlain*, 288 U. S. 333, 340, 53 S. Ct. 391, 77 L. Ed. 819. At best this evidence left the proximate cause of the accident a mere matter of speculation and conjecture. It might be inferred (a) that the decedent was using the hook to push the water spout to its normal position; (b) that the hook was being laid in its position on the top of the tender when it slipped and that decedent in an effort to grasp it fell from the tender to the ground; or (c) that decedent was leaning his weight on the hook when it slipped and precipitated him from the tender. As there was thus a total failure of plaintiff to offer evidence tending to prove a material issue under either count 2 or 3 of the complaint, the motion for a nonsuit was properly granted. *Pennsylvania R. Co. v. Chamberlain*, 288 U. S. 333, 343, 53 S. Ct. 391, 77 L. Ed. 819.

[4] Relative to plaintiff's second proposition, none of the exhibits and testimony offered by plaintiff and excluded under the rulings of the trial court would have supplied evidence as to the proximate cause of the lamentable accident. Therefore the trial court's rulings could not have resulted in prejudicial error, and it is unnecessary for us to comment upon them.

The judgment is affirmed.

We concur: CRAWFORD, P. J.; WOOD, J.



9 Cal.App.2d 704

PRICHARD et al. v. SOUTHERN PAC. CO.
et al.
Civ. 10064.

District Court of Appeal, Second District,
Division 2, California.
Nov. 2, 1935.

1. Statutes §219

Contemporaneous and practical construction of statute by those whose duty it is to carry statute into effect, plus acquiescence by persons having interest in matter, is sufficient to justify court in resolving any doubt as to meaning of language employed by Legislature in favor of such long unquestioned interpretation.

2. Costs §184(3), 185

Subpoena which, in accordance with long-established practice, has been delivered by clerk to attorney, signed and sealed, but leaving blank to be filled in thereafter by attorney title of cause, name of witness, and date of trial, held valid so as to entitle successful party to mileage and per diem of witness attending trial in response thereto (Code Civ. Proc. § 1986, subsec. 3).

3. Costs §184(3), 185

Mileage and per diem of witnesses who were summoned in good faith held proper items of costs to be taxed in favor of defendant who prevailed on a motion for nonsuit, even though witnesses were not sworn and did not testify.

4. Appeal and error §901

Error will not be presumed, but must affirmatively appear from record.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by Hallie Clara Prichard, executrix of the last will and testament of Elmer Milton Prichard, deceased, and others, against the Southern Pacific Company and another. From an order taxing costs, plaintiffs appeal.

Affirmed.

W. H. Douglass and Henry K. Elder, both of Los Angeles, for appellants.

W. I. Gilbert, of Los Angeles, for respondents.

McCOMB, Justice pro tem.

This is an appeal from an order taxing costs.

The questions presented for determination are: First. Is the successful party entitled to have taxed as items of cost, mileage and per diem of a witness who attends a trial in response to a subpoena which has been delivered by a deputy county clerk to an attorney, signed and sealed, leaving blank (a) the title of the cause, (b) the name of the witness, and (c) the date of trial, which omissions are supplied by the attorney prior to service of the subpoena? Second. Where a number of witnesses are subpoenaed by defendant and appear at the time of trial, but are neither sworn nor testify, may the defendant, who has prevailed on a motion for a nonsuit, have taxed as items of cost, mileage, and per diems of such witnesses?

It has been the long-established practice for the county clerk of Los Angeles county

to deliver blank forms of subpoenas signed and sealed to attorneys upon request, who thereafter insert (a) the title of the cause, (b) name of the witness, and (c) date of trial. These subpoenas so issued have, when duly served, been recognized as legally requiring the witness named therein to appear before the court on the date set forth in the subpoena. Plaintiff contends that a subpoena thus issued is void, relying principally upon the case of *Lucas v. Brown*, 127 Mo. App. 645, 106 S. W. 1089, wherein it was held that a subpoena, not naming the witness, issued by the county clerk was void. This case is clearly distinguishable from the one before us for the reason that the Missouri statute by its terms expressly provided that the subpoena must contain the name of the witness against whom it was directed, when issued by the county clerk. Our statute has no such requirement. From its language it appears to be wholly immaterial who inserts the title of the cause, name of the party, or date of trial, as "it is issued by the clerk, as of course, upon the application of the party desiring it." Subsection 3, § 1986, Code Civ. Proc.

[1, 2] The controlling principle in the instant case is found in the well-established rule that contemporaneous and practical construction of a statute by those whose duty it is to carry it into effect, plus acquiescence by persons having an interest in the matter, is sufficient to justify the court in resolving any doubt as to the meaning of the language employed by the Legislature in favor of such long unquestioned interpretation: *People v. Southern Pac. Co.*, 209 Cal. 578, 594, 290 P. 25. The practice followed in the instant case is efficient, economical, and has been found over a long period of time to be acceptable to the bench and bar of this state. We unqualifiedly approve such procedure.

[3, 4] Turning to the second question, if the witnesses are summoned in good faith, their mileage and per diems are proper items of cost, even though they are not sworn and do not testify. *Randall v. Falkner*, 41 Cal. 242, 246; *Whitaker v. Moran*, 23 Cal. App. 758, 762, 139 P. 901. There is nothing in the record before this court to show that the defendant acted in bad faith in summoning its witnesses. Error will not be presumed. It must affirmatively appear from the record. *Snowball v. Snowball*, 164 Cal. 476, 480, 129 P. 784; *County of Sonoma v. Hall*, 129 Cal. 659, 662, 62 P. 213; *Marshall v. Hancock*, 80 Cal. 82, 83,

22 P. 61. For the foregoing reasons, the trial court's rulings were correct.

The order appealed from is affirmed.

We concur: CRAIL, P. J.; WOOD, J.



10 Cal.App.2d 128

PEOPLE v. KEPFORD.

Cr. 1440.

District Court of Appeal, Third District,
California.

Nov. 12, 1935.

Hearing Denied by Supreme Court
Dec. 12, 1935.

1. Burglary ☞41(1)

Proof of ownership of automobile similar to one observed near scene of burglary held circumstance indicating guilt.

2. Burglary ☞42(1)

Testimony that article found in defendant's possession is similar to one that was stolen is sufficient identification, in absence of explanation by defendant.

3. Burglary ☞41(1)

Evidence sustained conviction of burglary in second degree.

4. Criminal law ☞1159(6)

Jury's verdict of guilty in prosecution for burglary in second degree would not be interfered with even if appellate court were of opinion that circumstances might be reasonably reconciled with innocence of accused.

5. Criminal law ☞651(1)

In burglary prosecution, refusal to order view of automobile involved in burglary, on ground that there was conflict in evidence as to whether stripe on automobile was white or yellow, or quarter of an inch wide or less, held not error where discrepancies were immaterial (Pen. Code, § 1119).

6. Criminal law ☞651(1)

Making of an order for a view is solely within trial court's discretion (Pen. Code, § 1119).

7. Criminal law ☞207(4)

Complaint charging commission of public offense may be filed before any magistrate within county in which offense was committed, and such magistrate has jurisdiction to hold defendant to answer.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Edward Kepford was convicted of burglary in the second degree, and he appeals. Affirmed.

Edward Kepford, in pro. per.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

DEIRUP, Justice pro tem., delivered the opinion of the court.

The defendant was convicted of the crime of burglary in the second degree upon evidence which may be summarized as follows:

Ralph Watson owned a poultry ranch. The defendant was the owner of a blue Nash sedan, around which was a narrow white stripe, and on three occasions the defendant had visited the ranch in his car. On the evening of February 10, 1935, Lati-ma Ziemann, a neighbor, while driving slowly past the Watson place, observed a blue Nash sedan parked at the side of the road. She noticed a streak of "a bright color," which she recalled as being yellow, around the car. On the following morning Watson discovered that his barn had been broken into and that two egg cases, each half-full of eggs, had been stolen. Andrew Herzer, who lived on a ranch in an adjoining county, testified that about three weeks or a month prior to March 15, 1935, the defendant brought an egg case, partly full of eggs, to that place in his blue sedan. Andrew's mother testified that the case arrived at the time when the defendant did. Louis Totman, a deputy sheriff, took the egg case from the Herzer home on March 15. It was offered in evidence, and was identified by Watson as being exactly like one of the two that had been stolen. The defendant did not account for his possession of the article.

Defendant contends that each of the circumstances as proven failed to show, beyond a reasonable doubt, that he was connected with the crime. The Nash car seen at the edge of the road was not positively identified as being his, and the egg case shown to have been in his possession was not definitely proven to be the one which was stolen. Defendant argues that each of the circumstances must be viewed separately in the light of the presumption of innocence.

[1-4] The jury had before it all of the circumstances connecting the defendant

with the crime, and it was their province to draw inferences therefrom. The ownership of an automobile similar to one observed near the scene of a crime was held, in *People v. Latona* (Cal. Sup.), 43 P.(2d) 260, to be a circumstance indicating guilt, and testimony that an article found in a defendant's possession is similar to one that was stolen, is a sufficient identification, in the absence of an explanation by the defendant. *People v. Frahm*, 107 Cal. App. 253, 290 P. 678. We think that the circumstances in this case fully justified the conclusion of the jury, as expressed in their verdict; but even if we were of the opinion that they might be reasonably reconciled with the innocence of the defendant, we should not be warranted in interfering with the determination of the jury. *People v. Latona*, supra.

[5,6] There was some conflict in the evidence as to whether the stripe on defendant's car was white or yellow, or a quarter of an inch wide, or less. The defendant asked the court to order a view of the automobile by the jury, and asserts that he was prejudiced by the refusal of the court to do so. It is apparent, however, that such discrepancies in the testimony as are shown by the record were immaterial; furthermore, the making of an order for a view, pursuant to the provisions of section 1119 of the Penal Code, "is a matter committed solely to the discretion of the court, and it is difficult to conceive of a case in which the facts would justify a reversal for an abuse of such discretion." *People v. Wong Hing*, 176 Cal. 699, 169 P. 357, 359.

[7] The burglary was committed in Elkhorn township. The complaint against the defendant was filed in Stockton township, in the same county. Defendant contends that the justice of the peace of the latter township lacked jurisdiction to hold the defendant to answer in the superior court. It is, however, settled that a complaint charging the commission of a public offense may be filed before any magistrate within the county in which the offense was committed, and such magistrate has jurisdiction to hold the defendant to answer. *People v. Van Zandt*, 123 Cal. App. 520, 11 P.(2d) 645.

The judgment and order are affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

KAISER v. HOPKINS, County Assessor. *
Civ. 10534.District Court of Appeal, Second District,
Division 2, California.

Nov. 8, 1935.

Hearing Granted by Supreme Court
Jan. 6, 1936.**1. Statutes** ⇨ 174, 175

Courts will interpret measure adopted by vote of people in such manner as to give effect to intent of voters adopting it.

2. Statutes ⇨ 212

Voters are presumed to have judged of amendment they were adopting by meaning apparent on its face according to general use of words employed, where it did not appear that words were used in technical sense.

3. Constitutional law ⇨ 14

Words used in Constitution must be taken in ordinary and common acceptation because they are presumed to have been so understood by framers and by people who adopted Constitution.

4. Taxation ⇨ 204(1)

Soldier who enlisted and served after Armistice of Nov. 11, 1918, held not entitled to exemption within constitutional provision allowing \$1,000 exemption from taxation to residents who served in army, navy, or marine service in "time of war," since voters intended to exempt those only who had served during period of actual conflict (Pol. Code, § 3612, subd. 4 (u); Const. art. 13, § 1½, amended Nov. 8, 1932).

5. Constitutional law ⇨ 20

Where two constructions can be placed upon a constitutional amendment and Legislature has enacted law placing reasonable construction upon amendment, courts will ordinarily follow legislative construction.

6. Constitutional law ⇨ 229(2)**Statutes** ⇨ 72**Taxation** ⇨ 195

Statute limiting period of service in war with Germany-Austria for tax exemption purposes to time preceding Armistice held not unconstitutional as denying equal protection of the laws or as violating state constitutional provision that all laws of general nature shall have uniform operation (Pol. Code, § 3612, subd. 4 (u); Const. art. 1, § 11; art. 13, § 1½, amended Nov. 8, 1932; Const. U. S. Amend. 14).

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Mandamus action by Ford M. Kaiser against Ed. W. Hopkins, Assessor of Los

Angeles County. From a judgment for plaintiff, defendant appeals.

Reversed.

Everett W. Mattoon, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for appellant.

Roy C. Kaiser, of Los Angeles, for respondent.

WOOD, Justice.

Plaintiff petitioned the superior court for a writ of mandate to compel the defendant, assessor of Los Angeles county, to grant him exemption from taxation in accordance with the provisions of the State Constitution, wherein it is declared that "the property to the amount of one thousand dollars of every resident of this State who has served in the army, navy, marine corps or revenue marine service of the United States in time of war, and received an honorable discharge therefrom * * * shall be exempt from taxation." Article 13, § 1½. Plaintiff served in the United States Army from May 13, 1919, to May 12, 1922. Defendant appeals from a judgment in plaintiff's favor. The sole question for determination in the proceeding is whether a soldier who enlisted and served after the armistice of November 11, 1918, is entitled to the exemption provided for those who served "in time of war."

[1-3] It is a general rule of statutory construction that the courts will interpret a measure adopted by vote of the people in such manner as to give effect to the intent of the voters adopting it. Cooley on Constitutional Limitations (5th Ed.) § 66. It must be held that the voters judged of the amendment they were adopting by the meaning apparent on its face according to the general use of the words employed. Such is the rule where it does not appear that the words were used in a technical sense. Miller v. Dunn, 72 Cal. 462, 14 P. 27, 28, 1 Am. St. Rep. 67. "Where a word having a technical as well as a popular meaning is used in the constitution, the courts will accord to it its popular signification, unless the very nature of the subject indicates or the context suggests that it is used in its technical sense." The words used in a Constitution "must be taken in the ordinary and common acceptation, because they are presumed to have been so understood by the framers and by the people who adopted it." Miller v. Dunn, supra; City of Pasadena

v. Railroad Commission of California, 183 Cal. 526, 192 P. 25, 10 A. L. R. 1425; San Pedro, etc., R. Co. v. Hamilton, 161 Cal. 610, 119 P. 1073, 37 L. R. A. (N. S.) 686; Weill v. Kenfield, 54 Cal. 111; Sprague v. Norway, 31 Cal. 173.

[4] When the armistice was effected on November 11, 1918, the conflict between the United States and Germany-Austria came to an end. All the war activities ceased, never to be renewed. It is true, as argued by plaintiff, that we were technically at war until July 2, 1921, during which time the peace commissioners negotiated the final terms of settlement, but in the minds of the people the war was over. A spirit of rejoicing swept the land, business cares were laid aside, people danced in the street and engaged in numerous impromptu celebrations. The young men of the nation were recalled from war, from the battlefields, where their lives had been endangered. In commemoration of the ending of the great war, the day of the armistice was established as a legal holiday. When at a later date the people, in appreciation of the great sacrifices made by the soldiers in leaving their homes and occupations to suffer the privations and dangers of war, amended the Constitution (Const. art. 13, § 1¼, amended Nov. 8, 1932) to grant them certain tax exemptions, they doubtless did so to reward those who served in time of actual war and not those who served in time of actual peace, to reward war service and not peace service. Application of the rules above set forth to the present situation leads to the inevitable conclusion that the voters used the words in question in their "ordinary and common acceptance," and that they intended to exempt those only who had served during a period of actual conflict.

Our views are in accord with a decision of the Supreme Court of Massachusetts, where a case very similar to the one before us was considered. In that case the petitioner sought by writ of mandate to compel the granting of certain privileges under a statute which allowed the privileges to any person who had served "in time of war." In that case, as in our own, petitioner joined the army after the armistice. In denying the petition, the court said: "When the armistice was signed it was generally recognized that the war had come to an end. It was so considered by the President of the United States who, on November 11, 1918, addressing the two Houses of Congress in

joint assembly under the provisions of the Constitution, stated 'The war thus comes to an end; for, having accepted these terms of armistice, it will be impossible for the German command to renew it.'" Scott v. Commissioner of Civil Service, 272 Mass. 237, 172 N. E. 218, 219.

[5] The state Legislature, in making provision for carrying into effect the constitutional exemption referred to, in 1929 enacted a law by which the words "in time of war" were given legislative interpretation. In section 3612 of the Political Code, it is provided: "The following are recognized as wars within the intent and meaning of said section of the constitution: * * * War with Germany-Austria, April 6, 1917, to and including November 11, 1918." Where two constructions can be placed upon a constitutional amendment and the Legislature has enacted a law placing a reasonable construction upon the amendment, the courts will ordinarily follow the legislative construction. In San Francisco v. Industrial Acc. Comm., 183 Cal. 273, 191 P. 26, 28, the court said: "In such a situation, where a constitutional provision may well have either of two meanings, it is a fundamental rule of constitutional construction that, if the Legislature has by statute adopted one, its action in this respect is well-nigh, if not completely, controlling. When the Legislature has once construed the Constitution, for the courts then to place a different construction upon it means that they must declare void the action of the Legislature. It is no small matter for one branch of the government to annul the formal exercise by another and co-ordinate branch of power committed to the latter, and the courts should not and must not annul, as contrary to the Constitution, a statute passed by the Legislature, unless it can be said of the statute that it positively and certainly is opposed to the Constitution. This is elementary. But plainly this cannot be said of a statute which merely adopts one of two reasonable and possible constructions of the Constitution."

[6] Plaintiff contends that the legislative enactment, Political Code section 3612, subdivision 4 (u), by which the war period is limited to the date of the armistice, is in violation of the Fourteenth Amendment to the Constitution of the United States, in that (as alleged) it denies the equal protection of the laws, and that the enactment in question violates the section of the Constitution of California (art. 1, § 11) which provides

that "all laws of a general nature shall have a uniform operation." In our opinion, the legislative enactment does not violate either of these constitutional provisions. The Legislature merely placed a construction upon the language used by the people in amending the Constitution. By such construction, it is held that the people granted certain exemptions to all members of a large group who served the nation in time of conflict, and that in such group those are not included who served in the army after the conflict had ceased. *Merchants' & Manufacturers' National Bank v. Pennsylvania*, 167 U. S. 461, 464, 17 S. Ct. 829, 42 L. Ed. 236; *San Francisco v. McGovern*, 28 Cal. App. 491, 152 P. 980; 61 Cor. Jur., §§ 383-4, p. 385.

Our attention has been called to the case of *Dooley v. Johnson*, 133 Cal. App. 459, 24 P.(2d) 540, in which a similar situation was involved and in which a conclusion was reached different from the one at which we have arrived. Holding the views above set forth, we must sustain the contention of defendant.

The judgment is reversed.

We concur: CRAIL, P. J.; McCOMB, Justice pro tem.



10 Cal.App.2d 155

PEOPLE v. McGILL
Cr. 2759.

District Court of Appeal, Second District,
Division 1, California.
Nov. 13, 1935.

1. Criminal law ⇐152

Prosecution for grand theft and forgery held not barred by limitations of seven years if defendant was not inhabitant of or usually resident within state during at least four years of such time (Pen. Code, §§ 800, 802).

2. Criminal law ⇐563

Generally, doctrine of reasonable doubt extends to evidence by which every material issue of corpus delicti is sought to be proved (Code Civ. Proc. § 2061, subd. 5).

3. Criminal law ⇐561(1)

In criminal action, burden is placed on people to establish beyond a reasonable doubt

guilt only of defendant therein, leaving issues which do not particularly relate to his guilt to be made according to preponderance of evidence (Pen. Code, § 1102; Code Civ. Proc. § 2061, subd. 5).

4. Criminal law ⇐565

State was not required to prove beyond reasonable doubt defendant's absence from state tolling limitations against prosecution for grand theft and forgery (Pen. Code, §§ 802, 1102; Code Civ. Proc. § 2061, subd. 5).

5. Criminal law ⇐739(3)

Whether defendant was absent from state for period sufficient to prevent prosecution for grand theft and forgery from being barred by limitations held for jury (Pen. Code §§ 800, 802, 1102; Code Civ. Proc. § 2061, subd. 5).

6. Criminal law ⇐1036(8)

Defendant could not complain of finding that defendant was absent from state for period sufficient to prevent prosecution for forgery and grand theft from being barred by limitations where he failed to request instruction respecting such issue (Pen. Code, §§ 800, 802).

7. Criminal law ⇐1170(1)

In prosecution for grand theft and forgery, involving issue whether defendant was absent from state for sufficient period to prevent bar of limitations, refusal to admit envelope addressed to defendant marked Los Angeles and other side stamped Santa Maria held not prejudicial error where effect could have been but slight and cumulative, and, if admitted, verdict would not have been affected (Pen. Code, §§ 800, 802).

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

George Howard McGill was convicted of grand theft and forgery, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

HOUSER, Presiding Justice.

From each of two judgments of conviction of the crime of grand theft and one judgment of conviction of the crime of forgery that were rendered against him, as well as from an order by which his motion for new trial was denied, appellant has appealed to this court.

[1] The principal point presented by appellant as affording a sufficient reason for an order by this court whereby said judgments would be reversed and the order for new trial would be granted, is that, although the offenses of which defendant was convicted were committed within this state in 1928, the complaint that supplied the foundation for his conviction was not filed until seven years thereafter, or in 1935; and that as a consequence, at the time when the action was commenced against defendant, the statute of limitations had run against each of such offenses; and in the premises, that the trial court had no jurisdiction either to try the action or to pronounce either of said judgments.

Appellant directs attention to the provisions of section 800, Penal Code, which provides that:

"An indictment for any other felony than murder, the embezzlement of public money, or the falsification of public records, must be found, or an information filed, within three years after its commission."

On the part of respondent it is urged that the language of section 802 of the same Code presents an insuperable obstacle to the legal conclusion suggested by appellant. That statute is as follows:

"If, when the offense is committed, the defendant is out of the state, the indictment may be found or an information filed within the term herein limited after his coming within the state, and no time during which the defendant is not an inhabitant of, or usually resident within this state, is part of the limitation."

An examination of the pertinent language of the two statutes discloses the situation that by the provisions of section 800, the offenses of which defendant was convicted apparently were "outlawed"; whereas, assuming that the last clause in section 802 is applicable, and that during at least four years of the seven years that elapsed between the dates of the alleged commission of the several respective crimes of which defendant was accused, and the date of the filing of the complaint, he was "not an inhabitant of, or usually resident within this state," the limitation of time within which the complaint must have been filed against defendant did not become effective.

Although on consideration not only of the language employed in section 802, but

as well its punctuation, and the separation of section 802 from section 800, it may be argued that the concluding clause of section 802, with reference to the limitation of time for the commencement of an action, refers to the condition only therein specified, to wit, that "when the offense is committed, the defendant is out of the state"; and that the "exception" has no general application. In that regard, in the case of *State v. Clemens*, 40 Mont. 567, 107 P. 896, 897, it was held, in effect, that the provisions of the Montana statute (which is identical with section 802 of our Penal Code) did not apply to a prosecution for an offense that was committed by the defendant while he was a resident of the state, but who afterward departed therefrom. In part, the Montana court said: "We think that the concluding words of section 9029, quoted above, are to be read with reference to the subject treated in the section, and that they apply only to a defendant who was not within the state when the crime with which he is charged was committed, and that they do not have any reference to a defendant who commits a crime while within this state, and afterwards leaves the state."

* * * The mere fact that a defendant is absent from the state does not constitute any justification or excuse for delay in filing an information against him, particularly in view of our very liberal rules applicable in extradition proceedings."

However, in this state, upon presentation of the question to the Supreme Court in the case of *People v. Montejo*, 18 Cal. 38, so little weight was accorded to a suggestion that the exception to which reference has been had applied only to an offense that had been committed by a defendant "out of the state," that it was summarily disposed of by the declaration of the court that, "We think it clear that this provision [now section 802, Penal Code] as well includes the case of the defendant leaving the State after the commission of the crime as the case of his absence at the time of its perpetration, and that it applies to all offenses."

Prior to the ruling in that case, in *People v. Miller*, 12 Cal. 291, 295, it was declared that, "It is true that the Statute of Limitations excludes from computation the time the defendant may be out of the State, but the rule is, that this exception must be stated in the pleading."

On the same point, in the case of *People v. Newell*, 192 Cal. 659, 669, 221 P. 622, it was said:

"The next point is that the information was not filed within three years after the alleged commission of the offense. Section 800, Pen. Code. It does not appear whether this was made a ground of demurrer or was otherwise brought to the attention of the lower court. However, the information alleges that the offense was committed on January 22, 1919, some 3 years and 9 days before the filing of the information. But the information also alleges that on or about October 5, 1921, appellant fled from the state of California to the republic of Mexico, and that he remained outside of the jurisdiction of the court continuously until on or about November 28, 1921—a period of 1 month and 23 days. Evidence was received tending to support the allegations of absence from the state, and there is no foundation therefore, for appellant's claim that the statute of limitations had run against the charge."

In *People v. Cheaney*, 111 Cal. App. 55, 58, 295 P. 84, 85, the question was treated in the following manner:

"While the information was filed about three years and sixty-two days after the commission of the crime, it was pleaded and stipulated that the defendant was absent from and outside the boundaries of the state from July 8, 1928, to October 11, 1928, or a period of more than three months. The claim that the statute of limitations had run against the charge is without foundation."

Notwithstanding the meager reasoning that has been bestowed by the courts upon that which would seem to deserve more careful attention, the conclusion would seem to be definite to the effect that the limitation on the time within which a criminal action may be instituted against a person after a given (ordinary) offense is alleged to have been committed by him at a time when he was either within or without the state is extended for a period equal to that during which the defendant in such action has not been "an inhabitant of, or usually resident within this state"; from which it follows that the point upon which appellant relies in that regard cannot be sustained.

[2-4] Appellant also contends that "the burden of proof was upon the state to

prove that the defendant was absent from the state. The People failed to establish this burden of proof beyond a reasonable doubt and to a moral certainty." In that connection it would appear to be the rule that, in circumstances such as are here presented, the duty devolves upon the people both to allege and to prove the fact of defendant's absence from the state for a period of time sufficient to prevent the full operation of the bar to the prosecution of the action. *State v. Bilboa*, 38 Idaho, 92, 213 P. 1025, 222 P. 785; *State v. Steensland*, 33 Idaho, 529, 195 P. 1080, 13 A. L. R. 1442; *People v. Miller*, 12 Cal. 291; and see generally monographic note, 13 A. L. R. 1449; 16 Cor. Jur. 530; 37 Cor. Jur. 1243 et seq.; 4 Wigmore on Evidence, p. 3586. But it is to be noted that none of such authorities goes to the length of declaring that the burden of proof requires that the absence of defendant from the state must be established beyond a reasonable doubt. As a general rule, as far as this state is concerned, the doctrine of reasonable doubt extends to evidence by which "every material issue" of the corpus delicti is sought to be proved. 8 Cal. Jur. 182. However, it should be clear that the facts which prove the existence of the corpus delicti are entirely distinct and separate from those by which the liability of the defendant to be prosecuted for the commission of the crime are sought to be established; and that, although the right to maintain the action is an essential element in the final power to pronounce judgment, that element constitutes no part of the crime itself.

Section 1102 of the Penal Code contains the provision that "the rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this code." And by subdivision 5, § 2061, of the Code of Civil Procedure, it is provided that in a civil action "the decision must be made according to the preponderance of evidence"; but that in criminal cases "guilt must be established beyond reasonable doubt." It will thus be noted that in a criminal action the burden is placed upon the people to establish beyond a reasonable doubt the "guilt" only of the defendant therein; which leaves issues which do not particularly relate to his guilt to "be made according to the preponderance of evidence."

[5,6] Without here attempting to set forth a résumé of the evidence that was

presented by the respective parties on the trial of the action, it may suffice to state that, although the testimony given by defendant and his wife in substance was that, except for a very short period of time, he was not "out of the state," the evidence produced by the people which consisted largely of indirect evidence, such as fruitless searches made of different county registrations of voters, of several different city and telephone directories, and of many and various unsuccessful efforts made by different respective officers to locate defendant within this state, together with sundry extrajudicial admissions made by defendant regarding his prolonged and practically continuous absence from the state, was sufficient to create a conflict in the evidence on the issue before the court. In any event, since in the circumstances the jury determined the conflict in the evidence against the testimony of defendant and his witnesses, its conclusion is binding upon this court. Furthermore, the record herein discloses the fact that at no time during the trial of the action did defendant request that the court instruct the jury regarding the particular issue which he now presents to this court for its determination. In such circumstances, defendant has no right to complain. 8 Cal. Jur. 309 et seq.

[7] However, appellant predicates prejudicial error upon the fact that the trial court refused to admit evidence offered by defendant that consisted of "an envelope addressed to George Howard McGill, marked 'Los Angeles' and the other side stamped 'Santa Maria.'" But even conceding that such offered evidence might have been relevant and admissible, nevertheless, its effect could have been but slight and at most cumulative of that already introduced by defendant. Considering the rejected evidence, it is apparent that if it had been admitted and thereafter given due weight by the jury, the verdict would not have been thereby affected.

Finally, appellant contends that the trial court erred to defendant's prejudice in refusing to permit a certain witness to testify as to his opinion regarding the value of a part of the property that was involved in one of the charges of grand theft. But a reading of the testimony given by such witness with respect to his qualifications as an expert on value of the property in question, clearly establishes

the conclusion that the trial court was right in its ruling in that regard.

The judgments and the order by which defendant's motion for a new trial was denied are, and each of them is, affirmed.

I concur: YORK, J.

DORAN, J., being disqualified, does not participate in this decision.



10 Cal.App.2d 108

**RICHARDS v. WHEELER et al., Constituting
Board of Trustees of Relief and
Pension Fund.**

MYERS v. SAME.

McCANN v. SAME.

Civ. Nos. 5430, 5462, 5463.

District Court of Appeal, Third District,
California.

Nov. 9, 1935.

1. Municipal corporations ⇨187, 200

Authority to provide for pensions and relief of policemen and firemen employed by chartered city constitutes a municipal affair.

2. Municipal corporations ⇨871

Provisions contained in municipal charter for relief and pensioning of firemen and policemen are not in contravention of Constitution prohibiting gifts of public money (Const. art. 4, § 31).

3. Municipal corporations ⇨187, 200

Municipality has right, by duly authorized legislation, to provide for pensioning and relief of its firemen and policemen by means of accident or life insurance, cost of which is deemed to be part of their compensation for service.

4. Municipal corporations ⇨200

In determining whether municipality is authorized to incur obligations to pay death benefits to heirs of deceased firemen, language of charter must be strictly construed and authority denied if power is doubtful.

5. Municipal corporations ⇨57, 59

Only such powers can be exercised under legislative grants to municipal corporations as are clearly comprehended within terms of

act or derived therefrom by necessary implication.

6. Municipal corporations ⇨187, 200

Charter provision authorizing city to provide pension and relief funds for policemen and firemen *held* not to authorize adoption of ordinance creating obligation to pay death benefits to beneficiaries of such employees.

7. Municipal corporations ⇨58

City charter, which purported to delegate all authority which city was to exercise in regard to pensioning of policemen and firemen, superseded ordinances previously existing regarding that subject not referred to in charter, and which were in violation of or which exceeded authority conferred in charter.

8. Municipal corporations ⇨116

Ordinances regarding pensioning of policemen or firemen were repealed by implication by subsequent ordinances fully covering same subject-matter.

9. Constitutional law ⇨102(2)

Pension granted by municipality to its employee is not a contractual obligation to which employee acquires vested right, but pension may be terminated at will by express or implied revocation thereof.

10. Municipal corporations ⇨200

General law authorizing municipalities under specified circumstances to pension firemen *held* inapplicable in proceeding wherein relief was sought under charter provision containing no reference to general law (Gen. Laws 1931, Act 2592).

three deceased members of the fire department of the city of Stockton to compel the trustees of the relief and pension fund of that city to pay their claims for death benefits which accrued by the terms of an ordinance which was enacted pursuant to the alleged authorization of the charter of that city "to provide a pension and relief fund for policemen and firemen." The claims were rejected on the ground that the ordinance exceeded the express or implied authority conferred by the charter in attempting to provide for death benefits. Demurrers to the petitions were filed on the ground that each fails to state facts sufficient to constitute a cause of action.

It is alleged that Melvin A. Richards, the husband of one of the petitioners, died January 26, 1934, as the result of an automobile accident which did not occur in the performance of his duties as a fireman. George Francis McCann, the husband of another petitioner, died May 30, 1935, from a heart ailment occurring at a time when he was not actively engaged in his duties as a fireman, and Ralph Myers, the husband of the third petitioner, died January 21, 1935, as the result of an operation for hernia which it is alleged occurred as a result of his employment as a fireman. Each petitioner is the widow of one of these deceased firemen. It is further alleged the respondents are the duly appointed trustees of the relief and pension fund of Stockton, which was created and is maintained pursuant to law, and which fund contains a sum in excess of \$100,000, from which the claims may be paid; that Stockton is governed by a freeholders' charter, which was adopted and ratified July 2, 1923 (St. 1923, p. 1321); that section 58, article 5, of the Charter provides for "a pension and relief fund for policemen and firemen"; that pursuant to the charter authorization therefor the city council adopted Ordinance No. 1278, on June 14, 1932, which provides for the retirement of firemen and policemen for disability or upon attaining a specified age, upon part pay; for the creation of a pension and relief fund by applying thereto a portion of the fixed salaries of such employees; for the selection of a board of trustees to handle and disburse the fund, and for death benefits which are doubled in the event of an accidental death occurring before the retirement of the employee. The ordinance provides for these death benefits in the following language: "Sec. 6 (a) *Natural*

Mandamus proceedings by Audrey E. Richards, by Mae Myers, and by Dolores C. McCann against R. J. Wheeler and others, as members of and constituting the Board of Trustees of the Relief and Pension Fund for retired or disabled members and for beneficiaries of deceased members of Police and Fire Departments of the City of Stockton. The proceedings were consolidated for hearing.

Writs denied.

Joseph C. Tope, Ira B. Langdon, Langdon & Tope, J. Leroy Johnson, and F. C. Cloudsley, all of Stockton, for petitioners.

Tom B. Quinn, City Atty., of Stockton, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

These proceedings were consolidated for hearing. Separate petitions for writs of mandamus were filed by the widows of

Death Benefit. In the event a member dies before retirement on a service pension, his beneficiary shall receive Five Thousand (\$5,000.00) Dollars. (b) *Accidental Death Benefit.* In the event a member dies from accident before retirement on a service pension, his beneficiary shall receive Five Thousand (\$5,000.00) Dollars in addition to the benefit provided under Sec. 6 (a).” It also appears that the husband of each petitioner was employed with the city as an active fireman at the time of his death, not having been retired from his service; that the claims were duly presented for payment for the respective sums alleged to be due the beneficiaries, and rejected. These petitions were then originally filed in this court to compel the trustees of the pension and relief fund to allow and pay the claims. To each petition a demurrer was filed, as above stated.

In support of these demurrers, the respondents claim that the death benefit feature of Ordinance No. 1278 is illegal and void as an exercise of excess authority alleged to have been conferred by section 58 of article 5 of the Charter of Stockton, and that each petition therefore fails to state facts sufficient to warrant the issuing of the writ of mandamus prayed for.

[1] The authority to provide for pensions and relief of policemen and firemen employed by a chartered city is conceded to be a municipal affair. *Klench v. Board of Pension Fund Commrs.*, 79 Cal. App. 171, 249 P. 46; *Popper v. Broderick*, 123 Cal. 456, 56 P. 53; *Burke v. Board of Trustees*, 4 Cal. App. 235, 87 P. 421.

[2,3] It is also conceded that the provisions contained in the charter of a municipality for the relief and pensioning of its policemen and firemen are not in contravention of article 4, § 31, of the Constitution prohibiting a gift of public money. *Fessier v. Campbell*, 2 Cal. (2d) 638, 42 P. (2d) 1020; *O’Dea v. Cook*, 176 Cal. 659, 169 P. 366; *Pennie v. Reis*, 80 Cal. 266, 22 P. 176. We also recognize the fact that *authorized* legislation providing for the relief and pensioning of policemen and firemen and the dependent members of their families is upheld on the theory that it amounts to a mere increase of compensation for service. *O’Dea v. Cook*, supra; 43 C. J., p. 813, §§ 1407 and 1492; 1 *Dillon’s Municipal Corporations*, p. 748, § 430; 2 *McQuillin’s Municipal Corp.* (2d Ed.) p. 206, § 529. Nor do we question the right of a municipality by duly authorized leg-

islation to provide for the pensioning and relief of its firemen and policemen by means of accident or life insurance, the cost of which is deemed to be a part of their compensation for service. This is merely recognizing the application of good modern business methods in the affairs of municipalities. The peace of the inhabitants and security of property in our cities and towns depend to a considerable extent upon the efficiency of policemen and firemen. They are engaged in hazardous pursuits. Violent death and unavoidable accidents constantly menace them in the performance of their duties. It is essential they should receive adequate compensation and feel an assurance that they and their dependents will be reasonably cared for in the event of unforeseen accident or death. The insurance of such employees of a municipality as a part of their compensation for service should be encouraged.

[4,5] It does not follow that a chartered municipality may provide for such insurance by ordinance unless it is authorized so to do. In construing section 58 of article 5 of the Stockton Charter to determine whether the city was authorized by ordinance to incur obligations to pay death benefits to the heirs of deceased firemen, we are compelled by the well-recognized rule of law to construe the language of the charter strictly, and if there is a doubt regarding the authority conferred thereby, we must weigh that doubt against the theory of a delegation of the authority. In 1 *McQuillin’s Municipal Corporations* (2d Ed.) p. 919, § 368, it is said in that regard:

“Only such powers and rights can be exercised under grants of the legislature to corporations, whether public or private, as are clearly comprehended within the terms of the act or derived therefrom by necessary implication, regard being had to the objects of the grants.

“Since municipal powers are required to be conferred in plain, unambiguous terms, the general well-settled rule of construction is that a doubtful power is a power denied.”

To the same effect are the following authorities: *Oro Electric Corp. v. Railroad Commission*, 169 Cal. 466, 147 P. 118; *Kellar v. City of Los Angeles*, 179 Cal. 605, 178 P. 505; *City of Long Beach v. Lisenby*, 175 Cal. 575, 166 P. 333; *Miller v. City of Los Angeles*, 185 Cal. 440, 197 P. 342; 18 Cal. Jur., p. 801, § 107.

[6] Applying the foregoing rules of construction, we are constrained to hold that the charter provision authorizing the city of Stockton to "provide a pension and relief fund for policemen and firemen and other officers and employees of the city," does not expressly nor by necessary implication authorize the adoption of the ordinance upon which the petitioners rely, creating an obligation to pay death benefits to the beneficiaries of these employees.

In the recent case of *Fessier v. Campbell*, 2 Cal. (2d) 638, 42 P.(2d) 1020, 1022, the Supreme Court appears to have determined that section 58, article 5, of the Charter of Stockton, which is involved in these proceedings, neither expressly nor by necessary implication authorized the city council to obligate the city to pay death benefits to the heirs or beneficiaries of its deceased firemen or policemen. The court said in that regard: "By its contract, the city has undertaken to pay at least the accidental death benefits when death is due to the employment, and which may be a large part of the cost of such insurance. Its action in this respect is purportedly pursuant to the power vested in it by subdivision 58 of article 5 of the city charter. *That section does not expressly include the right to provide for death benefits, nor is an implication of its inclusion necessary in order to execute the power vested in the city.* If the framers of the charter intended that the city should become obligated for the payment of death benefits, the matter could easily have been included."

The language of the Supreme Court which we have italicized for emphasis was undoubtedly used with reference to the established rule of law regarding the powers of municipal corporations which is uniformly accepted as correct by all text-writers. That rule is concisely stated in 1 McQuillin's *Municipal Corporations* (2d Ed.) p. 910, § 367, as follows: "The only powers a municipal corporation possesses and can exercise are: (1) Those granted in express terms; (2) Those necessarily or fairly implied in, or incident to, the powers expressly granted; and (3) Those essential to the declared objects and purposes of the municipality, not merely convenient, but indispensable."

[7,8] The petitioners assert that because the city of Stockton enacted an ordinance as early as 1901, providing for the payment of death benefits to the beneficiaries of its policemen and firemen,

which was amended from time to time, but which amended ordinance remained in force at the time of the adoption of the charter in 1923, it was deemed to have been continued in force as a binding obligation on the city, even after the adoption of the charter. We think not.

It has been held that specific reference in a charter to an existing general statute with the apparent intention of adopting it as a portion thereof has the effect of making that law a part of the charter. *Ex parte Lemon*, 143 Cal. 558, 77 P. 455, 65 L. R. A. 946; 18 Cal. Jur. 767, § 79. This rule has not been extended so as to apply it to ordinances of a municipality which exist at the time of the adoption of a charter. But assuming that the same rule does apply to city ordinances, there was no reference in the Stockton charter to existing city ordinances regarding the pensioning of policemen or firemen. It must therefore be assumed that by an omission to refer to such existing ordinances, section 58 of article 5 of the Charter which purports to delegate all the authority which the city is to exercise in that regard, necessarily supersedes ordinances previously existing regarding that subject which are in violation of, or which exceed the authority conferred by the charter. Moreover, the ordinance upon which the petitioners rely in this proceeding was adopted in 1932, long after the charter became effective. The former ordinances were repealed by implication (*Burke v. Board of Trustees, etc.*, 4 Cal. App. 235, 87 P. 421), and the last-mentioned ordinance is ineffectual in so far as it purports to enlarge on the authority conferred upon the city in that regard.

[9] It has been repeatedly held that a pension granted by a municipality to its employee is not a contractual obligation to which he acquires a vested right, but, on the contrary, that such pension may be terminated at will by either express or implied revocation thereof. *Clarke v. Police and Health Insurance Board*, 123 Cal. 24, 55 P. 576; 54 A. L. R. page 943, note.

[10] Nor may it be said the general law which was enacted by the state in its sovereign capacity authorizing municipalities under specified circumstances to pension firemen (*St. 1905*, p. 412; 1 *Deering's Gen. Laws of Calif. of 1931*, p. 1200, Act 2592) aids the petitioners in this proceeding. No reference to such law was made in the charter provision, and

the petitioners seek a remedy in this proceeding only against the board of trustees of the relief and pension fund of the city of Stockton. The general law on that subject has no application. The authority to issue the writs demanded must be found in the express or implied language of the charter provision.

On the authority of *Fessier v. Campbell*, 2 Cal. (2d) 638, 42 P.(2d) 1020, the demurrers are sustained, and the writs are denied.

We concur: PULLEN, P. J.; PLUMMER, J.



10 Cal.App.2d 390

**COWAN v. SECURITY-FIRST NAT. BANK
OF LOS ANGELES et al.**
Civ. 9992.

District Court of Appeal, First District, Division 2, California.

Nov. 26, 1935.

1. Husband and wife ☞279(1)

Mortgaging of home held not "sale" of home within provision of property settlement agreement that when wife sold home awarded to her thereunder she would pay husband certain sum out of money received from sale.

[Ed. Note.—For other definitions of "Sale," see Words & Phrases.]

2. Limitation of actions ☞24(1)

Action by husband commenced on September 16, 1933, to recover sum which property settlement agreement provided wife should pay to husband when wife sold home awarded to her under agreement, on ground that mortgage executed by wife on home on February 15, 1929, constituted sale within agreement held barred by limitations.

3. Vendor and purchaser ☞249

Vendor's lien does not exist where obligation to pay is to arise only on happening of contingency which may never occur, but exists only where there is absolute debt owing from vendee to vendor.

4. Vendor and purchaser ☞249

Allegation that divorced wife to whom home had been awarded pursuant to property settlement agreement providing that when wife sold home she would pay husband certain sum out of money received from sale had mortgaged home and that mortgagee there-

after proceeded to foreclose mortgage held insufficient to entitle husband to vendor's lien against property in absence of fraud or bad faith.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Fred L. Cowan against the Security-First National Bank of Los Angeles and another. From a judgment of dismissal, the plaintiff appeals.

Affirmed.

Hansen & Sweeney, Herbert J. Lindstrum, and George N. Foster, all of Los Angeles, for appellant.

Keogh, Cate & Colver and Alfred E. Cate, all of Los Angeles, for respondent Security-First Nat. Bank of Los Angeles.

A. W. Lane and M. E. Lane, both of Glendale, for respondent Eva P. Cowan.

SPENCE, Justice.

Plaintiff sought to recover judgment against defendant Eva P. Cowan, his former wife, and defendant Security-First National Bank of Los Angeles, for the sum of \$10,000, and to have said sum declared a lien upon certain real property and to have said lien foreclosed. Demurrers were sustained to the original complaint and thereafter to the first amended complaint with leave to amend. Plaintiff then filed his second amended complaint and defendants' demurrers thereto were sustained without leave to amend. Judgment of dismissal was thereupon entered, and from said judgment plaintiff appeals.

While the second amended complaint contained three counts, all of said counts were in substance the same and were based upon the property settlement agreement entered into between plaintiff and defendant Eva P. Cowan on November 28, 1927. The parties thereby divided certain real and personal property and made provision for the custody and support of their minor child. One of the parcels of real property which the wife obtained by the settlement and to which the wife received a quitclaim deed at the time of the execution of the agreement was the so-called "home place." One of the provisions of the agreement read as follows: "It is also agreed by and between the parties hereto that when the wife sells the home place situate at 1421

North Central, in the city of Glendale, Los Angeles County, California, that she will pay to the said husband the sum of Ten Thousand (\$10,000.00) dollars out of the money received from the sale of said property." It was not expressly agreed that the wife should sell forthwith, or within a reasonable time or at any time, and plaintiff did not allege and does not now claim that such was the agreement of the parties.

The property settlement agreement was thereafter recorded. On February 15, 1929, defendant Eva P. Cowan mortgaged said home place to defendant Security-First National Bank to secure her promissory note in the sum of \$12,000 and the mortgage was recorded on March 22, 1929. Plaintiff alleged on information and belief in his second amended complaint that said mortgage was given to secure a prior indebtedness. It was further alleged that in November, 1932, said bank commenced an action to foreclose said mortgage without making plaintiff a party to said action and that in January, 1933, the property was sold to said bank on the foreclosure sale following the judgment of foreclosure in said action. Upon the allegation of the foregoing facts, together with allegations of the demand upon and refusal by defendants to pay plaintiff the sum of \$10,000, plaintiff brought this action on September 16, 1933, and sought judgment as above indicated. The demurrers of both defendants attacked the sufficiency of the complaint to state a cause of action and also set up the statute of limitations.

[1,2] Appellant contends that the trial court erred in sustaining the demurrers without leave to amend and entering the judgment of dismissal. In our opinion this contention cannot be sustained. The agreement provided that "when the wife sells the home place—she will pay the husband the sum of \$10,000 out of the money received from the sale of the said property." The complaint fails to allege that the wife sold the home place at any time, but, on the contrary, it affirmatively shows that the wife mortgaged the home place and that the mortgagee thereafter proceeded to foreclose the mortgage. We believe it clear that the mortgaging of the home place did not constitute a sale of the property by the wife, but even if

the terms of the agreement could be construed to cover the execution of the mortgage in February, 1929, then appellant's cause of action was barred by the statute of limitations when this action was commenced in September, 1933.

[3,4] In further support of his contention appellant claims that "the allegations establish a vendor's lien," but we find no merit in this claim. Assuming, without deciding, that the relationship of vendor and vendee existed between the parties by reason of the agreement, the terms of said agreement were inconsistent with the theory of a vendor's lien. *Royal Con. Min. Co. v. Royal Con. Mines Co.*, 157 Cal. 737, 110 P. 123, 137 Am. St. Rep. 165. The agreement clearly contemplated that the wife might sell and convey the property free from any claim of the husband in which event the wife was to pay the husband \$10,000 out of the money received from the completed sale. The plain wording of the agreement negated the idea that the husband was to have any lien upon the property enforceable against purchaser thereof. Furthermore, it is essential to the existence of a vendor's lien that there be an absolute debt owing from the vendee to the vendor and the lien cannot exist where, as in the present case, the obligation to pay is to arise only upon the happening of a contingency which may never occur. *Gard v. Gard*, 108 Cal. 19, 40 P. 1059; *Womble v. Womble*, 14 Cal. App. 739, 113 P. 353; 25 Cal. Jur. p. 745. For the foregoing reasons, as well as other reasons which need not be discussed, we conclude that the allegations of the second amended complaint failed to show that appellant was entitled to a vendor's lien against said property.

It may be stated in conclusion that appellant based his claims entirely upon his alleged rights derived from the above-mentioned agreement. He made no allegations of fraud, collusion, or bad faith upon the part of the respondents or either of them, and, in the absence of such allegations, we are of the opinion that the appellant failed to state a cause of action.

The judgment is affirmed.

We concur: **NOURSE, P. J.; STURTEVANT, J.**

10 Cal.App.2d 277

PEOPLE v. LAWSON.

Cr. 1856.

District Court of Appeal, First District, Division 2, California.

Nov. 20, 1935.

Burglary 41 (1)

Evidence held sufficient to sustain conviction for burglary.

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Shields Lawson was convicted of burglary, and he appeals.

Affirmed.

Alfred J. Hennessy, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

NOURSE, Presiding Justice.

The defendant was indicted on five counts charging five separate burglaries and also a prior conviction on a charge of burglary. He denied all, by plea, but at the time of the trial admitted the prior conviction. On a trial by jury he was convicted on the first three counts and acquitted as to counts 4 and 5. He brings this appeal from the judgment and from the order denying him a new trial. The only question raised on the appeal is the sufficiency of the evidence to support the conviction.

Under count 1 defendant was charged with burglarizing an apartment at 805 Bush street on December 5, 1934. At that time a fur coat, a bag, and various articles of jewelry and clothing were taken. The door of the apartment had been broken near the lock, and an instrument commonly used for that purpose and known as a "jimmy" was found in defendant's possession at the time of his arrest. On the day following the burglary the defendant took the fur coat to a garage on Market street and arranged for its sale to a girl employed there. He left the coat with the girl, taking a \$5 deposit, and returned the next day when the sale was completed by payment to him of \$15. At that time he gave her a receipt in full in which he stated that he had obtained the coat from a Los Angeles dealer in ladies' clothing. To this receipt he signed a fictitious name and

gave a false address. At the time of his arrest the other articles taken from the apartment were found in his room. When asked for an explanation at that time, he gave an evasive answer as to where he procured each of these articles. As to the fur coat, which was recovered some days later, he said he "had lifted it from an automobile."

Count 2 charges the burglary of an apartment on December 10 of the same year. The defendant was identified as one who was seen prowling about the apartment shortly before the burglary was committed. All the articles taken at that time were found in his possession at the time of the arrest.

Count 3 charges the burglary of an apartment at 810 Eddy street on January 14, 1935. At that time a Pekinese dog, a dog basket, and a radio were taken. A few days later defendant sold the dog to another, and the dog basket and the radio were found in his possession at the time of his arrest. In this case also the defendant was identified as a man who was seen prowling about the place before the burglary was committed, and, after his arrest, admitted having stolen the dog.

The testimony of the arresting officers as to all three counts was to the effect that when defendant was arrested and charged with the burglaries he either remained mute or gave evasive answers; all his explanations of his possession of the stolen articles were so unreasonable or impossible that they could not help but disclose to the jury his guilty knowledge of the offenses charged. While the defendant took the stand in his own behalf, his testimony was so fantastic that it could not have borne weight with the jury. Among the circumstances tending to prove the guilt of defendant is the fact that all these burglaries were committed in the same manner and at about the same time of day. The apartments were all entered by means of a "jimmy," and such an instrument was found hidden in defendant's closet when he was arrested.

As is often the case in charges of this nature where the party is not actually seen in the commission of the crime, the evidence is to a large extent circumstantial and somewhat fragmentary. The evidence tending to prove an entry under the first count is weak, and appellant argues that it proves no more than possession of the sto-

len articles. But defendant's admission that he had "lifted" or stolen the fur coat, taken with the proof that it had been stolen from the apartment after the door had been broken, is sufficient with all the circumstantial evidence to sustain the conviction on that count. The identification of defendant under the second and third counts supports the circumstantial evidence of those burglaries and this is sufficient to sustain the verdict on those counts.

The judgment and the order are affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



10 Cal.App.2d 188

**NORAGER v. MOUNTAIN STATES LIFE
INS. CO. et al.**
Civ. 9604.

District Court of Appeal, First District, Division 1, California.
Nov. 14, 1935.

1. Insurance ⇐525

Finding that insured, who, though occasionally driven to barbershop, was unable to walk alone and was visited in his home by doctor at least once a week, was entitled to benefits for "confining illness" under disability policy held justified.

2. Appeal and error ⇐185(2)

Question of trial court's jurisdiction may be raised for first time on appeal, where amount involved was below trial court's jurisdictional minimum.

3. Courts ⇐120

Action at law arising in city of Oakland for monthly insurance benefits in amount under \$1,000 held within exclusive jurisdiction of justice court, though complaint alleged that defendant had declared policy expired and plaintiff prayed that policy be declared in full force (Code Civ. Proc. § 103; § 81, as added by St. 1933, p. 1810, as amended by St. 1933, p. 2476; § 112, as amended by St. 1933, p. 1814).

Appeal from Superior Court, Alameda County; John D. Murphey, Judge.

Action by Harry C. Norager against the Mountain States Life Insurance Company

and another. Judgment for plaintiff, and defendants appeal.

Reversed.

Philip O. Solon, of Oakland, for appellants.

John E. Wiese, of Oakland, for respondent.

KNIGHT, Justice.

This action involves the alleged breach of the provisions of a policy of health insurance. Judgment was entered in favor of plaintiff, the insured, and the insurance companies appeal.

The policy was issued by the appellant Sierra Nevada Life & Casualty Company, whose business was subsequently taken over by the appellant Mountain States Life Insurance Company; and three years after the issuance of the policy and on March 29, 1932, the insured suffered a paralytic stroke which completely paralyzed his left side; and since then he has been totally disabled and under the care of a physician. The clauses of the insurance policy out of which the controversy arises read as follows: "Confining Illness for Life. The Company will pay at the rate of \$75.00 per month for disability resulting from disease, the cause of which originates more than fifteen days after the date of this policy, and which confines the Insured continuously within doors and requires regular visits therein, at least once in every seven days, by a legally qualified physician, provided said disease necessitates total disability and total loss of time, and provided that no indemnity will be paid for the first seven days of such disability." "Non-Confining Illness. The Company will pay at the rate of \$75.00 per month for the first month, and \$37.50 per month for the next two months, for disability resulting from disease, the cause of which originates more than fifteen days after the date of this policy and which does not confine the Insured continuously within doors, but requires regular visits, at least once every seven days, by a legally qualified physician, provided said disease necessitates total disability and total loss of time, and provided that no indemnity will be paid for the first seven days of such disability, unless such non-confining illness shall immediately follow confining illness, indemnity for which is payable hereunder."

As called for by the "Confining Illness" clause above quoted, the insurer paid the

insured \$75 a month up to and including the month of April, 1933, at which time he was informed that thereafter the monthly benefit would be reduced to \$37.50 for two months, as provided in the "Non-confining Illness" clause, and that at the expiration of said two months the policy would terminate. Accordingly, he was given two checks for \$37.50 each, covering the months of May and June, 1933, and in July, 1933, said companies purported to cancel the policy. The insured refused to accept said checks in settlement of his claims, and in October, 1933, brought the present action wherein he asked that it be declared that the policy was still in full force and effect, and that he be given judgment for \$450, which sum represented the allowance of \$75 a month for the preceding six months as provided in said "Confining Illness" clause. The trial court found that the policy was still in full force, and accordingly awarded judgment in favor of the insured for \$450.

The refusal of the insurer to continue the payments of \$75 a month and its action in purporting to cancel the policy in July, 1933, were based upon the claim that the insured's illness no longer confined him continuously within doors, nor required regular visits at least once in every seven days by a legally qualified physician, and that consequently his case was removed from the "Confining Illness" clause of the policy to the "Nonconfining Illness" clause thereof. And in this connection appellants contend that the decision in *Carabelli v. Mountain States Life Insurance Company et al.* (Cal. App.) 46 P.(2d) 1004, is decisive of the present case.

[1] That case was decided subsequent to the trial of the present action, the principal appellant therein, Mountain States Life Insurance Company, being the principal appellant here; and the judgment in favor of the insured was reversed. There, too, the insured suffered a paralytic stroke, and the question presented was the precise one here involved, and it arose out of the clauses of a policy identical with those here under consideration. But a comparison of the two cases clearly demonstrates that other than as above stated the facts of the present case are essentially different from those of the *Carabelli Case*. There, as the decision states, the insured was able to move about his home and elsewhere unassisted. Habitually he took extended walks alone a considerable distance from

his home; and it was not necessary for the doctor to visit him at his home. He was able to and did walk alone sixteen or more times to the doctor's office, which was many blocks from his home; and continuously for a period of five weeks he was unattended by any physician. Here, however, the evidence shows that the insured is practically helpless and has been so since he was stricken. For six months or more he was confined to his bed; and thereafter he was not able to get about, even to move around his home, without assistance. It is true, as appellants point out, that after being bedridden for six months plaintiff occasionally visited a barber shop a short distance from his home. But usually he was driven there by his nephew in an automobile, and when he walked he was always accompanied by an attendant, for the reason that some one had to be with him constantly to support and guide him. He was unable to walk alone. Moreover, upon his arrival at the barber shop, it was necessary for the barber to assist him into the shop, remove his coat, help him in and out of the barber chair, and afterwards aid him in putting on his clothing. It is true also that the doctor did not keep a complete record of all of his visits, and consequently was unable to state definitely the exact number of times he called upon the insured. But the evidence amply supports the conclusion that he visited the insured in his home at least once in every seven days, and for a considerable period called several times a week. The evidence as a whole is legally sufficient, therefore, to sustain the trial court's finding that the nature of respondent's illness was not such as to remove his case from the provisions of the "Confining Illness" clause of said policy [*Nelson v. Washington Fidelity Ins. Co.*, 135 Cal. App. 731, 27 P.(2d) 779; *Home Protective Association v. Williams*, 151 Ky. 146, 151 S. W. 361, Ann. Cas. 1915A, 260; *Hays v. General Assembly American Benevolent Ass'n*, 127 Mo. App. 195, 104 S. W. 1141], and that therefore he was entitled to a continuation of benefits at the rate of \$75 a month.

[2,3] Appellants further contend that the original jurisdiction of the action was in the justice court and not the superior court. This contention is based upon the admitted fact that all actions at law arising in the city of Oakland wherein the demand sued upon exclusive of interest amounts to \$1,000 or less fall exclusively within the jurisdiction of the justice court.

Code Civ. Proc. § 103; § 81 (as added by St. 1933, p. 1810, as amended by St. 1933, p. 2476), § 112 (as amended by St. 1933, p. 1814). Appellants argue, therefore, that since the amount sued for herein was only \$450, the superior court was without jurisdiction to determine the cause. *Proctor v. Justice's Court*, 209 Cal. 39, 285 P. 312; article 6, § 5, Const. of Cal. Appellants filed no demurrer to the complaint, nor was the question of want of jurisdiction suggested by answer or during the course of the trial; but being a jurisdictional question, it may be raised for the first time on appeal (*Hallock v. Jaudin*, 34 Cal. 167, 173; 21 Cal. Jur. p. 268); and in our opinion appellants' contention must be sustained. The position taken by plaintiff is that inasmuch as the complaint alleged that the insurer "informed plaintiff that his policy had expired and would not be renewed," and in the prayer of the complaint he asked "that said policy of insurance be declared to be in full force and effect," the action presented an equitable issue which brought it within the jurisdiction of the superior court; and in support of his position plaintiff relies upon the decision rendered by the District Court of Appeal in the case of *Brix v. People's Mutual Life Ins. Co.* (Cal. App.) 29 P. (2d) 233. Admittedly, that case involved the same jurisdictional question here presented, but after the appeal was determined by the District Court of Appeal, the cause was taken over by the Supreme Court and it was there held that where, as here, an insured sues to collect accrued monthly benefits under a policy of insurance claimed to be due up to the time of the commencement of the action, the total amount of which is less than the minimum amount over which the superior court has jurisdiction, the inferior court has original jurisdiction of the action, despite the fact that the complaint contains additional allegations with reference to the future installments. Such allegations, the Supreme Court holds, do not operate to remove the cause to the jurisdiction of the superior court. *Brix v. People's Mutual Life Ins. Co.* (Cal. Sup.) 37 P.(2d) 448. In other words, it was held in effect that the matter of additional relief is merely consequential, and does not operate to confer jurisdiction on the superior court. The court went on to say, however, that its decision should not be construed as holding that in case of a transfer of the action to and a

retrial thereof in the inferior court the plaintiff might not, after proper amendment to that end, recover all installments which have fallen due on said policy of insurance since the commencement of said action, provided his total demand does not exceed the jurisdictional limit of the inferior court.

Therefore, in conformity with the decision of the Supreme Court in that case, the judgment herein is reversed.

We concur: TYLER, P. J.; CASHIN, J.



10 Cal.App.2d 172

PEOPLE v. KRUG et al.

Cr. 2799.

District Court of Appeal, Second District,
Division 2, California.

Nov. 13, 1935.

Rehearing Denied Nov. 25, 1935.

Hearing Denied by Supreme Court
Dec. 12, 1935.

1. Criminal law ☞1144(13)

On appeal from judgment entered on guilty verdict, evidence must be viewed in light most favorable to prosecution.

2. Burglary ☞41(1)

Evidence, when considered in connection with such inferences as jury may have reasonably drawn therefrom to sustain findings of fact on which guilty verdict was predicated, sustained conviction of burglary in second degree.

3. Criminal law ☞1159(5)

Where evidence tending to establish defendant's alibi in prosecution for burglary was conflicting, jury's finding thereon was conclusive on reviewing court.

4. Criminal law ☞1035(3)

In prosecution for burglary, action of clerk in explaining to jury before reading charge that count 3 was for other and separate cause of action, but different offense of same class of crimes and offenses charged in counts 1 and 2 of which defendant had been acquitted held not reviewable where no objection was made and court was not asked to admonish jury to disregard statement.

5. Burglary ☞35

In prosecution for burglary, excluding evidence that codefendant had been acquitted

of similar charge after being identified by witness who also identified defendant as one of burglars *held* not error, since such evidence did not tend to prove or disprove any issue in trial.

6. Witnesses $\Rightarrow$ 372(2)

In prosecution of Armenian for burglary wherein he attempted to establish an alibi, examination of defendant's witnesses as to their nationality *held* proper on theory that witnesses of same nationality might testify more favorably for fellow countryman.

7. Criminal law $\Rightarrow$ 393(1)

Statement of defendant made in grand jury room with full knowledge of his right to remain silent after an accusation has been made against him is admissible.

8. Criminal law $\Rightarrow$ 393(1)

In burglary prosecution, evidence that defendant stated before grand jury that he did know whether he committed offense *held* admissible where defendant was advised of his constitutional rights before he made statement and trial court instructed that defendant's refusal to testify before grand jury was not evidence against him.

9. Criminal law $\Rightarrow$ 1169(5)

Error, if any, in admitting testimony that defendant stated before grand jury that he did not know whether he committed robbery *held* cured by instruction that defendant's refusal to testify before grand jury was not evidence against him.

10. Criminal law $\Rightarrow$ 1144(15)

In burglary prosecution, permitting prosecution to examine defendant as to his whereabouts on dates identical with dates of burglary alleged in counts of indictment of which defendant had been acquitted *held* not error where evidence was stricken from record and jury was instructed to disregard it, since it will be presumed that jurors followed instructions.

11. Criminal law $\Rightarrow$ 1037(2)

Alleged misconduct of district attorney in commenting on defendant's failure to testify before grand jury *held* not reviewable where defendant did not request trial court to instruct jury to disregard alleged misconduct, especially where possible harm might have been obviated by appropriate instructions.

12. Criminal law $\Rightarrow$ 1037(2)

Unless harmful result of alleged misconduct of district attorney cannot be obviated by appropriate instructions, defendant may not predicate error thereon in absence of assignment of such alleged misconduct as error and request to trial court to instruct jury to disregard such conduct.

13. Criminal law $\Rightarrow$ 982

Summary denial of defendant's oral application for leave to file written application for probation *held* not error since within trial court's discretion (Pen. Code, § 1203).

WOOD, J., dissenting.

Appeal from Superior Court, Los Angeles County; J. J. Trabucco, Judge.

Frances Krug, Vahan Rejebian, Joe Mesina, John Rankin, and Stafen Ganchian were charged with burglary, and last-named defendant convicted of burglary in the second degree and he appeals.

Affirmed.

Chotiner & Chotiner, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

McCOMB, Justice pro tem.

Appellant was convicted after trial by jury of burglary in the second degree. This appeal is from the judgment and from the order denying his motion for a new trial.

[1] Viewing the evidence most favorably to the prosecution (People v. Dukes, 90 Cal. App. 657, 659, 266 P. 558), the facts in the instant case are:

Appellant was indicted for burglary of the house of Mrs. Mayer between 1 and 4 o'clock p. m. on April 24, 1935. Personal property of a value of approximately \$3,000 was taken. Mrs. Burke, the next door neighbor of Mrs. Mayer's, on the date of the burglary was sitting on her front porch, less than 50 feet from the driveway of Mrs. Mayer's home, about 3 o'clock in the afternoon and saw a man leaving the house with a bulging suitcase. He walked to the corner and turned east. About five or ten minutes later, a second man came out of the house through the front door, and continued in the same direction as the first man. This second man Mrs. Burke positively identified as appellant.

Appellant, after being advised by his counsel to stand on his constitutional rights and refuse to testify, was taken before the grand jury, where he was directly accused of having burglarized the home of Mrs. Mayer, and replied to said accusation, "I don't know."

Appellant, an Armenian, denied the charge and offered evidence of an alibi.

Appellant relies for reversal of the judgment on the following propositions:

First. The evidence is insufficient to sustain the verdict and judgment.

Second. It was prejudicial error for the clerk of the trial court in reading the charge to the jury to precede it by reading, "Burglary—three counts; Count Three is for a further and separate cause of action, but a different offense of the same class of crimes and offenses as the charges set forth in counts one and two hereof," as on a previous trial appellant was acquitted of the offenses charged in counts 1 and 2.

Third. The trial court committed prejudicial error in (a) sustaining an objection to appellant's offer to prove that a codefendant was acquitted by a jury of a similar charge after being identified by Mrs. Burke as the man who preceded appellant from Mrs. Mayer's home on April 24, 1935; (b) overruling objections of appellant to questions asked by the prosecution pertaining to the nationality of certain of appellant's witnesses; (c) permitting, over objection, the prosecution to read an accusatory statement and alleged answer made before the county grand jury; (d) permitting over objection, the prosecution to examine appellant while a witness as to his whereabouts on two dates which were identical with the dates of the burglary alleged in counts one and two of the indictment.

Fourth. The district attorney committed prejudicial error in commenting to the jury upon the alleged failure of appellant to testify before the grand jury.

Fifth. The trial court committed error in summarily denying appellant's oral application for leave to file a written application for probation.

[2] As to appellant's first contention, we have examined the record and are of the opinion there was sufficient evidence considered in connection with such inferences as the jury may have reasonably drawn therefrom to sustain the findings of fact upon which the verdict of guilty was predicated. *People v. Dukes*, 90 Cal. App. 657, 659, 266 P. 558.

[3] Appellant strenuously urges that the jury should have believed the evidence tending to establish his alibi. This was a question of fact as to which the evidence was conflicting, and the jury's finding upon such evidence is conclusive in this court. *People v. Dukes*, 90 Cal. App. 657, 659, 266 P. 558.

[4] The second proposition upon which appellant predicates error may not be urged in this court for the reasons (a) that no objection was made to the reading of the objectionable words, nor (b) was the court asked to admonish the jury to disregard the words as read. *People v. Gonzales*, 69 Cal. App. 609, 611, 231 P. 1014.

Appellant in his third contention claims the court committed prejudicial error in:

[5] (a) Sustaining an objection to appellant's offer to prove that a codefendant was acquitted by a jury of a similar charge after being identified by Mrs. Burke as the man who preceded appellant from Mrs. Mayer's home on April 24. This evidence was clearly immaterial, as it did not tend to prove or disprove any issue in the trial. The ruling was correct.

[6] (b) Overruling objections of appellant to questions asked by the prosecution pertaining to the nationality of certain of appellant's witnesses. Appellant, an Armenian, attempted to prove an alibi. It was proper for the prosecution to examine the witnesses as to their nationality, not for the purpose of implying that Armenians are to be distrusted or viewed with suspicion, but on the theory that witnesses of the same nationality might testify more favorably for a fellow countryman than if not so related. This rule is clearly stated by Mr. Justice Garoutte in *People v. Thomson*, 92 Cal. 506, 509, 28 P. 589, as follows:

"It is elementary law, supported by all authority, that the state of mind of a witness as to his bias or prejudice, his interests involved, his hostility or friendship towards the parties, are always proper matters for investigation, in order that truth may prevail and falsehood find its proper level. If the inner workings of a witness' mind are actuating his testimony, and the workings of that mind are brought forth to the light and held up in full view before the jury, results will be obtained much more in accord with truth and justice than though the witness' testimony is weighed and measured by his words alone."

In *People v. Cowan*, 1 Cal. App. 411, 413, 82 P. 339, 341, Mr. Justice Allen says:

"It is permissible upon cross-examination to show the fact of relationship, fraternal or otherwise, existing between the witness and the party in whose interest he is called, as tending to affect his credibility. For the purpose of fully weighing the evidence of any witness, the jury are entitled to know

his bias or feelings in the case, if any there be. *People v. Wong Chuoy*, 117 Cal. [624] 626, 49 P. 833. It is elementary that the state of mind of a witness as to his friendship or hostility towards the parties is proper matter for investigation. *People v. Thomson*, 92 Cal. [506] 509, 28 P. 589." (Italics ours.)

[7-9] (c) Permitting, over objection, the prosecution to read an accusatory statement and alleged answer made before the county grand jury. The alleged accusatory statement was as follows:

"Q. Have you ever been on the property at 1077 Hi Point Avenue in Los Angeles? A. I don't know.

"Q. Mr. Ganchian, I am directly accusing you of having burglarized the home of Mrs. Reba Mayer at 1077 Hi Point Avenue on the 14th day of April of this year. What have you to say to that? A. I don't know.

"Q. I am directly accusing you of having, in company and in conspiracy with Vahan Rejebian, John Rankin and Joe Messina and Frances Krug, burglarized the home of Mrs. Reba Mayer at 1077 Hi Point Avenue on April the 24th, 1935. What have you to say to that? A. I don't know."

The statement of a defendant made in the grand jury room with full knowledge of his right to remain silent after an accusation has been made against him is admissible evidence at the trial. *People v. O'Bryan*, 165 Cal. 55, 62, 130 P. 1042; *People v. Sexton*, 132 Cal. 37, 39, 64 P. 107; *People v. Singh*, 1 Cal.App.(2d) 729, 731, 37 P.(2d) 481. In the instant case it was stipulated that appellant was advised of his constitutional rights prior to going into the grand jury room. The foregoing testimony therefore was admissible. In addition, the trial judge properly instructed the jury that a defendant's refusal to testify before a grand jury is not evidence against him. Therefore, if, as contended by appellant, the statement was not an admission but merely a signifying of his refusal to testify before the grand jury, the instruction cured any error in the admission of the evidence.

[10] (d) Permitting, over objection, the prosecution to examine appellant while a witness as to his whereabouts on two dates which were identical with the dates of the burglary alleged in counts 1 and 2 of the indictment. As to this alleged error, the trial court ordered the questions and answers stricken from the record and instructed the jury to disregard the testimony thus stricken. It will be presumed that the jurors were true to their oaths and followed the admonitions and instructions of the court. *People v. Burkhart*, 211 Cal. 726, 733, 297 P. 11.

[11, 12] The fourth proposition presented by appellant may not be urged in this court for the reason that he did not lay the proper foundation in the trial court for review here. Unless the harmful result of the alleged misconduct of the district attorney cannot be obviated by appropriate instructions of the trial court, a defendant may not predicate error in this court in the absence of (a) assignment of such alleged misconduct as error and (b) a request to the trial court to instruct the jury to disregard it. *People v. Sieber*, 201 Cal. 341, 356, 257 P. 64. Appellant did not request the trial judge to instruct the jury to disregard the alleged misconduct, although the harm might well have been obviated by appropriate instructions.

[13] Appellant's final contention that the court committed error in summarily denying appellant's oral application for leave to file a written application for probation is without merit. It is within the discretion of the trial court to summarily deny such an application. Section 1203, Pen. Code; *People v. Howe*, 1 Cal. App. (2d) 518, 36 P. (2d) 820; *People v. Bill*, 140 Cal. App. 389, 35 P.(2d) 645.

The judgment and order are, and each is, affirmed.

I concur: CRAIL, P. J.

I dissent: WOOD, J.

10 Cal.App.2d 119

JOHNSON v. DU FOUR et al.

Civ. 9716.

District Court of Appeal, First District, Division 1, California.

Nov. 12, 1935.

Rehearing Denied Dec. 12, 1935.

Hearing Denied by Supreme Court

Jan. 10, 1936.

1. Automobiles Ⓒ244(50)

Evidence that pedestrian had been drinking alcohol and was walking or running diagonally across street at place other than crosswalk, contrary to ordinance, *held* to support finding of contributory negligence when pedestrian was struck by automobile.

2. Appeal and error Ⓒ237(2), 1053(3)

Where purpose of question was to show that ill effects suffered by pedestrian were partly due to certain injury to thyroid gland and not to automobile accident, admitting pedestrian's nonresponsive statement that such injury was inflicted by third person for stealing lady friend's affections *held* not irregularity preventing fair trial, where no motion to strike was made and jury were instructed to consider only ill effects of accident.

3. New trial Ⓒ102(8)

Denying new trial for newly discovered evidence *held* not error, where no good reason was shown why witness could not have been produced at trial and no application for continuance was made.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by George Johnson against Jack Du Four and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

James A. Myers and Henry F. Edson, both of Oakland, for appellant.

Charles V. Barfield, of San Francisco, for respondents.

TYLER, Presiding Justice.

Action for damages for personal injuries growing out of an automobile accident. Plaintiff alleged negligence on the part of defendant in the operation of his car. Defendant denied negligence and alleged that plaintiff himself was negligent and that such negligence contributed to the injury. The accident occurred on the northeast corner of the intersection of Broadway and Eighth street in the city of Oakland. A jury rendered a verdict in favor of defendant. Thereafter plaintiff moved for a new trial upon various

grounds. The motion was denied. Alleged errors relied upon for a reversal are insufficiency of the evidence to justify the verdict, error of the trial court in the admission of certain evidence, and in failing to grant a new trial on the ground of newly discovered evidence.

[1] There was evidence to show that defendant was driving his automobile over Eighth street and Broadway, a business district in the city of Oakland, at a speed estimated at fifteen miles an hour. Defendant first noticed plaintiff when he was walking fast or running slowly in a tangent toward the northwest, about twenty-five feet from the pedestrian lane and seven feet in front of his car. Defendant, on seeing plaintiff, immediately applied his brakes and turned his car to the right in an unsuccessful attempt to avoid striking plaintiff, who had continued following the course taken when defendant first observed him. There was introduced in evidence an ordinance of the city of Oakland governing a pedestrian's right to use the roadway to the effect that when within any business district a pedestrian shall not cross a roadway other than by a crosswalk. There was also evidence to the effect that plaintiff had been drinking, his breath being alcoholic. The evidence taken as a whole is sufficient to support the issue that plaintiff's own negligence proximately contributed to or caused the injury complained of.

[2] In support of the claim that irregularity in the proceedings prevented plaintiff from having a fair trial, it is claimed that the court committed error in receiving evidence concerning the manner in which plaintiff had suffered an injury to his thyroid gland. The purpose of the question was to show that one of the ill effects alleged to have been suffered by plaintiff was due to this injury and was not caused by the accident. Plaintiff volunteered the statement that it was due to a love affair, having been inflicted by his friend for stealing the affections of his lady friend. It is claimed that this fact had no bearing on the case and tended only to prejudice the minds of the jurors. The answer of plaintiff was not responsive to the question propounded and was volunteered by him. The judge instructed the jury that its consideration of the evidence was confined to the issue of the ill effects of the accident to plaintiff's throat. No motion

was made to strike the answer from the record. There is no merit in the objection.

[3] And, finally, appellant contends that the trial court erred in not granting his motion for a new trial on the ground of newly discovered evidence. This evidence related to the manner in which the accident happened. The evidence was known to plaintiff prior to the commencement of the action and no good reason was shown why the witness could not have been produced at the trial. Moreover, no application for a continuance was made in order to procure this testimony.

The judgment is affirmed.

We concur: CASHIN, J.; KNIGHT, J.



10 Cal.App.2d 124

PEOPLE v. MORTENSEN.

Cr. 2775.

District Court of Appeal, Second District,
Division 1, California.

Nov. 12, 1935.

1. Indictment and information ☞71

Information charging defendant with commission of crime of petty theft with prior conviction of felony, to wit, burglary, a felony for commission of which defendant had served term of imprisonment in penal institution, held sufficient to give accused notice of offense with which she was charged (Pen. Code, §§ 667, 950, 951, 952, 969).

2. Criminal law ☞986

Any possible irregularity in arraignment of defendant for judgment without specifically ruling on oral motion for new trial, which specified no grounds for granting motion, held waived, where at close of arraignment for judgment defendant's attorney had stated that there was no legal cause why judgment should not be pronounced, and defendant gave notice of appeal from order denying motion for new trial.

3. Criminal law ☞1206(3)

Validity of sentence to state prison for petty theft held not affected by statute which was enacted subsequent to time of pronouncement of judgment, where sentence as pronounced was within provisions of statute as it existed prior to and at time of pronouncement of judgment (Pen. Code, § 667).

4. Criminal law ☞982

Whether trial court will grant probation to convicted defendant is within discretion of trial court.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Margaret Mortensen was convicted of petty theft, and she appeals.

Affirmed.

John F. Groene, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Walter L. Bowers, Deputy Atty. Gen., for the People.

HOUSER, Presiding Justice.

Defendant having been convicted of the crime of petty theft, in connection with which it was established that theretofore she had been convicted of a felony for which she had served a term of imprisonment in this state, she appeals from the judgment which was rendered against her, as well as from the order by which her motion for a new trial was denied.

The first point presented by appellant is that the evidence was insufficient to support the judgment. No useful purpose would be served by a recital of the evidence that was adduced on the trial of the action. Suffice it to say that, after a careful examination of the evidence in connection with the legal principles of law applicable thereto as attested by many decisions by the appellate tribunals of this state, it manifestly appears that appellant's point in that regard cannot be sustained.

[1] By an allegation contained in the information that was filed against defendant, she was charged with the commission by her "of the crime of petty theft" with prior conviction of a felony, to wit, "burglary, a felony * * *"; and that for the commission by defendant of said felony she had "served a term of imprisonment therefor in a penal institution." In that regard, appellant complains of certain rulings made by the trial court by which her demurrer to the complaint was overruled and her motion to strike out was denied.

By referring to the clerk's transcript herein, it is disclosed that defendant's demurrer, besides being general in its nature, in effect also contained the objection to the complaint that it was indefinite

and uncertain in that "it cannot be ascertained therefrom what offense, if any, was committed by the defendant." The motion to strike related to the words "prior conviction of a felony, to-wit, burglary, a felony."

It is clear that neither of said objections is tenable. In "ordinary and concise language," as hereinabove indicated, and in accord with the provisions of section 969, section 667 (as the latter was in effect at the time of the trial of defendant and at the time when judgment was pronounced against her), and sections 950, 951, and 952, of the Penal Code, it appears that defendant was charged with having committed the offense of "petty theft with prior conviction of a felony." Paraphrasing the pertinent language of the statute last cited, the "words" employed in the information filed against defendant were "sufficient to give the accused notice of the offense of which she was charged." See *People v. Hillard*, 103 Cal. App. 698, 284 P. 1070; *In re Boatwright*, 216 Cal. 677, 15 P.(2d) 755.

[2] Appellant also complains that, although a motion for a new trial was made by her, the trial court failed to rule on such motion. The immediate circumstances connected with the said motion are disclosed by the following record of the proceedings, as are set out in the reporter's transcript, to wit:

"The Court: *People v. Mortensen*. There was a motion for new trial, wasn't there, in this case?"

"Mr. Groene: No, sir, but I can make it now."

"The Court: Yes, you may go ahead."

"Mr. Groene: I make a motion for new trial."

No grounds for granting the motion were then specified, or ever presented or argued to the trial court. However, without specifically ruling upon said motion, defendant was immediately then and there arraigned for judgment; at the close of which arraignment, the judge of the trial court made the usual inquiry, "Is there any legal cause to show why judgment should not now be pronounced?" To which question, the attorney who represented defendant, replied, "There is no legal cause. * * *

Regarding the circumstances that defendant failed to specify any grounds for

granting her motion, it has been held that even where such a motion is made "on all the statutory grounds," in the absence of argument or suggestion made by the moving party of any definite reason for granting the motion, an appellate tribunal will not reverse an ensuing judgment or order. *People v. Beatcher*, 136 Cal. App. 337, 28 P.(2d) 943. Moreover, the notice of appeal given by defendant contains the statement that she appeals "from the order of the Court on July 8, 1935, denying the motion of defendant for a new trial herein."

It is most evident that both the judge of the trial court and the defendant regarded the action of the court, to which reference has been had, as a denial of the motion for a new trial; and that defendant waived any irregularity that may have been present in the proceeding.

[3, 4] Appellant registers further complaint to the effect that the trial court committed prejudicial error in sentencing the defendant to the state prison, instead of to the county jail; also, that defendant was entitled to probation, which the trial court denied. In that connection, appellant relies upon the present provisions of section 667 of the Penal Code, to the effect that defendant was punishable "by imprisonment in the county jail not exceeding one year or in the state prison not exceeding five years." An examination of the history of the provisions of that statute, and particularly the clause thereof to which appellant has referred, reveals the fact that such clause did not become effective until a date some time after the date when the judgment was pronounced against her. As the statute existed prior to and at the time of the pronouncement of such judgment, the decision rendered by the trial court was well within its provisions; and even assuming (without deciding) that the case was one wherein defendant might have been admitted to probation, it is well settled that whether the trial court will grant probation to a convicted defendant is one that rests within the discretion of such court.

The judgment and order are affirmed.

I concur: YORK, J.

Mr. Justice DORAN, being disqualified, does not participate in this decision.

10 Cal.App.2d 218

DAVISON v. DIAMOND MATCH CO. et al.
Civ. 5290.District Court of Appeal, Third District,
California.

Nov. 16, 1935.

1. Master and servant ☞333

Since evidence in action for assault by gateman showed that corporation maintaining gate across highway instructed gateman to refrain from forcibly resisting persons desiring to pass and to allow plaintiff landowner to pass, verdict exonerating gateman and other agents of corporation held to preclude recovery against corporation.

2. Master and servant ☞300

Principal cannot be held responsible for agent if agent himself has committed no tort.

3. Master and servant ☞308

Employer, unless directing or ratifying employee's allegedly tortious act, cannot be held liable therefor.

Appeal from Superior Court, Tehama County; H. S. Gans, Judge.

Action by J. H. Davison against the Diamond Match Company and others. From a judgment for plaintiff against defendant named, such defendant appeals.

Reversed.

Fred C. Pugh and Pugh & Pugh, all of Red Bluff, and H. Eugene Chalstran, of Chico, for appellant.

Wetter & Rankin, of Red Bluff, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This appeal arose out of a cause of action for an assault and battery. The plaintiff originally set forth two causes of action, one for an assault and the second for maliciously obstructing a certain roadway, whereby plaintiff had ingress and egress to and from his ranch.

At the conclusion of plaintiff's case a nonsuit was granted as to the second cause of action. Upon submission of the cause, a jury, on the first cause of action, alleging assault and battery by defendant Pitkin, maliciously brought about by the direction of defendants the Diamond Match Company, a corporation, Richard A. Colgan, Jr., and Edmond Cameron, found in favor of defendants Colgan, Cameron, and

Pitkin and against the Diamond Match Company, fixing the general damages as \$500 and \$1,500 for exemplary damages.

Appeal here is by the Diamond Match Company from the judgment based upon these two verdicts. The original quarrel was between the Diamond Match Company and plaintiff and others as to whether a certain road leading through the company's timber lands was the private way of the Diamond Match Company or whether the same was a public highway. The company had for several years maintained gates or barriers across the road during the summer seasons as a protection against fires from hunters and campers particularly, and had a few years prior to this action, brought an action against certain of the landowners in the territory to have the status of the road determined. The Supreme Court, after a trial in the superior court, where judgment was entered against the company, affirmed that judgment and found the road to be a public highway and directed the same to be opened. *Diamond Match Company v. Savercool*, 218 Cal. 665, 24 P.(2d) 783. Pending the appeal and also during the interval between the affirmation of judgment and the coming down of the remittitur, the company maintained their gatemen at the barrier to prevent the use of the road by the general public. It was during this latter interval that the altercation hereinafter described took place.

Plaintiff was a landowner within the area, and the only means of access he had to his lands was by use of this road or highway. Very shortly after the judgment had been affirmed in the case of *Diamond Match Company v. Savercool*, supra, plaintiff sought legal advice and was informed that he need no longer recognize the claim of the company to impede or obstruct the use of the highway. Accordingly, one day as he was on his way to Redding, he drove his truck against the gate or barrier, thereby destroying it. Upon his return trip later the same day the gate had been repaired, and was opened by the gateman prior to his arrival; he, however, drove his truck part way through the gate and stopped. He then proceeded to alight from his truck, and as the aggressor, took an axe and advanced toward the obstruction with the declared purpose of cutting the gate away. Thereupon Pitkin, one of the gatemen, endeavored to prevent his accomplishing that purpose and the two

engaged in a physical encounter and the plaintiff was unable to accomplish his purpose. It was in this scuffle that plaintiff sustained the injuries complained of, upon which this action is based.

Appellant upon appeal here contends that the judgment entered upon the verdict exonerating Colgan, Cameron, and Pitkin, agents of the Diamond Match Company, and assessing damages against appellant, exonerated appellant company.

Appellant also claims plaintiff failed to produce any evidence of malice, fraud or oppression and thereupon no foundation was laid for an award of punitive damages; also that the verdict was the result of passion and prejudice incited by improper argument by counsel for plaintiff.

[1, 2] Our conclusion makes it necessary to consider only the first point presented. The Diamond Match Company is a corporation owning a large tract of timber in the area of the barrier and highway here in question. Richard A. Colgan, Jr., was sawmill superintendent and forester of the California lands belonging to the company; Edmond Cameron was a landowner in the neighborhood who supervised the maintenance of the gate across the highway at the request of Colgan, but was not an employee of the company. Colgan had never met Pitkin nor Lee, gateman, prior to their employment by Cameron. The instructions to Robert Lee, a defendant herein and one of the gatemen, as given him by Cameron, were that he would furnish them with a list of Davison's friends as soon as possible, but in the meantime to let Davison's people, friends, or relatives go through; also that if anybody came up and got too bad "don't have any trouble with him but open the gate and let him go through." Cameron also told him that if they could hold off any one seeking to go through the gate for a small argument it would be all right. Mr. Colgan, the officer of the company, instructed Mr. Cameron, to whom he had given authority over the gate, "To let any one through the gate who had property rights or interests beyond the gate, and further than that not to be hard boiled with any one who had a real reason for going into that country and not creating an extra hazard." He also instructed Mr. Cameron that Mr. Davison should be allowed to go through as he always had been, and his friends also. Mr. Cameron testified he gave practically the same instructions to the gate-

men that he had received from Colgan. Mr. Pitkin, one of the gate tenders, the only employee who engaged in the scuffle, testified that he was instructed by Mr. Cameron to have no trouble whatever and if anyone used force to break down the gate or anything to let them go through. This briefly constituted the uncontradicted instructions received by the gatemen. After the difficulty between Davison and Pitkin, Colgan was asked if he ever expressed approval of the act and he said that he did not. Cameron, immediately upon hearing of the difficulty, told Pitkin he did not approve of the fight or fighting at the gate or having any trouble over the gate and that he did not approve of anything of that nature.

In view of the foregoing we fail to see wherein appellant could be considered as a joint tort-feasor with Pitkin, Colgan, and Cameron. The evidence does not establish any personal participation on the part of the corporation or wherein its employee was in any way carrying out its expressed or implied instructions in applying force to Davison. The jury by their verdict have exonerated Pitkin the principal, thereby declaring in fact that he has done no wrong, and therefore the principal cannot be held responsible for the agent if the agent has himself committed no tort. Many cases support this well-defined rule, among others, *Bradley v. Rosenthal*, 154 Cal. 420, 97 P. 875, 129 Am. St. Rep. 171; *Fimple v. Southern Pac. Co.*, 38 Cal. App. 727, 177 P. 871, 872. In the latter case the court stated: "Where injury is solely the result of the negligence of the servant while performing his duties as such, the principal's liability for such injury can follow only from the relationship existing between the master and servant as such. They are not joint tort-feasors, so that either or both may be sued for the tort committed."

In the case of *Doremus v. Root*, 23 Wash. 710, 63 P. 572, 574, 54 L. R. A. 649, it was said: "The act of an employee, even in legal intendment, is not the act of his employer, unless the employer either previously directs the act to be done or subsequently ratifies it. For injuries caused by the negligent act of an employee not directed or ratified by the employer the employee is liable because he committed the act which caused the injury, while the employer is liable, not as if the act was done by himself, but because of the doctrine of respondeat superior,—the rule of

law which holds the master responsible for the negligent act of his servant committed while the servant is acting within the general scope of his employment, and engaged in his master's business. The primary liability to answer for such an act, therefore, rests upon the employee."

The foregoing principle finds support in the following cases: *Tolley v. Engert*, 71 Cal. App. 439, 235 P. 651; *Thompson v. Southern Pacific Co.*, 31 Cal. App. 567, 161 P. 21; *Benson v. Southern Pacific Co.*, 177 Cal. 777, 171 P. 948; *Bosse v. Marye*, 80 Cal. App. 109, 250 P. 693; *Triano v. F. E. Booth & Co., Inc.*, 120 Cal. App. 345, 8 P.(2d) 174; *Charles H. Duell, Inc., v. Metro-Goldwyn-Mayer Corp.*, 128 Cal. App. 376, 17 P.(2d) 781; *Shippy v. Peninsula Rapid Transit Co.*, 97 Cal. App. 367, 275 P. 515.

[3] We find no evidence in the record wherein Pitkin was instructed either directly or by implication to exert physical force in preventing anyone from passing through the gate, or to fight for its maintenance, and unless the employer has either directed or subsequently ratified the act complained of it cannot be held to have been the act of the employer. As was said by Chief Justice Beatty in *Rahmel v. Lehnendorff*, 142 Cal. 681, 76 P. 659, 660, 65 L. R. A. 88, 100 Am. St. Rep. 154: "The wrongful act must be one which the servant is empowered under some circumstances to do."

It is true that when Pitkin was asked upon examination why he didn't step aside when respondent told him he intended to remove the gate from the road he replied, "Because I was hired to protect the Diamond Match property," and also why he (Pitkin) stopped those seeking to go through the gate, he said, "Because that was what I am hired to do." However, we have no evidence of such orders from any one and the foregoing answers are based upon the conclusion of the witness as to what his instructions were.

Respondent strongly relies upon the case of *McInerney v. United Railroads of San Francisco*, 50 Cal. App. 538, 195 P. 958, 959. There a strike was in progress among the employees of the United Railroads, and was being resisted by the company, and with the aid of other persons replacing the strikers, was attempting to operate its street cars and to prevent injury to its property. The president of the com-

pany had instructed his subordinates to employ guards and to "spare no expense necessary to keep the cars running or necessary for the protection of passengers or the company's employees or the company's property."

Fitch, one of the defendants, was an employee of the railroad and on the evening in question was sent out in company with several others "to do patrol work on the street, to try and protect the property in any way they could—I would not say in any way they could, but to do anything they reasonably could to stop windows from being broken, crews pulled off cars, to help them out." Mistaking plaintiff for one who was interfering with the operation of the cars, defendant and his companion seized him, violently assaulting him, and subsequently caused his arrest. It was later discovered that they had assaulted a private citizen, in no way connected with the strike and innocent of the charge or suspicion of defendant. Plaintiff brought an action against the United Railroads and several of the individuals who took part in the assault. Upon the trial the jury found in favor of defendant Fitch and against the railroad. The railroad, upon appeal, contended, among other things, that the verdict in favor of defendant Fitch exonerated it from liability. But the court held that the directions given Fitch by the company were broad enough to contemplate the use of force and violence, if necessary, in repelling the assaults of strikers or in arresting those injuring or destroying company property. Fitch was therefore but obeying orders, and even if through mistaken zeal he exceeded his duty the company would be liable not merely under the doctrine of respondeat superior but as a joint participant also in the wrongful acts. In the instant case, however, we do not find instructions to the gatemen that could call for the use of force or violence, and therein lies the distinction between the instant case and the cited case.

Many other points are raised and argued, but we do not deem it necessary to discuss them.

We are therefore compelled to the conclusion that the jury by exonerating the defendants Colgan, Cameron, and Pitkin have thereby exonerated the Diamond Match Company from liability, and the judgment entered upon the verdict of the jury awarding judgment against the Dia-

mond Match Company should be reversed, and it is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.



10 Cal.App.2d 274

PEOPLE v. FOERST.

Civ. 9846.

District Court of Appeal, First District, Division 1, California.

Nov. 20, 1935.

1. Nuisance ☞84

Evidence that vacant, dilapidated wooden structure at least 50 years old endangered passers-by and constituted fire and health menace, and that stairways, joists, and floors were rotted and broken, and that vagrants committed nuisances on premises, which were infested with rats and vermin and gave off noxious odors, *held* to sustain conclusion that public nuisance existed, justifying abatement in action instituted by city attorney against landowner.

2. Nuisance ☞85

Findings that wooden structure was old, dilapidated, abandoned, and extremely dangerous, and that practically entire structure was rotten, broken, did not conform to building laws, and endangered passers-by, and was extreme fire hazard and insanitary, *held* to support judgment for demolition thereof in action instituted by city attorney against landowner, who contended that findings were insufficient because not expressly declaring structure to be public nuisance.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by the People against Wilhelmina Foerst. Judgment for plaintiff, and defendant appeals.

Affirmed.

Alvin A. Lobree and A. Brooks Berlin, both of San Francisco, for appellant.

John J. O'Toole, City Atty., and Edmond P. Bergerot, Deputy City Atty., both of San Francisco, for the People.

KNIGHT, Justice.

Pursuant to a resolution passed by the board of supervisors of the city and county of San Francisco, the city attorney instituted this action in the name of the people of the state to abate an alleged public nuisance which the city claimed the defendant maintained on premises belonging to her and situate on the corner of Revere and Third streets in said city. Judgment was entered in favor of plaintiff, and the defendant appeals. The principal grounds urged for reversal are that the evidence does not support the findings and that the findings are legally insufficient to sustain the judgment. In our opinion there is no merit in either point.

[1] Besides finding generally that all allegations of the complaint were true, the trial court found specifically as to the ultimate facts. Summarizing those allegations and findings, the following were the conditions shown thereby to exist: Upon said premises stood an old wooden structure, built as a dwelling some fifty or more years ago, but which continuously for a number of years next preceding the commencement of this action remained vacant; and on account of being unoccupied, its age, and want of upkeep and care, it decayed and became greatly dilapidated, and for several years before being condemned as a nuisance was dangerous and unsafe to passers-by, and a fire and health menace to the entire neighborhood. All of the doors and windows were destroyed, the stairways, joists, and floors were rotten and broken, the plumbing was wrecked, insanitary, and not connected with the sewer; the chimney was off balance, defective, and likely to fall; the basement was filled with an accumulation of rubbish; nuisances were being committed in and about the premises by vagrants, and the place was infested with rats and vermin, and contained filth which emitted noxious odors offensive to the senses and injurious to the health of neighboring residents. The above conditions which were shown to exist by competent testimony and by photographs taken of the interior and exterior of the wooden structure, which are made part of the record herein, are amply sufficient to sustain the trial court's legal conclusion that a public nuisance was being maintained which demanded abatement.

Furthermore, and aside from the matter of the sufficiency of the findings, the evi-

dence shows that for more than ten years prior to the commencement of the action complaints were made frequently to the municipal authorities about the noxious and dangerous condition of the premises; and that the health department held numerous hearings in an effort to persuade or compel the defendant as the owner of the premises to abate said conditions. Apparently, however, little if anything was done to that end, and the conditions continued to grow worse. Eventually the matter was brought before the board of supervisors, and after a hearing said board adopted a resolution declaring that said conditions constituted a public nuisance and directed the city attorney to institute legal proceedings to abate the same. The record also shows that after a day in court the trial of the action was continued some four months, and upon the conclusion of the trial no decision was rendered for several months, evidently for the purpose of allowing defendant additional opportunity to remedy the offensive conditions. But apparently no effort was made to do so or to conform to the directions of the municipal authorities and the requirements of existing ordinances; whereupon the trial court rendered its decision and entered judgment directing, among other things, that said wooden structure be demolished.

[2] Appellant does not question the power of a municipality to abate a public nuisance nor challenge the legality of any of the proceedings leading up to the commencement of the present action. She contends, however, because the findings did not, in express terms, declare the wooden structure to be a public nuisance, that portion of the judgment directing that the same be demolished is not supported by the findings and is against law. The trial court did in terms find, however, that said structure was old, dilapidated, unsafe, defective, abandoned, and extremely dangerous; that the chimney thereon was dangerous, extremely defective, and in an unsafe condition; that practically the entire structure was rotten, broken, did not conform to building laws, and was a menace to life and limb of passers-by and to the property adjacent thereto; furthermore, that it was an extreme fire hazard and insanitary. Clearly the above findings warranted the trial court in directing that the structure be demolished.

The remaining points urged are merely incidental to the main ones above mentioned, and do not require further discussion.

The judgment is affirmed.

We concur: TYLER, P. J.; CASH-IN, J.



PEOPLE v. HERBERT. *
Cr. 2716.

District Court of Appeal, Second District,
Division 1, California.

Nov. 7, 1935.

Hearing Granted by Supreme Court
Dec. 5, 1935.

Criminal law §200(1)

Conviction of defendant for manslaughter based on identical facts on which defendant had been already sentenced on his plea of guilty to charge of reckless driving held not objectionable on ground that defendant was twice put in jeopardy for same offense (Gen. Laws 1931, Act 5128, § 121; Pen. Code, § 1023).

ROTH, Justice pro tem., dissenting.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Homer M. Herbert was convicted of manslaughter, and he appeals.

Affirmed.

Paul G. McIver, of Montebello, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

HOUSER, Presiding Justice.

On November 17, 1934, defendant was driving an automobile at approximately 50 miles per hour in the rain, in the city of Montebello. As he thus approached an intersection of two streets, he attempted to pass an automobile that was in front of him, but realizing that he could not do so safely, applied his brakes, as a result of which his car skidded a distance of approximately 135

to 150 feet and careened into another automobile that was being driven by one Briscoe as a consequence of which collision Briscoe suffered injuries from which he died on the 19th day of November, 1934. On November 26, 1934, or about a week after Briscoe's death, defendant was charged with a violation of section 121 of the California Vehicle Act (Deering's Gen. Laws 1931, Act 5128), to wit, reckless driving. Said section reads as follows: "Any person who drives any vehicle upon a highway in so negligent a manner as to indicate either a wilful or a wanton disregard of the safety of persons or property shall be guilty of reckless driving and upon conviction shall be punished by imprisonment in the county jail for a period of not less than five days nor more than ninety days or by fine of not less than twenty-five dollars nor more than two hundred fifty dollars, or by both such fine and imprisonment."

To such charge defendant pleaded guilty; sentence was pronounced, which sentence was in part suspended; the net result being that defendant paid a fine of \$10. On January 16, 1935, by information filed against him, defendant was charged with the commission of the crime of manslaughter, a felony, committed as follows: "That the said Homer M. Herbert on or about the 17th day of November, 1934, at and in the County of Los Angeles, State of California, did willfully, unlawfully and feloniously and without malice, kill one Joseph Briscoe, a human being." It was stipulated by respective counsel that the said charge of manslaughter was based upon the identical facts which have been briefly summarized and upon which defendant had been already sentenced on his plea of guilty to the charge of reckless driving. To this information defendant entered pleas of not guilty and once in jeopardy. Trial was had without a jury, and the trial court found against defendant on his plea of once in jeopardy; found him guilty of manslaughter; pronounced sentence; suspended the same and placed defendant on probation. From the judgment entered pursuant thereto, and from an order denying his motion for a new trial, defendant has appealed to this court.

Although a question has been raised as to the formal legality and sufficiency of the plea of once in jeopardy, it is satisfactorily disposed of in the dissenting opinion filed herein. The decisive question is, Was the defendant placed in jeopardy twice for the same offense; or, to phrase it more specifically, does the charge of manslaughter on

the facts as outlined necessarily include the crime of reckless driving?

Before the appointment of Mr. Presiding Justice N. P. Conrey (then of this court) to the office of associate justice of the Supreme Court of this state, became effective, he prepared a certain memorandum that in a limited way represented his views with reference to the question of whether, considering the facts hereinbefore outlined, by defendant's prior conviction on the charge of "reckless driving," he had been placed in former jeopardy as far as the charge of manslaughter in the instant case was concerned. Although such memorandum does not purport to be, nor is, a complete or full expression of opinion with reference to the determinative issue of the instant appeal, nevertheless, taken in connection with the language expressed in the dissenting opinion filed herein, such memorandum is so indicative of that which is conceived to be the law of this state on the question thus presented, that, with a few inconsequential clerical or typographical changes in its original verbiage, it is herein adopted and made the opinion of this court. Such memorandum is as follows:

"The offense of reckless driving, in violation of section 121 of the California Vehicle Act, to which Herbert pleaded guilty in the police court, was not necessarily included in the manslaughter, viz., *the killing of Briscoe* 'unlawfully, feloniously and without malice,' by the defendant. It must be admitted that on November 26, when the complaint on the misdemeanor charge was filed, both offenses were complete, as the reckless driving and the primary injury to Briscoe both occurred on November 17, and the death of Briscoe followed on the 19th.

"As far as prior jeopardy is concerned, as that situation is described in section 1023 of the Penal Code, and applying that description or definition to the facts here, the manslaughter was not an offense necessarily or at all included in the misdemeanor charge, of which the defendant 'might have been convicted under that indictment or information,' that is, under the misdemeanor charge. It is true that on November 26 the facts were such that in a proper forum, the defendant then might have been prosecuted for manslaughter in the killing of Briscoe. In such prosecution he would have been placed in jeopardy, not for the separate offense of reckless driving, but for causing the death of Briscoe, by means of reckless driving plus the hitting of Briscoe. Under the manslaughter charge, he could

not have been acquitted of manslaughter and convicted of reckless driving. Under the misdemeanor charge in the police court, he could not have been convicted of manslaughter.

"In the case at bar, defendant's reckless driving of his car, that is, 'in so negligent a manner as to indicate a wilful or a wanton disregard of the safety of persons or property,' happened to be an act committed in violation of law; but for the purposes of trial of the instant case this conduct of the defendant, when proved, was merely part of the evidence of his unlawful killing of a human being, which in this instance was done 'in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.' Pen. Code, § 192.

"I am aware of the rule that where there are several degrees of a single kind of crime, the defense of 'once in jeopardy' is, under some circumstances, available, even where the prior action relates only to the lesser degree. Thus, an acquittal of manslaughter would protect against a subsequent prosecution for murder of the same victim at the same time as in the first case. I do not think that such rule applies to the case at bar.

"It is a constitutional right, that 'no person shall be twice put in jeopardy for the same offense.' I do not think that this defendant has been 'twice put in jeopardy for the same offense.'

"The latest case on this question is *People v. Coltrin* (Cal. App.) 48 P.(2d) 973,—see discussion on pages 977 and 978."

The facts in the case of *People v. Wilson*, 193 Cal. 512, 226 P. 5, are similar to those of the instant case. In principle, the decision in the cited case would seem to be determinative as against the point for which appellant herein so stoutly contends.

The judgment and the order by which defendant's motion for a new trial was denied are, and each of them is, affirmed.

I concur: YORK, J.

ROTH, Justice pro tem. (dissenting).

I dissent. It is axiomatic in our jurisprudence that a conviction or acquittal of a crime, which necessarily includes a lesser or a number of lesser offenses, constitutes jeopardy as to the offense or offenses necessarily included. Our Constitution provides: "No person shall be twice put in jeopardy

for the same offense." Article 1, § 13; Pen. Code, § 687.

Our statutes specifically provide as follows:

Penal Code, § 687: "No person can be subjected to a second prosecution for a public offense for which he has once been prosecuted and convicted or acquitted."

Penal Code, § 1023: "When the defendant is convicted or acquitted, or has been once placed in jeopardy upon an indictment or information, the conviction, acquittal, or jeopardy is a bar to another indictment or information for the offense charged in the former, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under that indictment or information."

Penal Code, § 1159: "The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense."

Penal Code, § 654: "An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other. In the cases specified in sections six hundred and forty-eight, six hundred and sixty-seven, and six hundred and sixty-eight, the punishments therein prescribed must be substituted for those prescribed for a first offense, if the previous conviction is charged in the indictment and found by the jury."

It is also basic that when a person is prosecuted for a lesser offense which is necessarily included in a greater one, such person cannot be prosecuted for the greater offense because the prosecution for the included lesser offense constitutes jeopardy as to the greater offense fully as much as in the converse situation. *People v. Hunkeler*, 48 Cal. 331; *People v. Defoor*, 100 Cal. 150, 34 P. 642; *People v. McDaniels*, 137 Cal. 192, 69 P. 1006, 59 L. R. A. 578, 92 Am. St. Rep. 81. In *People v. McDaniels*, 137 Cal. 192, at page 194, 69 P. 1006, 1007, 59 L. R. A. 578, 92 Am. St. Rep. 81, the court says: "It is well settled that a conviction of a lower offense embraced in a higher one, for the commission of which a defendant was tried, is an acquittal of the higher offense, and an independent trial and conviction

tion of the lower offense, when pleaded, must, upon the same principle, be a bar to the prosecution for the higher offense which included it. *People v. Defoor*, 100 Cal. 150, 34 P. 642."

To these well-established principles there are a number of exceptions: First, when the greater offense is not complete at the time jeopardy has attached on the lesser. *People v. Defoor*, 100 Cal. 150, 154, 155, 34 P. 642; *People v. Wilson*, 193 Cal. 512, 226 P. 5; *Commonwealth v. Roby*, 12 Pick. (29 Mass.) 496. In the *Wilson* Case the defendant, operating an automobile, struck one Johnson, and as a result of the injuries suffered thereby, Johnson died. Prior to the death of Johnson, defendant was charged with a violation of section 20, Motor Vehicle Act (Stats. 1915, p. 406, as amended by Stats. 1917, p. 400). Defendant pleaded not guilty to such violation, was brought to trial on said charge, but during the course of said trial Johnson died, and the misdemeanor complaint was dismissed and thereupon defendant Wilson was charged with the crime of manslaughter, to which he entered a plea of once in jeopardy, which, upon motion of the district attorney was stricken out by the trial court, which court directed the jury to bring in a verdict for the people. The Supreme Court said, speaking with reference to this point, 193 Cal. 512, at page 515, 226 P. 5, 6: "In order that a plea of once in jeopardy may be available to a defendant, the second prosecution must be for the same offense, both in law and fact, as that for which the first prosecution was instituted. * * * In such an event the *second prosecution* is not for the same offense as the first. * * * In none of the cases cited by the appellant in support of his contention as to his plea of 'once in jeopardy' does the element of death, which is the essential basis of the charge of manslaughter, appear to be present; nor upon principle do we think a case can be conceived wherein a charge of murder or manslaughter could be defeated by a plea of once in jeopardy, based upon a mere misdemeanor charge, trial, or conviction of the assault or offense which had *later resulted in the death of the injured victim*. It was therefore not error in the trial court to strike out the defendant's offered evidence in that regard, or to direct the jury to find against the defendant upon his aforesaid plea." (Italics ours.)

Whether the situation alluded to in the *Wilson* Case constitutes an "established exception" to the rule of once in jeopardy, as

stated in *People v. Defoor*, 100 Cal. 150, 155, 34 P. 642, or, as the language of the supreme court in the *Wilson* Case suggests, a different and separate crime, there can be no doubt that the plea of once in jeopardy would not be available under the facts of this case, if the death had occurred *after* the filing of the lesser charge, provided such lesser charge were then dismissed, or after final judgment of conviction on the lesser charge.

A second exception is founded upon the procurement of a first conviction or acquittal by fraud, connivance, or collusion. *People v. McDaniels*, 137 Cal. 192, 199, 69 P. 1006, 1009, 59 L. R. A. 578, 92 Am. St. Rep. 81. In the *McDaniels* Case, the court says with reference to this point: "Of course, if the former conviction was procured by the fraud, connivance, or collusion of the defendant, this fact vitiates it, and it is no bar to a subsequent prosecution. *State v. Little*, 1 N. H. 257; *State v. Lowry*, 1 Swan. [Tenn.] 34; *State v. Reed*, 26 Conn. 202; 1 Bish. Cr. Law, §§ 1008, 1010. But here there is no pretense that the prosecution before the justice was fraudulent. The constitutional provision here involved was made for the protection of the citizen, and should be liberally construed in his favor. In *State v. Cooper*, 13 N. J. Law, 361, 25 Am. Dec. 490, it was said: 'Where the state has thought proper to prosecute the offense in its mildest form, it is better that the residue of the offense go unpunished, than, by sustaining a second indictment, to sanction a practice which might be rendered an instrument of oppression to the citizen.'"

What is said by the court in the *McDaniels* Case with reference to the absence of fraud is equally applicable to the facts of this case, since there is no evidence that there was any fraud, collusion, or connivance other than that which is suggested by the culpable laxness of the administrative authority which initiated the original charge in the Montebello police court. Fraud cannot be presumed; no point was made of it at the trial, and, standing alone, the bare fact, while undoubtedly "raw," does not warrant a finding of fraud.

A third exception is found in the rule adopted in those states which have established by statute or judicial construction that jeopardy attaches only to crimes of the same degree. This principle is that a misdemeanor is never "necessarily included" in a felony, but that only another felony can be "necessarily included" in a felony charge. The early case of *Commonwealth*

v. Roby, 12 Pick. (29 Mass.) 496, makes clear this principle.

In the Roby Case defendant was indicted for a felonious assault on Maria Leonard on May 2, 1831, with intent to kill and murder. He was tried and convicted, but between the time of conviction and the passing of sentence, Maria Leonard died. The court, instead of pronouncing sentence, suspended judgment until the next term in order to permit the filing of an indictment for murder. The murder indictment was filed. Defendant pleaded jeopardy, and the court found against said plea. It will be noted that in the Roby Case the death occurred *after* the prosecution for the lesser offense had been initiated. The case, therefore, on its facts falls within a well-settled exception (People v. Defoor, *supra*), or becomes a separate offense because of the after occurring fact. People v. Wilson, 193 Cal. 512, 226 P. 5. It was not, however, decided on this ground. The statutes of Massachusetts as judicially construed prevented a misdemeanor from being included in a charge of a felony, on the theory that a misdemeanor and a felony could not *be the same offense in law*, because they were of a different classification or degree, even though both arose from the same transaction and were both the same in fact. Thus in the Roby Case the court first refers to the fact that jeopardy applies only to offenses of the same classification or degree, and says, 12 Pick. (Mass.) 496, at page 502: "It may now be taken to be an expression descriptive of the class of punishments denounced by law against those offenses coming under the denomination of felony. People v. Goodwin, 18 Johns. [N. Y. 187] 201 [9 Am. Dec. 203]." The court then construes two apparently conflicting statutes of the state, and says, 12 Pick. (Mass.) 496, at page 507: "The earlier statute, upon the charge of any crime, authorized the jury to find the prisoner guilty of a part, whether such part amounted to a felony or not. This statute is in terms repealed, and another similar one enacted, with this limitation, that when the crime charged is a felony, the jury may convict and the court sentence for a part, *provided such part amounts to a felony*. By force of this obvious and studious alteration of the law in this respect, the power of convicting of a misdemeanor, on an indictment for a felony, seems to be effectually taken away." (Italics ours.) The court in that case goes on to say, 12 Pick. (Mass.) 496, at page 505: "In applying this rule to the present case,

we are all of opinion, that the facts constituting the felony and murder charged in the indictment now pending, would not have been competent evidence to warrant a conviction of the offence charged in the indictment in the Municipal Court. That offence was a misdemeanor, to wit, an assault, charged to have been committed with a felonious intent to murder. The offences are distinct in their nature, of a distinct legal character, and in no case could a party on trial for the one be convicted of the other."

It is apparent, therefore, that in some states statutes specifically provide that in the prosecution of a felony there can be no conviction of a misdemeanor even though in the prosecution for a felony the evidence would show guilt of a misdemeanor, and that a prosecution for a misdemeanor will not bar a prosecution for a felony arising from the identical act or transaction. 16 C. J. 272, note 19. Such, however, is not the law of this state. In People v. McDaniels, *supra*, 137 Cal. 192, page 197, 69 P. 1006, 1008, 59 L. R. A. 578, 92 Am. St. Rep. 81, the court says: "In England, prior to Lord Denman's Act (* * * enacted in 1837), one indicted for a felony could not be convicted * * * for a misdemeanor. * * * But Lord Denman's act provided * * * where the crime charged shall include an assault against the person, there might be an acquittal of the felony and a conviction of the assault. The vital principle of that act is embodied in section 1159 of our Penal Code. There are many cases, however, in this country that have followed, in their results, at least, the old common law, and permit different crimes included in the same act or transaction to be separately prosecuted and punished." See, also, 137 Cal. 192, page 199, 69 P. 1006, 59 L. R. A. 578, 92 Am. St. Rep. 81.

We have referred at length to the Roby Case because it is cited as authority by many other cases which assert the principles of the Roby Case, but which principles were not applicable to the facts of such other cases, because in such other cases there was no event occurring *after* a prosecution for a lesser offense making complete a greater offense, as there was in the Roby Case, and there were no specific statutory provisions or indigenous judicial interpretations holding that a felony could not under any circumstances include a misdemeanor or as a lesser crime.

Because of the failure of so many decisions to make clear the distinctions between

the application of the general test rules concerning jeopardy and the exceptions to such rules, the fact that all or some of the exceptions are recognized in some jurisdictions and none in others, the failure on the part of the courts to agree on what constitutes one transaction, and the actual conflict between many jurisdictions, where the rule and exceptions are apparently the same, to agree in their application to similar facts, has led to much and continuous confusion on the subject of double jeopardy. Our Supreme Court says in *People v. Defoor*, 100 Cal. 150, 154, 34 P. 642, 643: "The circumstances under which courts have been called upon to determine what facts constitute the same offense have been so different and numerous that the authorities upon this subject are seriously conflicting, so far as the general question is concerned." This confusion, however, is due, not alone to the "circumstances under which courts have been called upon to determine" facts, but also to the failure of the courts to distinguish cases which were decided in the light of statutory enactments, stare decisis of the particular state, and other exceptions to generally accepted rules. On this same subject our Supreme Court, in *People v. McDaniels*, supra, 137 Cal. 192, at page 198, 69 P. 1006, 1009, 59 L. R. A. 578, 92 Am. St. Rep. 81, says: "This rule of interpretation is in many of the cases not thought of by the courts, and other obvious principles are overlooked, so that *our books contain numerous decisions wherein this constitutional right has been denied to the prisoner.*" (Italics ours.)

In this state there may undoubtedly be a conviction of a lesser offense, even though it be a misdemeanor "necessarily included" in the greater offense charged "or of an attempt to commit the same" under the clear language of the Code sections and the authorities. Thus in this state there can be no question that the conviction of a crime of assault would bar a prosecution on a charge of assault with intent to commit murder. *People v. Defoor*, supra; *People v. McDaniels*, supra; *People v. Hunckeler*, supra.

As already suggested, a source of further confusion arises from a failure of many decisions to distinguish between a plurality of separate crimes of the same degree or a plurality of separate crimes of different degree arising from a single transaction, or a series of consecutive acts; and one crime of large degree arising from one act or transaction which necessarily includes less-

er crimes. Compare *People v. Majors*, 65 Cal. 138, 146, 3 P. 597, 52 Am. Rep. 295; *People v. Stephens*, 79 Cal. 428, 430, 21 P. 856, 4 L. R. A. 845; *People v. Brannon*, 70 Cal. App. 225, 233 P. 88; *People v. Scofield*, 203 Cal. 703, 710, 265 P. 914.

This source of confusion has been caused by a misconception of what is a single transaction, a failure to define the crime or crimes involved, and a consequent misapplication of principles generally accepted as sound.

It is settled in this state and many others, although some have announced a contrary doctrine (*Clem v. State*, 42 Ind. 420, 13 Am. Rep. 369), that a person may commit one or more crimes by the same act. *People v. Majors*, 65 Cal. 138, 146, 3 P. 597, 52 Am. Rep. 295; *People v. Brannon*, 70 Cal. App. 225, 233 P. 88.

Thus it is established that if, with malice aforethought, X puts poison in a cup with intent to kill A, and A, B, and C drink therefrom and die, X may be charged with three separate murders. Or, if X, with intent to kill A, shoots at A and merely wounds him, but the bullet also enters the body of B and kills B, X is guilty of two separate crimes, to wit, assault with intent to murder A, and the murder of B. *People v. Majors*, supra; *People v. Brannon*, supra. So, it has been held that if one enters a mail car and opens seven different sacks of mail, he is guilty of seven different offenses. *Ebeling v. Morgan*, 237 U. S. 625, 35 S. Ct. 710, 59 L. Ed. 1151. Yet, it has also been held under similar circumstances, that a prosecution for one of the crimes bars a prosecution for any of the others, because they all arise out of the same transaction. 16 C. J. 272, note 21; *Clem v. State*, supra. The fallacy in the application of this rule is the failure of the courts to take into consideration the definition of the crime with which the defendant is charged. When the definitive terms of the crime charged are broken down, it clearly appears in these cases, first, that frequently where "the same transaction test" is applied, it is in fact and law not the same transaction; and, secondly, where it actually is the same transaction in fact, there are two classes of offenses committed: First, separate crimes, which can never be included in each other; and, second, one crime or separate crimes in which one or more minor offenses are necessarily included. So, in the Mailbag Case (*Ebeling v. Morgan*, supra) the statute specifically made the unlawful opening or violation of a mailbag a separate crime. Open-

ing seven different mailbags in rapid succession was no more one transaction than if one deliberately got himself drunk and stood on a street corner and successfully shot seven different people. In each situation, seven different crimes have been committed, and the transaction is not the same. In a case of multiple killing with one shot, or with a single dose of poison, the transaction is the same, but the same transaction has given rise to separate crimes, which can never be merged or included, because of the nature of the definition of the crime. Thus murder is defined as "the unlawful killing of a human being, with malice aforethought." Penal Code, § 187. (Italics ours.) The definition is obviously singular. A human being does not mean more than one. It means one. Obviously, therefore, if a person kills more than one human being by the same act, he commits a number of murders, each a separate and distinct felony.

Various tests have been enunciated by the cases to assist a court to determine when one crime is necessarily included in another. The cases of *People v. Wilson*, and *People v. Majors*, *supra*, enunciate such tests. Other California cases hereinafter referred to enunciate other tests which are also generally accepted. The case of *Commonwealth v. Roby*, 12 Pick. (29 Mass.) 496, sets forth a number of different tests, all indorsed by ancient and respectable authority. None of them, however, has any universal application, and they frequently have been applied differently to the same facts. *People v. McDaniels*, *supra*, 137 Cal. 192, page 198, 69 P. 1006, 59 L. R. A. 578, 92 Am. St. Rep. 81. Excluding the three exceptions which have been already stated, of which only the first two apply in this state, and without attempting to analyze specifically all the jeopardy principles enunciated by the various cases, but testing them in the light of a great number of adjudicated California cases, as applied to a variety of different facts, it appears that the practical rule which has been adopted by the courts of this state may be stated as follows: When the facts in a given situation as they actually exist *at the time of a prosecution for a lesser offense* can, and actually do, make out a complete corpus delicti for a greater one, even though *all* of those facts are not necessary to establish the corpus delicti of the lesser crime first charged, but such portion of the facts as are used to establish the corpus delicti of the lesser crime *are in their entirety integrally necessary as*

a matter of law to establish a corpus delicti for the greater crime, then a prior prosecution of the lesser crime bars a subsequent prosecution for the greater crime. Conversely, if the greater crime is first charged, and, in order to prove it, it is integrally necessary and essential to completely prove the corpus delicti of a lesser crime, such lesser crime is necessarily included in the greater. In short, when a corpus delicti is once drained from the facts of a given situation and the same corpus delicti is in its entirety an indispensable part of a greater crime, the crime spelled out by the first corpus delicti is a "necessarily included" offense. To illustrate: Arson is a distinct offense. If in the commission of arson an innocent person in the building is burned to death, murder has been committed, which is, under ordinary circumstances, an entirely separate crime. On the facts recited, however, a prosecution for arson would bar a prosecution for murder. *State v. Cooper*, 13 N. J. Law, 361, 25 Am. Dec. 490; *Reg. v. Lau Kin Chew*, 8 Haw. 370, cited in note in 4 A. L. R. 702. So robbery and murder are separate crimes; yet if in the commission of a robbery the thief accidentally shoots the owner and kills him, a prosecution for robbery would bar one for murder. This is so because the *malicious intent* which, as a matter of law, is indispensable to proof of the murder must be gathered from the other crime and can be proved in no other manner. If, however, while committing arson the arsonist observes that he is being watched by A and shoots and kills A in order to perpetrate his crime of arson without detection, or if the robber, to prevent identification by one who has observed him, shoots and kills such observer, then an arson or robbery prosecution would not bar a murder charge because the essential elements of each separate offense can be proved without drawing upon the lesser offense to supply as a matter of law some necessary and essential omission which *must be supplied* before a murder case can be completed. So assault is a necessarily included element of many felonies and an attempt to commit a crime is always a necessarily included element of a completed crime. Pen. Code, § 1023. An assault, however, frequently accompanies the commission of crimes of which it is not a necessary element. 16 C. J. 274; *People v. De-foor*, 100 Cal. 150, 34 P. 642. Thus, if in the heat of anger upon sudden provocation, A set upon B and killed him, the assault by A is integrally a part of the corpus delicti

on a charge of manslaughter. If A be charged with assault *after* B's death, the first prosecution is undoubtedly a bar to the second. On the other hand, if A commit a robbery upon B and after the robbery or attempted robbery actually assault him with a deadly weapon, they are separate crimes, because the actual assault is not part of the corpus delicti of robbery and the robbery is no part of the corpus delicti of the actual assault. *People v. Bentley*, 77 Cal. 7, 18 P. 799, 11 Am. St. Rep. 225; *People v. Pickens*, 61 Cal. App. 405, 214 P. 1027. The same is true as between burglary and larceny (*People v. Devlin*, 143 Cal. 128, 76 P. 900; *People v. Snyder*, 74 Cal. App. 138, 239 P. 705), and an analysis will show that the same is true in almost all California cases in which our courts have denied the plea of jeopardy and held that there were separate crimes involved. In some of the cases there are additional distinguishing features. *People v. Scofield* (Cal. App.) 258 P. 656; *People v. Scofield*, 203 Cal. 703, 265 P. 914; *People v. Thal*, 61 Cal. App. 48, 214 P. 296; *People v. Ryan*, 74 Cal. App. 125, 239 P. 419; *People v. Marzec*, 108 Cal. App. 264, 291 P. 600; *People v. Shaffer*, 81 Cal. App. 752, 254 P. 666; *People v. Case*, 77 Cal. App. 477, 246 P. 1083; *People v. Kerrick*, 144 Cal. 46, 77 P. 711; *People v. Parker*, 74 Cal. App. 540, 241 P. 401; *People v. Anastasion*, 79 Cal. App. 268, 249 P. 209; *People v. Brain*, 75 Cal. App. 109, 241 P. 913; *People v. Sheik*, 75 Cal. App. 421, 243 P. 39; *People v. McKee*, 80 Cal. App. 200, 251 P. 675; *People v. Degnen*, 70 Cal. App. 567, 234 P. 129; *People v. Johnson*, 82 Cal. App. 411, 256 P. 273; *People v. Rabe*, 202 Cal. 409, 261 P. 303; *People v. Stovall*, 94 Cal. App. 635, 271 P. 576; *People v. Koehn*, 207 Cal. 605, 279 P. 646; *People v. Powell*, 50 Cal. App. 436, 195 P. 456; *People v. Oliver*, 102 Cal. App. 29, 282 P. 813; *People v. McGrath*, 94 Cal. App. 520, 271 P. 549; *People v. Helbing*, 61 Cal. 620; *People v. Stephens*, 79 Cal. 428, 21 P. 856, 4 L. R. A. 845; *In re O'Connor*, 80 Cal. App. 647, 252 P. 730; *People v. McFarlan*, 126 Cal. App. 777, 14 P.(2d) 1066.

A close scrutiny of the foregoing California cases demonstrates the soundness of what for want of a better name may be called the corpus delicti test. It is on similar facts directly applied in the case of *People v. Scofield* (Cal. App.) 258 P. 656. In the *Scofield* Case the defendant was charged in three counts, one for manslaughter, one for driving while intoxicated, and one for violation of section 141 of the California

Vehicle Act (St. 1923, p. 562). After the jury had been impaneled and sworn, the district attorney dismissed the count of driving while intoxicated. In commenting upon the instructions of the trial court, the appellant court said, 258 P. 656, at page 658: "It will be observed that the trial judge instructed the jury, in the disjunctive, that appellant must be found guilty of manslaughter if—the other requisites of the law being satisfied—the jury determine that he drove his car while intoxicated, or at an unlawful rate of speed. * * * As far, then, as the question here involved is concerned, the point may be considered as if the jury had been instructed, alone, that if it found that appellant drove the automobile while under the influence of liquor he must be convicted of manslaughter. But appellant had just been acquitted of a charge of driving while intoxicated upon the same occasion. The instruction practically told the jury that he might be tried again on the charge, and it would seem for that reason to have been erroneous. * * * Here the charge of driving while under the influence of liquor, if we consider it alone under the instruction which was given to the jury, was a necessary element in the charge of manslaughter. The latter charge was nothing without the former." The court discusses at some length the distinction between this case and the case of *People v. Wilson*, 193 Cal. 512, 226 P. 5, and *People v. Brannon*, 70 Cal. App. 225, 233 P. 88. A hearing in the Supreme Court was granted in this case, and while that court in its opinion (203 Cal. 703, 265 P. 914) does not specifically refer to the point to which attention has been directed, but concerns itself primarily with the third count of the information (the only one upon which a conviction was had), the court does say, 203 Cal. 703, at page 705, 265 P. 914, 915: "Numerous specifications of error are assigned with reference to the conduct of the case applicable to the *first and second counts*. [These were the counts charging manslaughter and driving while intoxicated.] They have been examined, but nothing is discovered which would prejudicially affect the rights of the defendant as to the count upon which he was convicted. *They are not likely to recur* in the event of a new trial, and no further notice need be taken of them." (Italics ours.)

In the case of *People v. Bentley*, 77 Cal. 7, 18 P. 799, 800, 11 Am. St. Rep. 225, the defendant was tried and convicted of an attempt to commit robbery. On the trial of

said charge he pleaded prior conviction of an assault with a deadly weapon under a former indictment charging assault with intent to commit murder. All of the charges arose out of the same facts. The court there said 77 Cal. 7, pages 8, 9, 18 P. 799, 11 Am. St. Rep. 225: "According to the testimony in this case, the first thing done by the defendant and his confederate was an attempt to intimidate and rob; the next was to attack with a deadly weapon. It cannot be the law that a man having assaulted another with a deadly weapon, and having also attempted, *before* that, to rob him, can escape punishment for the attempt to rob because of conviction for assault with a deadly weapon. *If the offenses do not possess the same elements*, although both relate to the same transaction, it would seem that both may be punished. This view of the law seems to have been taken by the supreme court of this state in the case of *People v. Majors*, 65 Cal. 138, 3 P. 597 [52 Am. Rep. 295, where many authorities bearing upon the matter in hand are cited and discussed. The offense of which the defendant was first convicted, was an effort to injure the person of the prosecutor with a deadly weapon: that of which he was last convicted, was an attempt to take away the goods of the prosecutor from his person by intimidation or violence. *The essential elements of the two offenses are not the same.*" (Italics ours.)

In *People v. Pickens*, 61 Cal. App. 405, 214 P. 1027, defendant, in pursuance of a conspiracy to force a taxi driver to leave town, robbed the taxi driver. He was charged in the same indictment with two counts, one of robbery and the other with assault with a deadly weapon. The question of the identity of the offenses because they arose out of the same transaction is there discussed, the court saying, 61 Cal. App. 405, at page 406, 214 P. 1027, 1028: "It is apparent that these facts permit the construction that the prime purpose of the conspiracy in assaulting Richey was not to rob him, but rather to drive him from the community, and that the robbery was an afterthought of one or some of the conspirators who took advantage of the opportunity presented to enrich themselves by appropriating Richey's money. Viewed in this light, the robbery was not a part of the same offense as the assault and the case is substantially identical with *People v. Bentley*, 77 Cal. 7, 18 P. 799, 11 Am. St. Rep. 225."

The *Bentley* and *Pickens* Cases emphasize the fallacy of the same transaction test laid down by many cases. In a vernacular sense, the plurality of crimes committed in both cases arose out of the same *continuous* transaction, in which the defendants committed separate acts, which acts in themselves and without any dependence upon or aid from other acts generated separate crimes. It is undoubtedly true that a charge of robbery is pregnant with simple assault as distinguished from battery. Pen. Code, § 211. This does not mean, however, that a robber may not commit both assault and battery and robbery, depending upon the facts of each case. So a robber may intercept an intended victim and strike him with his fist or other weapon; this act, standing alone, constitutes an assault and battery. He may then proceed to rob his victim and assuming the force or fear essential to robbery is not related to the first blow, as may be and undoubtedly is frequently the case, the robbery is a separate crime. The robber, having completed his crime of robbery, might then to further impress his victim proceed to "slug" him, thus committing a third offense. All such offenses would be separate, because the corpus delicti of each could be proved without reference to or aid from the others.

In *People v. Devlin*, 143 Cal. 128, 76 P. 900, defendant was charged and found guilty of burglary. On the trial of said burglary charge, he offered as a bar the plea of a former conviction on the charge of petit larceny committed at the same time as the burglary and growing out of the same transaction. The court in passing upon said plea said, 143 Cal. 128, at page 129, 76 P. 900: "The plea of once in jeopardy, to be good, must be for the offense charged in the information. * * * Burglary is the entering of a building or structure with intent to commit grand or petit larceny or any felony. Pen. Code, § 459. Larceny is the felonious stealing or carrying away the personal property of another. Pen. Code, § 484. It is evident that one can commit burglary by entering a building with intent to commit any felony, such as rape, robbery, arson, or murder. It is also evident that the crime consists of the entry with the intent set forth in the statute. After one has entered a building with intent to commit any other felony than grand or petit larceny, he has committed burglary; but he may then find that it is impossible, for various reasons, to commit the felony which it was his intent-

ion to commit when he entered, and conclude to commit larceny by stealing some article of value in the building. He thus, in rapid succession, commits two crimes. Indeed, after he has committed burglary, he might, under favorable circumstances, commit any felony named in the statute. He might commit rape, and in such case he would be guilty of burglary and also of rape. Therefore we concluded that the evidence did not show, nor tend to show, that defendant had been before in jeopardy for burglary. The Legislature, no doubt, 'may pronounce as many combinations of things as it pleases criminal, resulting not infrequently in a plurality of crimes in one transaction, or even in one act, for any one of which there may be a conviction without regard to the others.' * * * *'Larceny is not necessarily included in burglary, like manslaughter in murder, within the sense of the statute. On the contrary, it is no part of it. The offense of burglary is complete without any larceny being committed. The relation contemplated by the statute does not exist between burglary and such other felony, if any, as may chance to be committed by the defendant at the same time.'*" (Italics ours.)

In *People v. Kerrick*, 144 Cal. 46, 77 P. 711, 712, defendant stole some cattle and after completing the theft changed the brand on said cattle. He was first charged and convicted for a violation of section 357 of the Penal Code, to wit, changing or altering the brand on cattle. Later he was charged and convicted of larceny of the same cattle. He pleaded prior conviction. The court said: "No conviction could be had of the crime defined in section 357 of the Penal Code under an information charging only grand larceny. The former crime is not in any sense a necessary element of the latter, nor can it be said to be 'necessarily included' in the latter. * * * It seems, from the record before us, that the two crimes were not only distinct in law, but also in fact. The larceny of the cattle was completed on the 27th day of March, 1902, by driving them out of a pasture, where they were kept by the owner, with intent to steal them. The marks and brands were changed the day following, to prevent identification. Here were two separate and distinct criminal acts, committed on different dates, each constituting a crime in fact as well as in law, and each being also entirely distinct in name and statutory definition, and neither constituting a necessary incident to or part of the other."

It has been generally held that burglary does not include larceny, or robbery, or assault with intent to kill. *People v. Shaffer*, 81 Cal. App. 752, 254 P. 666; *People v. Case*, 77 Cal. App. 477, 246 P. 1083; *People v. Snyder*, 74 Cal. App. 138, 239 P. 705; *People v. Marzec*, 108 Cal. App. 264, 291 P. 600. So it has also been held that a charge of rape does not include a violation of section 288 of the Penal Code. *People v. Parker*, 74 Cal. App. 540, 241 P. 401; *People v. Anastasion*, 79 Cal. App. 268, 249 P. 209.

In *People v. Ryan*, 74 Cal. App. 125, 239 P. 419, defendant was charged with seventeen counts of felonies, three of which consisted in the forging of three different checks which were uttered at the same time by the defendant. In this particular transaction, defendant was charged with two separate forgeries and one charge of uttering checks. Defendant contended that the utterance of all three checks was but one offense. The court said, 74 Cal. App. 125, at page 130, 239 P. 419, 421: "Appellant further refers to decisions which hold that the passing or utterance of several forged instruments at the same time constitutes but one offense. We are satisfied that the greater weight of authority is definitely in favor of this proposition. * * * But, on the other hand, it seems to have been held, with good reason, that the mere false making and forging of two separate instruments, although done at the same time, are separate and distinct offenses. * * * In the note, in 61 L. R. A. at page 822, the proposition is stated, followed by reference to a number of decisions, that the forgery of several instruments at the same time is regarded generally as the commission of a separate offense for each instrument. Evidently this statement referred to the direct act of forgery considered apart from the utterance of the instrument.

"Accepting the foregoing as a correct statement of the law, and remembering that utterance, or passing, of a check was charged in only one of the three counts, we conclude that appellant was correctly convicted and sentenced separately for the three offenses."

In *People v. McGrath*, 94 Cal. App. 520, 271 P. 549, defendant was charged with driving an automobile over and along a public highway while then and there under the influence of intoxicating liquor. He pleaded not guilty. During the deliberations of the jury the foreman inquired of the court whether the jury could bring in a

verdict of reckless driving. The court then of its own motion instructed the jury that "reckless driving" was an included crime. This was held error. The court, 94 Cal. App. 520, at page 525, 271 P. 549, 551, specifically pointing out the separate nature of the two crimes and demonstrating how one may drive in a most circumspect manner while under the influence of intoxicating liquor and that it "is wholly unessential to the establishment of the crime of reckless driving" that there be any "evidence of indulgence in intoxicating liquor." It is worth noting, however, that 94 Cal. App. 520, at page 526, 271 P. 549, 551, the court says: "Whether or not a person charged, under section 367e of the Penal Code, with having operated or driven a motor vehicle while intoxicated which has resulted in the death or injury to any person, may be found guilty of the offense declared by section 112 of said act, that is, driving while under the influence of intoxicating liquor, is a question not involved on this appeal, and consequently we do not presume to pass upon it."

In *People v. McKee*, 80 Cal. App. 200, 251 P. 675, 677, defendant was convicted upon a charge of manslaughter and also of violation of section 141 of the California Vehicle Act (hit and run). "The first point urged by appellant is that the defendant was twice placed in jeopardy for the same offense, maintaining as the foundation for this argument that the transaction upon which the two offenses are based is but a single one. Violation of section 141 of the Motor Vehicle Act is not included within or in fact related to the offense of manslaughter. There is a sort of illicit relationship between burglary and larceny, and yet they are not so wedded that a conviction cannot be had for both, although both of them grow out of the same continuous set of acts. * * * It cannot therefore be successfully argued that the defendant here was twice put in jeopardy. The acts constituting the second offense did not really commence until after the woman had been struck, at which time the first offense had been completed. This same circumstance is involved and considered in the connection between burglary and larceny, or robbery."

In *People v. Thal*, 61 Cal. App. 48, 214 P. 296, defendant was originally charged with obtaining property under false pretenses. The information set forth the facts in detail, which were in substance, that defendant through the utterance of a fictitious check and representation to his victim that

he had ample funds in the bank obtained from his victim certain property. On the morning of the trial, a motion was made by the district attorney to amend the information, which motion was granted. An amended information was thereupon filed in two counts, the first count being substantially the same as the original information with some inconsequential changes, but the second count charged for the first time a violation of section 476 of the Penal Code. Objection was made to the filing of the amended information, which was overruled. Upon the conclusion of the trial, the court directed a verdict of not guilty on the first count, and the defendant was convicted by the jury on the second count. The contention of defendant was "that since by the original information the only offense with which he was charged was that of obtaining property under false pretenses, said second count in the information charging another and different offense cannot be held to be an amendment of the original information within the meaning of section 1008 of the Penal Code permitting the amendment of informations." The court said, 61 Cal. App. 48, at page 53, 214 P. 296, 298: "We are cited to no authority which would sustain such a conclusion. On the other hand, we are referred to the case of *People v. Chober*, 29 Cal. App. 627, 157 P. 533, which holds that under section 1008 of the Penal Code it is within the discretion of the trial court to permit a change in the charge against the defendant where the new or additional crime charged *was included within the original offense as stated in the first information*. That would seem to be precisely the present case. According to the original information, the defendant, in committing the crime of obtaining property by false pretenses, did so through the commission of the further crime of uttering and passing a fictitious check. Upon the authority of the case above cited, we therefore hold that the appellant's objection to the order of the trial court permitting the filing of the amended information in this case is not well taken." (Italics ours.) A petition to have the cause heard in the Supreme Court was denied.

Of all the California cases thus far cited, the only ones which appear to be at variance with the test enunciated are *People v. Helbing*, *People v. Stephens*, *In re O'Connor*, and *People v. McFarlan*, supra. In *People v. Helbing*, 61 Cal. 620, the defendant had been convicted of battery. Thereafter he was charged with assault with a

deadly weapon. He pleaded the prior conviction. The court held that the battery was no bar to the second charge. The court said, 61 Cal. 620, at page 621: "But the former conviction did not legally operate as an acquittal of the offense charged in the information, unless it was for an offense included within the offense charged; and that presents the question, whether the offense of 'battery' is included within or is an ingredient of the offense of assault with a deadly weapon, with a felonious intent."

It will be noted from the foregoing excerpt that the court indorses the very doctrine enunciated, to-wit, that the test of whether an offense is necessarily included in another is whether it is an ingredient of such offense. In the Helbing Case, however, the court goes on to say that while battery includes assault, assault does not include battery, saying, 61 Cal. 620, at page 622: "But the less does not include the greater. Battery, therefore, includes assault, but assault does not include battery." The case then refers to *Commonwealth v. Roby*, supra, upon which it apparently relies, and follows the Roby Case in the application of accepted principles without noting that the facts in *Commonwealth v. Roby* brought the Roby Case within exceptions not warranted by the facts of the Helbing Case. An attempt is made to reconcile the holding of this case in the case of *People v. McDaniels*, supra, 137 Cal. 192, page 195, 69 P. 1006, 59 L. R. A. 578, 92 Am. St. Rep. 81, where it was held that battery *was included* in the charge of assault with intent to commit murder and that jeopardy on the battery charge barred a prosecution on the charge of assault with intent to commit murder. The case of *People v. Stephens*, supra, although later than that of *People v. Majors*, supra, disregards the doctrine of the Majors Case to the effect that burglary and crimes of the same or different degree, but each nevertheless several and distinct, may arise out of one act. It cannot be reconciled with the Majors Case, which is frequently referred to with approval by later California cases. In the case of *In re O'Connor*, 80 Cal. App. 647, 252 P. 730, O'Connor, as petitioner, made application for writ of habeas corpus having been convicted in the municipal court on three counts of a complaint and having been sentenced on each. One of the points raised in the application was that count one in the complaint charged the identical crime set forth in count three of the complaint, and having been convicted on count one, peti-

tioner was in jeopardy as to the charge in count three. Count one charged the offense of larceny by trick and device; count three charged a violation of section 654b of the Penal Code, which has to do with false advertising concerning real property. In count three of the complaint, the specific acts charged were "for the purpose of misleading and deceiving the public generally, and to fraudulently induce the public to enter into obligations relating to said property and to purchase certain interests in said mining claim." The conviction as to count one of the complaint was obtained upon the same evidence and based upon the same facts as was the conviction which was obtained on count three of the complaint. The court therein said, 80 Cal. App. 647, at page 651, 252 P. 730, 731: "It is urged that the defendant having been tried, convicted and sentenced under count 1, there can be no prosecution upon count 3, because the facts constituting the bases of both charges are identical. * * * The offense alleged by count 3 to have been committed is not necessarily included within that set forth in count 1. In a case where one is convicted of an offense necessarily included within another, and later is prosecuted for the greater, a plea of once in jeopardy will be sustained, for such conviction might have been had under the latter. The converse would also be true if the prosecution had begun with the greater offense, and there had been an acquittal, and subsequent prosecution attempted under the lesser charge. In such cases, and of course where the offenses charged are identical, there can be but one conviction and but one sentence. But where, as here, entirely separate and distinct offenses are charged in two counts, and one is not necessarily included within the other, a prosecution for one is no bar to a prosecution for the other, *even though the same testimony may be applicable to both*. In brief, count 3 charges the offense known as false advertising of real property. This offense became complete when the deceptive advertising matter was circulated with criminal intent. It is obvious that this false advertising is a distinct offense from larceny by trick and device as charged in count 1. The mere fact that the false literature was used as a part of the device through which the larceny was accomplished does not argue against the fact that the offenses are nevertheless separate and distinct. *The latter involves as an essential element the taking of personal property of another*. As to the former, the taking of property is not involved. The

outstanding element of the offense of falsely advertising real estate is the publication and circulation of deceptive matter. It is complete without regard to whether or not any one is deceived or damaged. The statute is intended to protect the public from a certain prevalent and pernicious form of trickery, but publication is not essential to larceny by trick and device. Other distinctions might be pointed out, but these are sufficient to indicate that the offenses are separate and distinct and that one is not necessarily included within the other. While a single act may be an offense against two statutes, and thus constitute two crimes, if each statute requires proof of a fact additional to those involved in the other, an acquittal or conviction of either does not result in the defendant having been in jeopardy for the other. *Morey v. Commonwealth*, 108 Mass. 433."

The opinion in the O'Connor Case is written by the same court which delivered the opinion in the Scofield Case, and is, in my opinion, at direct variance with the doctrine of the Scofield Case on the subject of jeopardy. It is not consistent with the doctrine of the California cases, which we have cited at some length and analyzed in detail, and is at direct odds with the doctrine of included offenses as stated in the case of *People v. Thal*, 61 Cal. App. 48, 214 P. 296, in which latter case the Supreme Court denied a hearing.

The case of *People v. McFarlan*, *supra*, may be reconciled on the theory that a plurality of separate crimes arose from the same act. If it cannot be included within that classification, then it like the O'Connor Case is not consistent with the weight of authority in this state.

Any effort to determine what is a necessarily included offense by the test enunciated depends upon the definitive nature of the crime charged, as applied to the facts of each specific case. In this case the charge is manslaughter. Manslaughter, in so far as it applies to the facts here, is defined in section 192 of the Penal Code as follows: "Manslaughter is the unlawful killing of a human being, without malice. It is of two kinds: * * * 2. Involuntary—in the commission of an unlawful act, not amounting to felony." Every felony has as a necessarily included minor offense, the attempt to commit it. So also different felonies from the very nature of their definitions necessarily include different lesser offenses to a varying degree. It is trite to say that a charge of murder in the first degree in-

cludes murder in the second and also manslaughter, and that assault and battery includes assault. Involuntary manslaughter, because of its definition, may include any one or more of as many unlawful acts not amounting to a felony, as there are in the statute books. On such a charge, it is idle to say that the included crimes on a manslaughter charge must be as fixed as are the originally included crimes on the usual murder charge. To require such a literal adherence to the doctrine of included lesser offenses would, in my opinion, do violence to the language of the code sections. It is apparent that manslaughter may be committed in a myriad number of ways. It is equally apparent that what is an inherent and "necessarily included act not amounting to a felony" on one manslaughter charge may have no relation to another charge of manslaughter. Unlawful acts not amounting to a felony differ in accordance with the fortuitous circumstances by or through which they may be created, or the peculiar tastes, predilections, or impulses of the persons who commit them. What minor crime or crimes is or are included in the charge of manslaughter depends entirely upon the facts of each case. Thus, driving while intoxicated, reckless driving, or any one of a dozen traffic violations, all may be included in a charge of manslaughter or any one of them may be included, although none of them as abstract crimes is necessarily included in the other. On the facts of this case, the unlawful act without which there could be no manslaughter was the reckless driving. The reckless driving is therefore a necessary, essential, and integral part of the corpus delicti of the manslaughter charge. There is, in our opinion, no similarity between this type of case and those other California cases which have been referred to, in which distinctions are drawn between robbery and assault with a deadly weapon, robbery and larceny, burglary and larceny, violation of section 288 and rape, and others of a similar nature. An analysis of the facts of those cases in the light of the legal definition of the crimes charged, demonstrates that the facts necessary to prove one or the other of the crimes charged do not constitute any part of the corpus delicti of the other. Thus, in order to prove robbery, it is not necessary to prove a prior assault or battery, or a post robbery battery. In order to prove burglary, it is not necessary to prove larceny. In order to prove violation of section 357 of the Penal Code, it is not necessary to prove larceny. In order to prove violation

of section 288 of the Penal Code, it is not necessary to prove rape, and the converse follows with reference to each situation. Larceny by trick and device, like manslaughter, may be committed in numerous ways. If the trick and device used happens to be a violation of a particular Code section and on a trial for larceny by trick and device the corpus delicti of that crime cannot be proved without proving in its entirety the violation of the Code section involved, then in our opinion the violation of the Code section is a necessarily included lesser offense, on the direct authority of *People v. Thal*, 61 Cal. App. 48, 50, 214 P. 296. It is for this reason that we believe that the *O'Connor* Case is not consistent with the weight of California authority.

The case of *People v. Johnson*, 82 Cal. App. 411, 256 P. 273, has been called to our attention. The defendant was convicted of the offense of practicing medicine without a license. The facts, as stated in the opinion, are as follows, 82 Cal. App. 411, page 412, 256 P. 273: "Two indictments were found against appellant by the same grand jury, upon the same date, based upon the testimony of the same witnesses, and upon identically the same facts and circumstances. In other words, the prosecution carved out of the same facts, acts, and circumstances two offenses; the first charge being that of abortion, and the second, practicing medicine without a license. The appellant was tried upon the charge of abortion and acquitted, and was thereby placed once in jeopardy of the charge of practicing medicine without a license; said charge being based upon the same alleged facts, acts and circumstances."

On the facts of the *Johnson* Case, it seems clear on a general analysis, that the corpus delicti of the crime of abortion does not comprise within its elements, the right of a person to practice medicine. That such fact may have been proved can make no difference. Abortion may be committed by a layman or by a licensed surgeon. The corpus delicti of that crime comprises the acts done which constitute the abortion; whether the person who committed the acts is or is not licensed to practice has nothing to do with the corpus delicti of that crime. It is also undoubtedly true that the offense of practicing without a license is punished, not because an abortion was performed, but because an unlicensed person is not permitted to practice any kind of medicine or surgery without a license. If, instead of performing an abortion, defendant in the

Johnson Case had successfully performed a necessary hysterotomy, and saved a life, he would still be guilty of practicing medicine without a license. If, however, in the *Johnson* Case, the proof on the charge of practicing without a license were the same act of abortion of which defendant had been already convicted (as seems to have been the fact), and not some other act which could have been classified as a practice of medicine, then it is submitted that the decision in the *Johnson* Case does violate the clear mandate of section 654 of the Penal Code. Elaborating further, for the purpose of illustration, the facts of the *Johnson* Case: Thus, if the person upon whom the abortion was performed had died, as a result of the abortion, and *after* the death of such person defendant had been charged with and tried for abortion, he would undoubtedly have been in jeopardy as to a subsequent murder charge, because the manner of the death, to wit, abortion, would be an essential and integral part of the corpus delicti of the murder charge. And, conversely, if defendant had been charged with murder and acquitted, he could not thereafter be prosecuted for abortion. This is the exact situation in the recent case of *People v. Coltrin* (Cal. App.) 48 P. (2d) 973, cited in the main opinion, and though a contrary view is there taken by the court, the view herein expressed seems to be indorsed in a separate concurring opinion by Mr. Justice Marks.

While in the instant case manslaughter was charged in general terms, it is undoubtedly true that it might have been charged specifically, for it is established that assault or an assault and battery may be committed upon a human being with an automobile as well as with an automatic. *State v. Sudderth*, 184 N. C. 753, 114 S. E. 828, 27 A. L. R. 1180; *State v. Rountree*, 181 N. C. 535, 106 S. E. 669; *State v. McIver*, 175 N. C. 761, 94 S. E. 682; *State v. Leary*, 88 N. C. 615. In the case of *Lauterbach v. State*, 132 Tenn. 603, 179 S. W. 130, in a similar situation, a defendant was charged with manslaughter in that he "unlawfully, feloniously, and recklessly" drove [driving] an automobile upon John D. White, and thereby caused [causing] his death. 'At the time,' continues the indictment, 'said Max Lauterbach was driving said automobile along St. Elmo avenue, a public thoroughfare, at a rate of speed in excess of 20 miles an hour, and in disregard of the presence of said John D. White. Whereby the grand jurors present that the said Max

Lauterbach has committed involuntary manslaughter.' " So in this case, the defendant might have been charged by an allegation of more specific ultimate facts. If he had been, there could be no question but that reckless driving was a necessary, essential, and integral part of the corpus delicti of the charge of manslaughter, and the Attorney General so concedes.

The effect of the Attorney General's concession is that a district attorney, by charging manslaughter in general terms, can deprive a defendant of a substantial right. If this be sound, then the constitutional right of a defendant can be swept away by a resourceful pleader. In the instant case it was stipulated that the facts which gave rise to the charge and conviction of reckless driving were identical with those which gave rise to the charge of manslaughter, and while the trial court found that the defendant had violated other provisions of the California Vehicle Act besides section 121 (Deering's Gen. Laws 1931, Act 5128), it was found that defendant had violated section 121. Under such circumstances, we see no alternative other than to hold that the charge of reckless driving was a necessarily included minor offense of the charge of manslaughter. The most recent case which applies the corpus delicti test on an analogous factual situation is that of *People v. Burkhardt* (Cal. App.) 50 P.(2d) 97, Mr. Presiding Justice Crail dissenting.

I am not unmindful of the dangers of the rule enunciated, but the entire subject of double jeopardy is fraught with pitfalls. Many courts suggest that the principle that jeopardy on a lesser necessarily included crime bars a prosecution for the greater has been subject to much abuse, and there are undoubtedly a greater number of unrecorded cases, which would cumulate proof in that regard. This, however, has been true for a long time, but, as pointed out, there is in theory at least the stop-gap that if there is any fraud or collusion in the initiation of prosecution for a lesser offense there is no jeopardy.

When the facts have all occurred and give rise to a grave criminal charge, which charge may necessarily include a number of lesser minor offenses, the people must trust those officials charged with the enforcement of its laws to properly execute the same. If a public official charged with the enforcement of laws makes an election which is detrimental to the state, the state is nevertheless bound thereby. As said in the case of *People v. McDaniels*, 137 Cal.

192, at page 198, 69 P. 1006, 1009, 59 L. R. A. 578, 92 Am. St. Rep. 81: "All criminal prosecutions are by the state, which is a single entity. It may choose its forum, and determine for what particular offense it will prosecute the citizen for a violation of the criminal law. It cannot complain if it has made an unwise selection, but, having made its selection and inflicted the penalty it has imposed for such violation, the constitution interposes for the protection of the accused, and declares that he shall not be twice put in jeopardy for the same offense, and this provision, being for the benefit and protection of the accused, is to be liberally construed."

The majority opinion states that the reckless driving in the instant case "was not an offense necessarily or at all included in the misdemeanor charge," and that "Under the misdemeanor charge in the police court, he could not have been convicted of manslaughter." It is submitted that this argument is a fallacy even though so respectable an authority as Wharton seems to indorse it; Wharton on Criminal Pleading and Practice (9th Ed.) § 476, where it is said, "as at the time of conviction of assault there could have been no conviction of the homicide the prosecution of the homicide is not barred by the conviction of the assault." Quoted in *People v. Wilson*, 193 Cal. 512, 515, 226 P. 5. Under our practice, no defendant can ever be convicted of an offense greater than the one charged. If the facts of a given case demonstrated murder in the first degree, and the charge brought thereon were one of manslaughter, can there be any doubt but that an acquittal or conviction on the manslaughter charge would completely bar a murder charge? If on such facts there is no bar, then there is no principle of once in jeopardy. It is also asserted in the majority opinion that "for the purposes of trial of the instant case this conduct of the defendant, when proved, was merely part of the evidence, * * * which in this instance was done 'in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.' Penal Code, § 192." This statement overlooks the fact that the information made no such charge and also the stipulation in the trial court made by the district attorney that the manslaughter charge grew out of the same act, to which the defendant had pleaded guilty in the police court. Further, it admits that defendant can be deprived of a right by a method of pleading. Also, it is

submitted with due deference to my learned colleagues that it begs the question, because if there is a distinction between reckless driving as an "unlawful act" and reckless driving as a lawful act committed "in an unlawful manner," then such a distinction makes the same act or omission punishable in different ways and is contrary to the clear and express mandate of section 654 of the Penal Code.

I conclude, therefore, that on the facts of the instant case, the crime of reckless driving is an offense "necessarily included" in the charge of manslaughter, and that defendant's plea of jeopardy should have been sustained.

An additional point has been raised that the judgment must be sustained because defendant's plea of once in jeopardy was not entered with the full formal requisites set forth in section 1017, subd. 4, of the Penal Code, which provides: "If he plead once in jeopardy: 'The defendant pleads that he has been once in jeopardy for the offense charged (specifying the time, place, and court).'" In this case the minutes of the court, as set out in the clerk's transcript, show: "The defendant is duly arraigned, states his true name to be as charged in the information, waives reading of the information and time to plead, *regularly enters his pleas of Not Guilty and Once in Jeopardy* and the trial of the action is thereupon set for. * * *" The cases of *People v. Moronati*, 70 Cal. App. 17, 21, 232 P. 991, and *People v. O'Leary*, 77 Cal. 30, 33, 18 P. 856, unquestionably require a rigid adherence to the mandate of the Code section. I feel, however, that the use of the word "regularly" in the minutes of the court definitely suggests that the plea was made as required by law. The fact that the clerk of the court is not authorized to enter a plea short-cutting the same in the manner the minutes show, in lieu of entering the plea as required by the Code, cannot in my opinion be held to penalize a defendant. Nor does the probability that a clerk may adopt such methods charge a defendant with the duty of overseeing the entries made by the clerk of the court. Furthermore, in this case an objection was made to the introduction of the evidence at the outset of the trial, and it was stipulated that the facts upon which the manslaughter complaint was issued were the same as those upon which the complaint for reckless driving had been issued, and under which defendant had been previously convicted. **Thereafter** argument was had on the ob-

jection to the evidence, which was confined entirely to the question of whether defendant had been in jeopardy, which argument was participated in actively by defendant's counsel, the court and the district attorney, and the reporter's transcript shows that this argument on the objection to the evidence took all of the first morning and a portion of the first afternoon of the trial. At the conclusion of this argument, the objection to the evidence was overruled, and the trial court voluntarily granted leave to defendant to renew the discussion at the conclusion of the People's Case. The discussion was renewed on a motion made by defendant to dismiss the information, which motion was discussed by the same parties also at great length and then denied. In addition, at the conclusion of the case, the court, after making a complete summary of the facts and finding defendant guilty, proceeded to make an exhaustive analysis of the legal questions involved and the practical consequences resulting from defendant's plea of once in jeopardy, which analysis by actual count covers approximately eight full pages of the reporter's transcript. Finally, in pronouncing sentence the following took place:

"The Court: * * * Is there any legal ground why the court should not proceed to pronounce judgment and sentence?"

"Mr. McIver: No.

"The Court: You want to reserve the point you made as to being twice in jeopardy, don't you?"

"Mr. McIver: I don't know whether this is the proper time; * * *

"The Court: That is why I am suggesting this. I don't want to cut you out by a statement that there is no legal ground why the court should not proceed to pronounce judgment and sentence.

"Mr. McIver: With that exception.

"The Court: That is what I wanted to be sure you had in the record.

"Mr. McIver: With the exception that I am still of the opinion that the boy has been once in jeopardy before this trial."

And as the last word in the case, the court said: "I think you have a point (referring to the question of jeopardy) that should be taken care of, and I rather hope you will appeal it; and it will not annoy me a bit if you reverse me on this. I think it is a question that should be taken to the higher courts."

To hold in the face of such a record that defendant is unable to avail himself

of his plea of once in jeopardy, because the clerk of the court negligently failed to make the proper entry of said plea in the minutes, in my opinion, would be nothing short of farcical. In my opinion, the judgment and the order denying motion for a new trial and each of them should be reversed.



9 Cal.App.2d 687

**BANK OF AMERICA NAT. TRUST & SAV-
INGS ASS'N v. FIDELITY & DEPOSIT
CO. OF MARYLAND et al.**

Civ. 5366.

District Court of Appeal, Third District,
California.

Nov. 1, 1935.

Hearing Denied by Supreme Court
Dec. 30, 1935.

1. Principal and surety ⇨200(5)

In action on guardianship bond against corporate surety which filed cross-complaint joining personal sureties on prior bond, personal sureties *held* proper parties for determination of whether they were cosureties and obligated to contribute to liability represented by bond.

2. Appeal and error ⇨187(2)

In action on guardianship bond against corporate surety which filed a cross-complaint against personal sureties on prior bond alleging liability of personal sureties as cosureties, cosureties, who tried cause on theory that question of liability was in issue and did not appeal from judgment, could not for first time on appeal by corporate surety raise question of their misjoinder.

3. Appeal and error ⇨171(1)

In action on guardianship bond against corporate surety which filed cross-complaint against personal sureties on prior bond, corporate surety *held* entitled to a determination on appeal of liability of cosureties, where issue of liability was tried without objection, though appeal did not raise question of proper procedure of enforcing contribution against sureties (Civ. Code, § 2848).

4. Guardian and ward ⇨177

Personal sureties on guardianship bond *held* not discharged from liability, where guardian on filing first annual account requested court to fix amount of new bond and, on settling account, court ordered a new bond,

but no order was made exonerating sureties or discharging their bond and they did not apply for an order of discharge and no notice of proposed discharge was given (Probate Code, § 1483).

5. Guardian and ward ⇨177

Personal sureties on guardianship bond *held* not discharged from liability by filing of new bond by corporate surety, where personal sureties did not seek discharge and provision of Code relating to procedure for obtaining a discharge was not complied with (Pol. Code, §§ 970, 972-975, 981).

6. Guardian and ward ⇨177

As respects guardianship bond, provision of Probate Code contemplating that order of court discharging surety will be made upon proceedings duly had upon such notice thereof as court may direct *held* to prevail over provision of Political Code for exoneration of sureties upon filing and approval of new bonds, since such provision of Probate Code was latest expression of legislature on subject (Probate Code, § 1483; Pol. Code, §§ 970, 972-975, 981).

7. Statutes ⇨225

Where two statutes are in apparent conflict, they should be so construed, if reasonably possible, as to allow both to stand; but where impossible to reconcile them, dates of their enactment will be examined in determining legislative intent, and effect given to later statute.

Appeal from Superior Court, Yolo County; Neal Chalmers, Judge.

Suit by the Bank of America National Trust & Savings Association, as guardian of the estate of Elmer J. Barlow, an incompetent person, against the Fidelity & Deposit Company of Maryland, in which the defendant Fidelity & Deposit Company of Maryland filed a cross-complaint against G. Wilson and F. B. Edson. Judgment for plaintiff and cross-defendants, and the defendant Fidelity & Deposit Company of Maryland appeals.

Affirmed as modified.

Thomas E. Davis, of San Francisco, for appellant.

A. G. Bailey, of Woodland, for respondent Bank of America Nat. Trust & Savings Ass'n.

Huston, Huston & Huston, of Woodland, for respondent Fidelity & Deposit Co. of Maryland and others.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant Fidelity & Deposit Company of Maryland has appealed from a judgment which was rendered in favor of the cross-defendants G. Wilson and F. B. Edson in a suit on guardianship bonds against the sureties on account of the misappropriation of the funds of the estate by the former guardian of an incompetent person.

William Barlow was appointed guardian of the estate of Elmer J. Barlow, an incompetent person, April 19, 1926. Pursuant to an order of the probate court he filed a guardianship bond in the sum of \$2,000 with the cross-defendants Wilson and Edson as sureties thereon. October 28, 1928, William Barlow filed his first annual account for settlement and alleged that the bond was insufficient to cover the money in his hands belonging to the estate, asking that the court "fix the amount of such new or additional bond as the court may require." The account was settled and the court made its order that the guardian "give a new bond in the sum of \$2,000, surety or \$4,000 personal." The former bondsmen were not discharged. The appellant, Fidelity & Deposit Company, filed the new bond for \$2,000. William Barlow resigned as guardian May 23, 1932. The plaintiff was thereupon appointed guardian of the estate of the incompetent person. On subsequent showing it was determined that the former guardian, William Barlow, had misappropriated funds of the estate after the appointment of the new guardian, amounting to the sum of \$1,758.30. This suit was commenced against the Fidelity & Deposit Company of Maryland, alone, as surety for the recovery of the amount of the misappropriated money. Upon petition and proceedings duly had it was ordered that the respondents G. Wilson and F. B. Edson, as bondsmen in the guardianship matter be made parties defendant in this action, and that the appellant be permitted to file a cross-complaint against them as cosureties on the guardianship bonds. The respondents failed to demur on the ground of misjoinder of parties defendants. They answered the cross-complaint without suggesting that they were improperly joined as defendants. The respondents Wilson and Edson affirmatively alleged that they had been discharged as sureties on their bond. Moreover, they answered the cross-

complaint on the assumption that their asserted liability on the guardianship bond was a proper issue to be determined and the case was tried on that theory. Findings were adopted favorable to the respondents. It was determined that the cross-defendants had been discharged of their liability on their guardianship bond, that they were not indebted to the estate, and that the appellant take nothing by its cross-complaint. A judgment was accordingly rendered in favor of the cross-defendants and against the Fidelity & Deposit Company of Maryland for the sum of \$1,758.30. From this judgment the surety company has appealed.

The appellant concedes its liability on the bond for the payment of the judgment, but contends that the court erred in finding that the cross-defendants Wilson and Edson were not also liable on their bond and asserts that it is entitled to have their liability as cosureties determined so that when the surety company pays the judgment it may enforce contribution of their lawful proportion thereof. On the contrary, the respondents insist that the cross-defendants were wrongfully made parties to the action; that they are not liable on their bond for the reason that they were discharged from their obligation; and that the appellant is not entitled to contribution until it has first satisfied the judgment.

[1,2] We are of the opinion the cross-defendants Wilson and Edson were not necessary party defendants in this suit, but assuming that the plaintiff had the option to bring this suit against only one of several cosureties, the codefendants were *proper* parties for the purpose of determining whether they were cosureties and therefore obligated to contribute to the liability represented by the bonds. Section 379a of the Code of Civil Procedure, which was adopted in 1927 (St. 1927, p. 477), provides that: "All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative; and judgments may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities."

It is true that the complaint failed to allege that Wilson and Edson were liable on their bond as cosureties, but the court authorized the appellant to file a cross-complaint in which it was specifically so al-

leged, and the cross-defendants failed to demur on that ground. On the contrary, they conceded their liability to be a proper issue to be determined in this suit by failing to demur to the cross-complaint on the ground of misjoinder of party defendants and by answering that pleading and trying the cause on the theory that it was a proper issue to be determined. *Kunz v. California Trona Co.*, 169 Cal. 353, 146 P. 885; *Busset v. California Builders Co.*, 123 Cal. App. 657, 664, 12 P.(2d) 36, 39. In the case last cited it is said: "Any objection on the ground of misjoinder should have been raised by demurrer." Moreover, the cross-defendants are not permitted to raise on appeal for the first time the asserted error of the trial court in authorizing them to be made party defendants for they not only tacitly consented thereto, but they have not appealed from the judgment. *Rapp v. Southern Service Co.*, 116 Cal. App. 699, 708, 4 P.(2d) 195, 198; *Hudgins v. Standard Oil Co.*, 136 Cal. App. 44, 28 P.(2d) 433. In the *Rapp Case*, supra, it is said in that regard: "It is the general rule that a respondent in whose favor a judgment is rendered * * * cannot, on an appeal of the opposite party, ask a court of review to consider any errors against him."

[3] This appeal does not raise the question of the proper procedure of enforcing contribution against cosureties. The appellant concedes that it is primarily liable under its bond for the full amount of the judgment, but it is insisted that the cross-defendants were properly joined as defendants in the action and that the court erred in specifically finding that they were not liable for any part of the obligation at any time or under any circumstances. It is true that neither surety would be entitled to contribution against other cosureties until he had first satisfied the obligation. Section 2848, Civ. Code. But since they were made party defendants in the suit and the issue of their liability was tried by all parties without objection, this judgment will become *res adjudicata* of that issue and the appellants will be denied the lawful right to enforce contribution against them even after the obligation has been fully paid by it. This would defeat justice provided the cross-defendants are liable under the provisions of their bond. *Todhunter v. Smith*, 219 Cal. 690, 28 P.(2d) 916.

[4] We are persuaded the court erred in determining that the cross-defendants were discharged from their liability on their guardianship bond, and that there is no evidence to support the finding in that regard. It is not a question of what the court intended to do regarding the discharge of the cross-defendants, but rather what a reasonable construction of the record discloses that the court actually did or was authorized to do in that regard.

There is no conflict of evidence with respect to the court record, May 11, 1926, a guardianship bond was filed in the Estate of Elmer J. Barlow, an incompetent person, in the sum of \$2,000. The cross-defendants were the sureties on that bond. In October, 1928, the guardian filed his first annual account therein, showing receipts amounting to \$2,420.91, and disbursements in the sum of \$1,067.50, leaving a balance on hand of \$1,353.41. The guardian then petitioned the court to "fix the amount of such new or additional bond as this court may require." The account was duly settled, and the court made its order on October 15, 1928, that "said guardian give a new bond in the sum of \$2,000.00 surety or \$4,000.00 personal." No order was then or subsequently made exonerating the individual bondsmen or discharging the original bond. Pursuant to the order of court for an additional or new bond, the appellant, Fidelity & Deposit Company of Maryland, filed its bond in the estate on November 2, 1928, in the sum of \$2,000. In a subsequent accounting it was determined that the guardian, William Barlow, had misappropriated the sum of \$1,758.30 belonging to the estate. On proceedings duly had, the guardian was removed, and this respondent Bank of American National Trust & Savings Association was appointed and qualified as guardian of the estate of said incompetent in the place of William Barlow. Upon the trial of this case the court found: That "the said (personal surety) bond was canceled and annulled and the said bondsmen G. Wilson and F. B. Edson were discharged from all future liability. * * * That said bond of G. Wilson and F. B. Edson is not in full force and effect and has been of no force and effect since the 7th day of November, 1928, as to any liability created since said time." It was stipulated that no other orders, notices, or proceedings except those which are mentioned above were had in the matter of the

estate affecting the original bond or purporting to discharge the bondsmen.

Unless the language of the court ordering that the guardian "give a new bond in the sum of \$2,000.00" necessarily infers that the last-mentioned bond was to be furnished in lieu of the original bond and that it implies that the first bondsmen were thereby exonerated and the bond discharged, then there is no evidence to support the finding that the cross-defendants were discharged from their liability on their bond.

The sureties on the original bond did not apply to the court for an order discharging them from liability. No notice of a proposed discharge of those sureties was given. The court made no order discharging them. For the protection of the estate the Probate Code authorizes the discharge of the sureties of an existing bond upon the giving of a new bond when it appears that the discharge may be granted without injury, and only upon notice thereof. Section 1483 of the Probate Code provides that: "The court may require a new bond to be given by a guardian whenever it deems it necessary; and when it appears that no injury can result therefrom to those interested in the estate, it may discharge the existing sureties from further liability, after such notice given as the court may direct."

It has been held that when the Code specifically requires "such notice given as the court may direct," the jurisdiction of the court depends on the giving of some notice, the nature of which may be determined by the court, and on the contrary, that the court may not then entirely dispense with notice. *Olcese v. Superior Court of Kern County*, 210 Cal. 566, 292 P. 964, 965. With respect to notice regarding the appointment of a special administrator, it is there said: "The requirement of section 1412 of said Code [of Civil Procedure] that such reasonable notice must be given cannot, by any stretch of construction, be held to mean that no notice whatever of the application for such appointment or of the hearing thereon shall be required."

The section referred to in the preceding quotation was subsequently changed by the adoption of section 461 of the Probate Code so as to specifically authorize "the appointment * * * at any time *without notice*." *Evans v. Superior Court of Los*

Angeles County, 215 Cal. 58, 66, 8 P.(2d) 467.

[5, 6] It is suggested that article 9 of the Political Code (part 3, tit. 1, c. 7) with respect to bonds of officers is made applicable to guardianship bonds and thereby automatically accomplishes the discharge of the sureties on the original bond herein by virtue of the filing of the new bond by the Fidelity & Deposit Company of Maryland. We think not. Section 981 of the Political Code declares that: "The provisions of this article apply to the bonds of receivers, executors, administrators, and guardians." Section 970 of that Code also provides that: "Whenever any sureties on the official bond of any officer wish to be discharged from their liability, they and such officer may procure the same to be done if such officer will execute a new bond with sufficient sureties in like form, penalty, and conditions, and to be approved and filed as the original bond. Upon the filing and approval of the new bond such first sureties are exonerated from all further liability."

But in the present case the original sureties did not ask to be discharged from further liability on their guardianship bond. The provisions of sections 972-975 of the Political Code regarding the necessary procedure for obtaining the discharge of sureties from further liability were not complied with in this case. Moreover, if it be deemed that the Political Code provides for the automatic discharge of sureties from further liability by the mere filing of a new bond regardless of notice or application therefor, those provisions are in absolute conflict with section 1483 of the Probate Code, which contemplates that an order of court to that effect will be made upon proceedings duly had upon such notice thereof as the court may direct. We are of the opinion these statutory provisions may be readily reconciled. But even though they be deemed to be in irreconcilable conflict, the section of the Probate Code will prevail, for it is the latest expression of the legislature in that regard. The Political Code sections in question were enacted in 1872. Section 1803 of the Code of Civil Procedure, which was re-enacted by the adoption of section 1483 of the Probate Code, became the law in 1880.

[7] In 59 C. J. p. 1042, § 619, it is said with respect to conflicting statutes: "Where two statutes are in apparent con-

flict, they should be so construed, if reasonably possible, as to allow both to stand and to give force and effect to each, and if it is not possible to reconcile them, the dates of their enactment will be examined in determining the legislative intent, and effect given to the later one."

For the reason that there is no evidence to support the finding and judgment to the effect that the cross-defendants Wilson and Edson were discharged from their liability on their guardianship bond, and that question was a valid issue in this case, it becomes necessary to reverse the judgment in that regard. The judgment holding the appellant, Fidelity & Deposit Company of Maryland, to be liable on its guardianship bond in the sum of \$1,758.30 is valid and should be affirmed.

The judgment is modified, and the trial court is directed to also render judgment jointly against the cross-defendants Wilson and Edson in the sum of \$1,758.30. As so modified, the judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



10 Cal.App.2d 97

LEWITH v. REHMKE.

Civ. 1196.

District Court of Appeal, Fourth District,
California.

Nov. 8, 1935.

Hearing Denied by Supreme Court
Jan. 1, 1936.

1. Deeds ⚡71

Statements in letters of grantee to grantor, even if considered as threats to assist grantor's opponent in an action brought against grantor, by conveying to opponent information detrimental to grantor unless grantor executed particular deed to grantee *held* not to authorize cancellation of deed at suit of grantor, on ground that statements constituted "menace" within statute, where threats had reference to a fraudulent transaction in which both parties had participated (Civ. Code §§ 1567, 1569, 1570, 1689).

[Ed. Note.—For other definitions of "Menace," see Words & Phrases.]

2. Deeds ⚡210

Evidence that defendant had cared for mentally infirm wife of plaintiff for approximately four years and had performed services

for plaintiff *held* to justify finding that deed sought to be canceled was supported by consideration.

3. Deeds ⚡211(1)

Evidence sustained finding that grantor of deed sought to be canceled was mentally competent when deed was executed.

4. Appeal and error ⚡731(5)

Specification of error complaining of insufficiency of evidence to support judgment, but failing to recite particulars in which it was contended evidence was insufficient, *held* not to authorize review (Code Civ. Proc. § 648).

5. New trial ⚡153

Where appellant gave notice of intention to move to vacate judgment and to reopen cause for introduction of additional evidence and notice specified that motion was made under statute authorizing court to vacate judgment and grant new trial in ruling on motion for a new trial in an action tried without a jury, affidavits in support of motions were required to be filed within 10 days after service of notice, since motion for vacation of judgment amounted in effect to a motion for new trial within statute requiring filing of affidavits within ten days after serving notice of intention to move for a new trial (Code Civ. Proc. §§ 659a, 662).

6. Appeal and error ⚡110

Order denying new trial *held* not appealable (Code Civ. Proc. § 963).

7. Appeal and error ⚡113(1)

Order denying motion for vacation of judgment presented under statute relating to motions for new trial *held* not appealable (Code Civ. Proc. §§ 662, 963).

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action by Joseph L. Lewith against Mae Rehmke, also known as May E. Rehmke. From a judgment for defendant and orders denying plaintiff's motion for a new trial and a subsequent motion to vacate the judgment and reopen the case, plaintiff appeals.

Appeal from orders dismissed, and judgment affirmed.

See, also, 217 Cal. 563, 20 P.(2d) 687.

Clifford C. Pease and John B. Molenaar, both of San Diego, for appellant.

Gray, Cary, Ames & Driscoll and E. A. Walters, all of San Diego, for respondent.

JENNINGS, Justice.

Plaintiff instituted this action to cancel a deed which he had executed whereby he conveyed certain real property to the defendant and also to quiet his title to said property. The complaint alleged that the defendant procured the deed from plaintiff at a time when she was acting as a fiduciary agent of plaintiff through the instrumentality of certain threats which she made to plaintiff, who was then in a weakened mental condition, and that no consideration was given by defendant for the deed. Trial of the action resulted in a judgment in defendant's favor and in the denial of a motion for a new trial and of a subsequent motion to vacate the judgment and reopen the case for the introduction of further evidence. From the judgment thus rendered, and from the orders denying the aforesaid motions, plaintiff prosecutes this appeal.

On this appeal, which is presented through the medium of a bill of exceptions, appellant sets out nine specifications of errors committed by the trial court which it is contended entitle him to a reversal of the judgment and orders.

The principal contention advanced in support of a reversal of the judgment is that the trial court's finding that the deed executed by appellant in which respondent was named as grantee is a valid deed of conveyance is entirely unsupported by the evidence, and that the judgment in respondent's favor which is necessarily predicated upon this finding should therefore be reversed.

It is our conclusion that no useful purpose would be served and that this opinion would be unduly lengthened by including herein a summary of the evidence which is contained in the bill of exceptions. Appellant contends, first, that the evidence showed that respondent occupied a position of trust and confidence with relation to appellant. The trial court found that from January 1, 1923, until February 25, 1929, the respondent on numerous occasions acted as a trusted agent and adviser in business matters for appellant, that she collected and handled sums of money for appellant, paid bills and expenses for him, and in her name held title to certain of his properties, but that appellant did not, because of such agency or trust, rely and depend upon respondent as his confidant and adviser in all of his business dealings. Examination of the bill of exceptions indi-

cates that the evidence supports the finding thus made, and that no broader finding was warranted by the evidence adduced during the trial of the action.

[1] The second contention urged by appellant is that a finding of the trial court that the deed was not executed by appellant as a result of threats and duress practiced upon him by respondent is lacking in evidentiary support. The threats upon which appellant relies consist of statements contained in numerous letters written by respondent to appellant during a period of several months prior to the execution of the deed. The statements refer to an action which was brought against appellant in Seattle, Wash., during the year 1928, for the purpose of canceling a 99-year lease of certain property in Seattle executed by appellant as lessor in December, 1927, on the ground of fraud and amount to a promise by respondent to assist appellant in the conduct of the suit, and particularly to refrain from conveying to the plaintiff in said action certain information which would be beneficial to said plaintiff and detrimental to appellant, provided appellant would execute the deed sought to be canceled by the instant action.

Appellant's contention with respect to the lack of evidentiary support of the trial court's finding that the deed was not executed as a result of threats and duress is not persuasive. In the first place, section 1689 of the Civil Code provides that a party to a contract whose consent thereto was obtained through menace or fraud is entitled to rescind the contract. Section 1567 of the same Code provides that apparent consent is not free when it has been obtained through duress or menace. The term "duress" is defined in section 1569 of the Code and the term "menace" in section 1570. The former of these sections provides that duress consists of unlawful confinement, unlawful detention of property, confinement, lawful in form, but fraudulently obtained, of certain designated persons. Section 1570 provides that menace consists in a threat, first, of such duress as is specified in subdivisions one and three of the preceding section, second, of unlawful and violent injury to person or property, or, third, of injury to character. The statements of respondent upon which appellant relies do not at all fit the definition of menace declared in section 1570, and it may not successfully be urged that uncontradicted evidence showed that the exe-

cution of the deed was accompanied by duress practiced upon appellant. If the written statements may properly be designated as threats, they amounted to no more than threats to assist appellant's opponent in the Washington suit by conveying to such opponent certain information allegedly detrimental to appellant. Viewed as such, they did not fulfill the statutory definition of menace which might have justified the trial court in canceling appellant's deed on the ground that his apparent consent to its execution had been obtained through menace and was not therefore free and voluntary.

Furthermore, when the threats are considered in the light of all the evidence bearing upon them, the following situation is disclosed: At the time appellant executed the contract leasing the Seattle property for a term of 99 years, he represented to the lessee that the property, which consisted of an apartment house, was then producing an income of \$1,265 per month. This representation was untrue and known by appellant to be false. At this time respondent was operating the apartment house for appellant. To lend credibility to his representation, he persuaded respondent to continue her operation of the apartment house as sublessee and to pay to the lessee the amount which he had represented was the monthly rental value of the property. To enable her to do this, he provided respondent with sufficient funds to make up the difference between the represented monthly rental and the actual receipts obtained from the leasing of the various apartments contained in the building. This arrangement continued for several months until respondent left the place. It is apparent, therefore, that when respondent on various occasions threatened that she would convey information to the plaintiff in the Washington action, she referred to the above-described arrangement. Under these circumstances, the court was justified in refusing the equitable remedy of cancellation to appellant. Since the threats had reference to a clearly fraudulent transaction in which both parties had participated, the basis for relief was tainted with fraud, and a court of equity should leave them in the position in which they had placed themselves. Good conscience is a fundamental requisite of equitable interposition, and, as declared by a learned student of equity jurisprudence, "any really unconscientious conduct, connected with

the controversy to which he is a party, will repel him from the forum whose very foundation is good conscience." *Pomeroy's Equity Jurisprudence* (3d Ed.) vol. 1, § 404; *Allstead v. Laumeister*, 16 Cal. App. 59, 65, 116 P. 296.

[2] Appellant's third contention advanced in support of his attack upon the trial court's finding that the deed sought to be canceled is a valid instrument of conveyance is that the evidence was insufficient to support a finding that respondent had given consideration for the deed. It was conceded that respondent had paid no money to appellant in return for the execution of the deed. Appellant, however, admitted that respondent had cared for his mentally infirm wife for a period of approximately four years. It also appeared that respondent had performed numerous menial tasks for appellant during a period of years and that she had given much of her time and energy to serving appellant for a period of approximately eight years. Appellant testified that he had expended a considerable sum of money for the purchase of clothing for respondent and had provided her and her children with groceries. The question of whether or not there was any consideration for the deed was a pure question of fact which the trial court decided in respondent's favor on evidence that, at best, was conflicting. The finding that there was consideration for the deed may not, therefore, be disturbed.

[3] Appellant's fourth contention, which is likewise advanced in attacking the trial court's finding that the deed is valid, is that an incidental finding negating a condition of mental incompetency in appellant at the time the deed was executed is lacking in evidentiary support. Examination of the evidence which was produced pro and con as to this feature of the case as the same is reflected in the bill of exceptions fails to sustain appellant's contention in this regard. It is true that a number of witnesses, among whom were certain medical men, testified that, in their opinion, appellant was not competent to transact business at the time the deed was executed. Opposed to this evidence witnesses who were produced by respondent testified that, in their opinion, appellant was then competent. One of such witnesses was a physician in San Diego, who testified that the appellant called upon him on February 22, and February 25, 1929, that he conversed with appellant on these two oc-

casions and propounded various questions to appellant, and that from the answers returned to such questions and from the conversations which occurred on the above-mentioned dates, the witness considered that appellant was then mentally competent. It should be observed that the first of the two above-mentioned visits apparently occurred on the day following delivery of the deed. Here again it is apparent that the evidence with respect to appellant's mental competency at the time the deed was executed was conflicting. The established rule which precludes a reviewing court from disturbing a finding based on conflicting evidence is therefore applicable.

[4] The foregoing contentions of appellant relate to the ninth specification of error set out in the bill of exceptions which is stated as follows: "Specification of the insufficiency of the evidence to support the judgment." The specification is most general in its terms and contains nothing more than a repetition of appellant's claim that the evidence is insufficient to support various broadly specified findings of the trial court without reciting the particulars in which it is contended the evidence is insufficient to sustain the criticized findings. In our opinion, the above-mentioned specification of error is not correctly framed and might properly have been disregarded on this appeal. Section 648, Code Civ. Proc.; *Crow v. Crow*, 168 Cal. 607, 611, 143 P. 689; *Cameron v. Ah Quong*, 175 Cal. 377, 386, 165 P. 961; *Regoli v. Stevenson*, 179 Cal. 257, 176 P. 158; *Mills v. Brady*, 185 Cal. 317, 320, 196 P. 776; *Hastaran v. Marchand*, 23 Cal. App. 126, 137 P. 297; *Mazuran v. Stefanich*, 95 Cal. App. 327, 330, 272 P. 772; *De Brito v. San Diego Packing Co.*, 125 Cal. App. 61, 13 P. (2d) 798, 14 P.(2d) 305. Nevertheless, because of appellant's insistence that various findings of the trial court are entirely lacking in evidentiary support, the entire transcript has been read and examined with the result that we are impelled to the conclusion that the claim of evidentiary insufficiency is untenable.

Specifications of error numbered 1 to 7, inclusive, relate to various rulings of the trial court sustaining and overruling objections to specified questions that were propounded to respondent as a witness during the trial of the action. It is our opinion that, if it be assumed, for the sake of argument, that the various rulings to which

exception has been thus taken were erroneous, they were nevertheless harmless. Examination of the entire record is productive of the conclusion that no miscarriage of justice has resulted by reason of the rulings. Section 47½, art. 6, Constitution of California.

[5] Appellant's eighth specification of error is that the trial court erred in denying his motion to vacate the judgment and to reopen the case for the purpose of receiving additional evidence and in striking from the files of the action an affidavit of appellant presented in support of the motion. The reason for the court's ruling to which exception is thus taken was that the affidavit was not filed within the time provided by the Code of Civil Procedure for the filing of such a document.

With respect to this specification, the record shows that judgment was entered on December 22, 1930, and notice of entry of the judgment was given on December 27, 1930. On January 3, 1931, appellant filed notice of intention to move for a new trial. On February 20, 1931, appellant gave notice that on February 25, 1931, he would move the court to vacate the judgment and to reopen the cause for the purpose of permitting the introduction of additional evidence which was set forth in an affidavit of appellant attached to the notice and by reference made a part thereof. This notice specified that the motion for vacation of the judgment would be made under and by virtue of the provisions of section 662 of the Code of Civil Procedure and that the basis therefor would be the affidavit of appellant which was attached to the notice. The notice with the attached affidavit was filed on February 20, 1935. On February 25, 1935, the motion for a new trial and the motion for vacation of the judgment were presented to the court and were argued by counsel for the respective parties. Counsel for respondent objected to any consideration being given to appellant's affidavit on the ground that it was not filed within the time permitted by the Code and moved that the affidavit be stricken from the files of the action. The objection was sustained and the court denied both the motion for a new trial and the motion for vacation of the judgment.

As above stated, the notice of motion for vacation of the judgment and for reopening the cause to permit the introduction of additional evidence specified that the motion would be made under the provi-

sions of section 662 of the Code of Civil Procedure. This section provides that in ruling on a motion for a new trial in an action tried without a jury, the court may vacate the judgment and grant a new trial on all or part of the issues, or, in lieu of granting a new trial, may vacate the findings and judgment and reopen the case for further proceedings and the introduction of additional evidence. It is obvious that this section refers solely to a motion for a new trial and that it enlarges to a very appreciable degree the court's power in ruling upon such a motion. If, therefore, the motion for vacation of the judgment and for reopening of the cause be considered as amounting to a motion for a new trial of which appellant had theretofore given notice of intention, the time within which affidavits in support of the motion might be filed is clearly stated in section 659a of the Code of Civil Procedure. This section provides that within 10 days after serving a notice of intention to move for a new trial the moving party shall serve upon all other parties and file any affidavits intended to be used upon such motion. As above mentioned, appellant's notice of intention to move for a new trial was filed on January 3, 1931, and the affidavit was not filed until February 20, 1931. It is therefore apparent that the affidavit was filed too late, and that the trial court would not have been justified in considering it. *W. P. Fuller & Co. v. McClure*, 48 Cal. App. 185, 194, 191 P. 1027; *Terry v. Lesem*, 89 Cal. App. 682, 265 P. 523; *Morris v. Purity Sausage Co.*, 1 Cal. App. (2d) 120, 36 P. (2d) 126.

We do not understand that it is contended that the motion for vacation of the judgment and for reopening the cause for the purpose of introducing additional evidence was presented pursuant to section 663 of the Code of Civil Procedure which, under certain conditions, permits the vacation of a judgment on motion of the aggrieved party. In the first place, the notice of motion stated that the motion would be made in accordance with the provisions of section 662 of the Code of Civil Procedure. In the second place, it is evident that section 663 was not applicable, since the notice specified that the sole purpose of having the judgment vacated and the cause reopened was to procure the introduction of additional evidence, "to wit: the evi-

dence set forth in plaintiff's affidavit referred to herein." It was not urged on the hearing of the motion, nor is it contended on this appeal, that the conclusions of law are inconsistent with the findings or that they lack the support of the findings which would justify a motion for vacation of the judgment under section 663. Finally, even if it could be assumed that the attempt was made to present the motion pursuant to section 663, appellant would be in no better situation than he occupies when the motion is considered as having been made pursuant to section 662. Section 663a of the Code of Civil Procedure requires that a party intending to make the motion mentioned in section 663 shall, within ten days after notice of the entry of judgment, serve upon the adverse party and file with the clerk of the court a notice of his intention. As above indicated, notice of entry of judgment was given on December 27, 1930, and the notice of motion for vacation of the judgment was not filed until February 20, 1931. The notice was therefore filed too late to comply with the mandatory requirements of section 663a and the motion could, in no event, have been considered as a motion presented in accordance with the provisions of section 663 of the Code of Civil Procedure. It is our conclusion, therefore, that the motion for vacation of the judgment was supplementary to the motion for a new trial and that the trial court did not err in sustaining respondent's objection to any consideration being given to appellant's affidavit and in striking the same from the files of the action.

[6,7] The attempted appeal from the order denying a new trial is dismissed since the order is not one from which an appeal is permitted. Section 963, Code Civ. Proc. It is our opinion that the trial court's order denying the motion for vacation of the judgment presented under the provisions of section 662 of the Code of Civil Procedure is likewise not an appealable order.

The attempted appeal from the orders to which reference has heretofore been made is therefore dismissed. The judgment from which the appeal has been perfected is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

10 Cal.App.2d 229

ELMORE v. LASSEN COUNTY et al.

CRANDALL v. SAME.

HAWKINS v. SAME.

Civ. 9868.

District Court of Appeal, First District,
Division 2, California.

Nov. 18, 1935.

1. Automobiles ⇨246(58)

Instruction that if plaintiffs' automobile stopped before entering through highway and defendant's automobile was at distance as to appear not to constitute an immediate hazard, plaintiffs' automobile had right to proceed *held* erroneous where evidence showed that plaintiffs' automobile stopped at stop sign which was eighty-six feet from intersection, from which point view toward defendants' automobile was obstructed (St. 1929, p. 509, § 22½; St. 1931, p. 2126, § 131 (c)).

2. Trial ⇨243

In actions for injuries sustained in automobile collision at intersection with through highway, instruction that first party to intersection has right of way, and if two automobiles approach at same time, automobile to right has right of way *held* error as in conflict with instruction giving correct law as to right of way where intersection is with through highway (St. 1931, p. 2126, § 131 (a, e)).

3. Appeal and error ⇨1064(1)

Where there was evidence that defendants were driving in excess of forty-five miles per hour at time of collision with plaintiffs' automobile, instruction that if jury found that defendants were driving at speed in excess of forty-five miles per hour defendants were violating law *held* prejudicial, since under statute it was not unlawful to drive in excess of forty-five miles per hour under some circumstances (St. 1931, p. 2120, § 113 (a), (b) (7), (d)).

4. Trial ⇨267(3)

In actions for injuries sustained in intersectional automobile collision, defendants' requested instruction that no insurance company was party to or interested in action was properly modified by striking out words "or interested in" before it was given, where there was no evidence that insurance company was or was not interested.

Separate actions by Lillian R. Elmore, Josephine Crandall, and Olive Hawkins against Lassen County and others, which were tried together. From judgments for the plaintiffs, the defendants appeal.

Judgments reversed.

Hamilton Wright, of Oakland, and Grover C. Julian and James A. Pardee, both of Susanville, for appellants.

Leroy R. Goodrich, of Oakland, Rittenhouse & Snyder, of Santa Cruz, and Maurice J. Rankin, of San Jose, for respondents.

STURTEVANT, Justice.

Miss Elmore, with three others, was driving north on Morse avenue and C. C. Jeskey, with J. B. Leavitt the sheriff of Lassen county, was driving east on Bayshore highway and their automobiles collided at the intersection of the two roads which is located a short distance north of San Jose. Miss Elmore and two of the passengers riding with her commenced separate actions. All three actions were tried together. The jury returned verdicts in favor of the plaintiffs, and from the judgments entered thereon the defendants have appealed.

In their complaints the plaintiffs alleged negligence in general terms. On the trial the negligence claimed as against the defendants was excessive speed. The defendants denied the charge of general negligence and pleaded contributory negligence. On the trial they introduced evidence to the effect that when their car approached the intersection, and before the driver saw the plaintiffs, the defendants' car was proceeding not to exceed 43 miles an hour. It was contended by the defendants that when they first saw the plaintiffs' car defendants were 95 feet west from the middle line of Morse avenue and that plaintiffs' car was 40 feet south of the center line of Bayshore highway going 20 to 25 miles per hour. At first defendants attempted to pass to their left and in front of the plaintiffs' car thinking the driver would give way, but on seeing she was not going to do so defendants' car then swerved back, the driver put on his brakes, and entered the intersection traveling 8 miles per hour, but his left front wheel hit the left rear wheel of plaintiffs' car and after the impact came to a standstill within 12 or 18 inches. The plaintiffs' car continued forward, described a half circle to the right, and turned over completely. There was evidence of skid

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

marks on the highway, but defendants throughout contended their car did not make the marks and could not have made them. Therefore there was evidence in the record which would have justified the jury in finding that the defendants had the right of way (section 131, subd. (c) [St. 1923, p. 560, § 131 (c), as amended by St. 1931, p. 2126]); that the plaintiff Miss Elmore was guilty of contributory negligence in failing to allow the defendants to pass in front of her; and that there was no evidence showing a set of circumstances that would render the speed of the defendants at the time and place of the accident unlawful. *Johnson v. Gokey* (Cal. App.) 41 P.(2d) 193; *Pilcher v. Tanner Motor Livery*, 138 Cal. App. 558, 33 P.(2d) 58. Relying upon this state of the record, the defendants attack certain instructions given at the request of the plaintiffs, and they also attack the action of the trial court in modifying an instruction requested by the defendants.

[1] The first attack made by the defendants is made on plaintiffs' instruction 15 which was as follows:

"The California Vehicle Act, section 131 (c) provides as follows: 'The driver of any vehicle who has [1] stopped as required by law at the entrance to a through highway shall yield to other vehicles within the intersection or approaching so closely [2] on the through highway as to constitute an immediate hazard but said driver having so yielded may proceed and other vehicles approaching the intersection [3] on the through highway shall yield to the vehicles so proceeding into or across the through highway.'

"Hence the court instructs you that while it was the duty of the car in which plaintiffs were traveling to stop before entering the through highway on which defendants were driving and to yield to other vehicles upon such through highway within the intersection or approaching so closely as to constitute an immediate hazard, nevertheless if plaintiffs' car did stop before entering upon such intersection, and the car of the defendants was not within such a distance as to appear to a person of ordinary prudence to constitute an immediate hazard, but was at such distance as to indicate to a person of ordinary prudence that it did not constitute an immediate hazard, the car in which the plaintiffs were traveling had the right to proceed and it was the duty under such circumstances for the defendants' car to yield the right of way to the

plaintiffs' car, so proceeding into or crossing the through highway. In other words, if the driver of the car in which plaintiffs were traveling acted as an ordinarily prudent person would have acted under like circumstances, she was not guilty of negligence in attempting to cross the highway." The defendants complain of the last paragraph. Under the facts of this case the attack is not without merit. On the east side of Morse avenue, 86 feet south of the southerly boundary line of Bayshore highway, is a stop sign. Miss Elmore testified she stopped at the sign, but then she drove forward without stopping again. The statute provides for the placing of stop signs as warnings. It does not command drivers to stop within any certain distance of such signs. However, its provisions are mandatory that such drivers stop "before entering" a through highway. Section 22½ (St. 1923, p. 517, § 22½, as added by St. 1929, p. 509). The exact spot to stop is made clear by the provisions of another portion of the statute (section 131, subd. (c) which clearly implies that it will be at a point where the driver has a view of the vehicles within the intersection or approaching so closely from the left as to constitute an immediate hazard. The stop sign was near, but it was not at the entrance of the intersection. Furthermore, there was evidence that from the stop sign one's view of the highway to the left was so obstructed that only a very small portion of it could be seen and one could not ascertain if a vehicle was approaching so closely from the left as to constitute an immediate hazard. The last paragraph was an inaccurate application of the law to the facts.

[2] Acting upon the request of the plaintiffs, the trial court gave their instruction No. 16, which was as follows:

"The California Vehicle Act, in effect at the time of this accident, provided as follows: 'The driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection. When two vehicles enter an intersection at the same time the driver of the vehicle on the left shall yield to the driver on the right.'" It will be noted that the instruction is a copy of subdivision (a) of section 131 of the statute. It will be noted also subdivision (a) is addressed to intersections in general. Subdivision (c) of the same section on the other hand is addressed to intersections with a through highway. Such an intersection was the one involved in this case.

The latter subdivision was covered by instruction No. 21 given at the request of the defendants. The latter instruction was properly given, but plaintiffs' instruction No. 16 should not have been given, as it was not addressed to any facts in the case. The defendants complain to the effect that the two instructions were conflicting. The plaintiffs reply all of the instructions should be read together and when so read both instructions can be given full force and effect. This reply of the plaintiffs is insufficient in the instant case, the gravamen of which was, which car at the particular intersection had the right of way. It is clear the instructions were conflicting and it is impossible to know which one the jury followed.

[3] Acting upon the request of the plaintiffs, the trial court gave their requested instruction No. 10. It was as follows:

"The California Vehicle Act [St. 1923, p. 553, § 113 (a), amended by St. 1931, p. 2120] in effect at the time of this accident provided as follows: 'Any person driving a vehicle on the public highways of this state shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway, and no person shall drive any vehicle upon a public highway at such a speed as to endanger the life, limb or property of any person.'

"The California Vehicle Act then provides that 45 miles per hour is the maximum speed permitted by law. Hence, if you find in these cases that the defendants were driving in excess of 45 miles per hour at the time in question, the defendants were violating the law." By chapter 1026, Statutes 1931 (page 2120), section 113 was amended to read as follows: "Sec. 113. * * * (b) Subject to the provi-

sions of subdivision (a) of this section and except in those instances where a lower speed is specified in this act, it shall be lawful for the driver of a vehicle to drive the same at a speed not exceeding the following: * * * 7. Forty-five miles an hour under all other conditions. * * * (d) In any civil action the driver of a vehicle who has operated such vehicle at a speed in excess of the miles per hour set forth in subdivision (b) applicable at the time and place shall not be deemed to have been negligent by reason thereof as a matter of law but in all such actions the burden shall be upon the opposing party to establish that the operation of such vehicle at such speed constituted negligence." Under the clear wording of said statute, it was not unlawful, under some circumstances, at the time and place of the accident involved in this action to drive in excess of 45 miles per hour. *Newman v. Solt* (Cal. App.) 47 P.(2d) 289, and cases there cited. In the instant case there was considerable evidence indicating that the defendants were driving at a speed in excess of 45 miles per hour. It is patent that the instruction was highly prejudicial to the defendants.

[4] The defendants asked an instruction as follows: "The court instructs the jury that no insurance company is a party to or interested in these actions or any of them." The trial court struck out the words "or interested in" and as so modified gave the instruction. Its action was clearly correct. There was no evidence that any insurance company was or was not interested.

For the errors indicated above, the judgments are reversed.

We concur: NOURSE, P. J.; SPENCE, J.

4 Cal.2d 596

RYAN v. BYRAM, County Tax Collector.

L. A. 15560.

Supreme Court of California.

Nov. 18, 1935.

Rehearing Denied Dec. 17, 1935.

1. Counties ☞191

County board of supervisors must adopt budget as condition precedent to valid tax levy (Pol.Code, § 3714).

2. Counties ☞191

Tax levy based on items not included within previously approved and adopted budget is invalid to extent that it includes items not part of budget (Pol.Code, § 3714).

3. Statutes ☞227

Only those provisions of tax statute enacted for benefit of taxpayer are mandatory,

while provisions enacted to secure orderly conduct of business are merely directory.

4. Statutes ⇨46

Statute providing that no assessment or act relating to "assessment" or collection of taxes is illegal on account of informality is applicable, not only to informalities in process of ascertaining value of property for tax purposes, and in collection of taxes, but also to informalities in levying tax and proceedings incidental thereto, since word "assessment," as used second time, includes entire statutory method of imposing taxes, including the levy of taxes (Pol.Code, § 3885).

[Ed. Note.—For other definitions of "Assessment," see Words & Phrases.]

5. Counties ⇨191

Statutory provisions for preparing preliminary budget, for printing and publication, for giving of notice and holding of hearings, and for adoption of budget before tax rate is fixed, are mandatory, since for taxpayer's benefit (Pol.Code, § 3714).

6. Counties ⇨191

Where county board of supervisors within time for adoption of budget had agreed on inclusion of all disputed items, although in some cases exact amount had not been computed, but merely depended on mathematical calculations by auditor, and all that board failed to do as required by statute was to have formal resolution approving budget properly express its previously expressed intention, board had power after expiration of time for adopting budget to correct mistake (Pol.Code, §§ 3714, 3885).

7. Counties ⇨191

Action of board of county supervisors in fixing reserves by first determining tax rate, applying rate to assessed valuation, deducting from amount so raised departmental appropriations and dividing balance between various reserve funds held not unlawful (Pol. Code, § 3714).

In Bank.

Proceeding in mandate by Alice Clark Ryan against H. L. Byram, as Tax Collector of the County of Los Angeles, State of California.

Petition for peremptory writ of mandate denied.

Holbrook, Taylor, Tarr & Reed, David E. Hinckle, W. Sumner Holbrook, Jr., and John Harlan Dawson, all of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and J. H. O'Connor, Asst. Co. Counsel, both of Los Angeles, for respondent.

PER CURIAM.

This is a proceeding in mandate to compel respondent as tax collector, to issue receipted tax bills to petitioner upon payment to respondent of a sum less than the amount claimed by respondent to be due for taxes for the tax year 1935-1936. It is the theory of petitioner that certain portions of the tax levied by the board of supervisors for Los Angeles county and for the Los Angeles county flood control district for 1935-1936 are invalid. Petitioner contends that the county levy is based on an allowance of over \$6,000,000 for unappropriated and general reserves, and a fund for estimated delinquencies for which an appropriation was never validly made, and that the flood control district levy is based on an allowance of over \$2,000,000 for unappropriated and general reserves, for which an appropriation was never validly made. The board levied a tax for county purposes of \$1.19 per hundred dollars of assessed valuation, and for flood control district purposes of \$0.19 per hundred. It is stipulated that if the above items should be deleted, the rate would be \$0.98 and \$0.08, respectively.

For a proper understanding of the points made, it is necessary to review in detail the facts leading to the two levies. On or about July 30, 1935, the board of supervisors of Los Angeles county adopted a preliminary budget. In this preliminary budget it was proposed that there be allowed for county purposes \$700,000 for unappropriated reserves and \$5,619,000 for general reserves, the last item to be divided between various designated funds. The preliminary budget also proposed an allowance of \$250,000 for unappropriated reserves and \$1,652,680.90 for general reserves for the flood control district.

Pursuant to Political Code, § 3714, notice of the adoption of the preliminary budget was properly published and notice properly given that hearings would be held by the board, beginning August 15, 1935, at which time taxpayers would be permitted to express their views for or against the inclusion of budget items. Hearings were thereupon held over a period of several weeks. During these hearings, unappropriated and general reserves were fully discussed, as well as an allowance for anticipated delinquencies, and some items in reference thereto definitely passed upon by resolution. On August 31, 1935, at 12:45 a. m., the board passed a resolution purporting to adopt the budget as finally approved. This

resolution, due to exigencies of time, omitted any itemization of departmental appropriations and was incomplete in other important respects. The resolution, after setting forth certain purely formal matters, recited that: "Now, Therefore, Be It Resolved that the Board of Supervisors, having concluded said hearing, does hereby adopt the said budget and does hereby finally determine and fix each and all of the items of said completed budget as therein set forth, and it is ordered that a copy of said complete budget be filed in their office; said budget being in words and figures following, to-wit:"

There followed, in the resolution, a general summary of the departmental appropriations, which summary had the following totals:

General county funds	\$36,675,579.57
Special county funds.....	8,323,318.32
Special district funds.....	7,580,061.92

Grand total.....\$52,578,959.81

Under the special district funds the appropriation for the flood control district was listed as \$4,613,539.84.

It will be noted that this summary fails to list any appropriation for unappropriated or general reserves for either the county or the flood control district, and is also silent as to any appropriation for the county for anticipated tax delinquencies.

On the evening of August 31, 1935, the board passed the 1935-36 tax levy resolution. So far as pertinent here, the resolution set forth a rate of \$1.19 per \$100 of assessed valuation for county purposes and \$0.19 per \$100 for flood control district purposes. These levies were based upon computations made by the auditor as disclosed by his extension sheet. As therein indicated, the auditor had taken the totals of the departmental appropriations, as shown in the above-mentioned summary, and had added thereto certain sums for reserves for the county and for the district and, in the case of the county, had added 10 per cent. for estimated delinquencies in tax collections. These sums were arrived at by adding to the departmental appropriations for the above-mentioned purposes an amount in excess thereof that would be raised by the above-mentioned rates, which rates had been previously agreed to by the board. In the case of the county, this added sum was \$6,613,151.97 and, in the case of the flood control district, this added sum was \$2,198,259.24.

On September 4, 1935, the deputy county counsel presented and explained to the board another budget resolution and suggested that it readopt and ratify the budget. It was explained to the board that the resolution passed on the morning of August 31st was not complete. This resolution was passed. It contained a complete itemized budget and included appropriations for reserves and anticipated delinquencies in tax collections in exact accord with the amounts set forth in the auditor's extension sheet. The itemization of the various appropriations required over 50 pages.

It is petitioner's contention that, under section 3714 of the Political Code, the adoption of a budget is a condition precedent to the adoption of a tax levy; that the resolution of the morning of August 31st fixed the budget as therein provided; that the tax levy, in so far as it will raise amounts in excess of the amounts therein provided, is invalid; that the resolution of September 4th was totally ineffective to add to the budget items not contained in the resolution of August 31st. It is stipulated that, if petitioner is correct, the tax rate for the county should have been \$0.98 per hundred dollars of assessed valuation in place of the \$1.19 rate as fixed and, for the flood control district \$0.08 in place of the \$0.19 rate.

Section 3714 of the Political Code provides a complete statutory method for the adoption of a budget and for the levying of county and special district taxes. So far as pertinent here, it provides that before July 10th of each year each county official or department shall file with the auditor an itemized estimate of receipts and expenditures for the fiscal year; that from such estimates the county auditor shall prepare a tabulation showing the proposed complete expenditure program of the county and special districts for the fiscal year; that such tabulation shall be submitted by the auditor to the board of supervisors on or before July 30th of each year; that the board shall thereupon consider such tabulation in detail and shall, on or before August 10th, revise, reduce, or add to any of the items, if it be so advised; that the board may, if it deem it advisable, set a portion of each fund aside for unappropriated reserves which shall not exceed 10 per cent. of the total amount of such fund; that said budget "shall contain an amount or amounts to be known as a general reserve or 'general reserves' * * * in such sum or sums as the county board of

supervisors shall deem sufficient"; that those tabulations by the board shall constitute the "preliminary county budget for the fiscal year"; that on or before August 10th the preliminary budget shall be printed and copies made available to any taxpayer that desires the same; that notice of the preparation of the preliminary budget shall be published in a paper of general circulation at least once, which notice shall recite the date at which the board will conduct hearings for fixing the final budget; that on or before August 20th the board shall meet as stated in the notice, at which time any taxpayer may appear and be heard for or against any part of the budget; that such hearing may be continued from day to day for not to exceed 10 days. Up to this point, the board strictly complied with every provision of the section, and hearings were held as therein provided. The section then provides:

"Upon the conclusion of such hearing but not later than the thirtieth day of August of each year at such time as the county board of supervisors may direct, said board shall by resolution, adopt the budget as so finally determined, * * * and shall file in their offices a copy of the completed budget. The several amounts specified in the resolution as finally enacted, shall be and become appropriated for the several offices, departments, services, institutions or districts, for the fiscal year to which the budget is intended to apply. * * *

"The county board of supervisors shall, not later than the first day of September, fix the rates of county and district taxes designating the number of cents levied for each fund upon each one hundred dollars of assessed value of the county for the current fiscal year to raise the amount of the estimated expenditures as finally determined, * * * and the tax for county and local purposes shall not exceed the amount specified in the budget, after allowing for delinquency as provided in law."

The petition herein alleges that when the above provisions are applied to the facts involved herein, the following conclusions are necessary:

(1) Jurisdiction of the board over the budget ceased with the adoption of the budget resolution of August 31st; that

(2) The September 4th resolution was contrary to the notice of hearing given on August 3d; that

(3) The September 4th resolution was contrary to the provisions of section 3714,

in that it was adopted later than August 30th and was adopted subsequent to the adoption of the tax levy and not prior thereto; that

(4) The September 4th resolution enlarged the proposed budget for 1935-36 by over \$7,000,000, without notice to the taxpayers.

Fundamentally, it is petitioner's contention, as already stated, that, under section 3714, supra, the adoption of a budget is essential to a valid tax levy; that the resolution of August 31st limited the budget to the amounts therein specified; that the tax levy of August 31st is invalid in so far as it will raise funds in excess of those set forth in the budget resolution; and that the resolution of September 4th was totally ineffective for any purpose.

[1-3] We agree with petitioner that, under the provisions of section 3714, supra, the board must adopt a budget as a condition precedent to a valid tax levy. We further agree with petitioner that a levy based on items not included within a previously approved and adopted budget is invalid to the extent that it includes items not part of the budget. *Hellman v. City of Los Angeles*, 147 Cal. 653, 82 P. 313; *Vernon Parish Lumber Co. v. Word*, 146 La. 1068, 84 So. 358; *Engstad v. Dinnie*, 8 N. D. 1, 76 N.W. 292; *People v. Day*, 277 Ill. 543, 115 N.E. 732. However, we think that the record in this case fairly indicates that prior to August 31st the board had agreed upon the inclusion of all the disputed items, although in some cases the exact amounts had not been computed, and that the resolution of August 31st was incomplete and did not properly reflect the board's intention. We are further of the opinion that the resolution of September 4th was intended to correct the resolution of August 31st and to make it speak the board's true intentions, as indicated by its prior actions. The board, in our opinion, had the power to correct its former resolution in this manner. Petitioner relies upon the well-settled rule that all proceedings in the assessment of property for taxation and all proceedings in the levying and collection of taxes are in invitum, and are to be strictly construed in favor of the taxpayer. Petitioner further contends that under this rule all of the time limit provisions in section 3714 are mandatory, and that, after the time therein fixed has elapsed, the board is without jurisdiction to further proceed. Under this theory, the resolution of September 4th would be, as petitioner claims,

a nullity. We are not in entire accord with petitioner. It is a well-settled rule of construction, applicable to tax statutes, that only those provisions enacted for the benefit of the taxpayer are mandatory, while provisions enacted to secure the orderly conduct of business are merely directory. Cooley, in his well-known work on Taxation (4th Ed.) § 510, states the rule, amply supported by authorities, as follows: "All the provisions of a statute not on their face merely permissive or discretionary are intended to be obeyed, or they would not be enacted at all; and therefore they come to the several officers who are to act upon them, as commands. But the negligence of officers, their mistakes of fact or of law, and many other causes, will sometimes prevent a strict obedience, and when the provisions which have been disregarded constitute parts of an important and perhaps complicated system, it becomes of the highest importance to ascertain the effect the failure to obey them shall have on the other proceedings with which they are associated in the law. The form the question most commonly assumes is this: Some official act which the law provides for, and which constitutes one step to be followed by others in reaching a specified result, having failed to be taken, does the authority to proceed toward the intended result terminate when that particular step has been neglected, or may the proceeding go on to a conclusion, treating the neglect as immaterial? If the proceeding fails at that point, the requirement of the official act which has been neglected is said to be mandatory, but if it may still proceed, the requirement is directory only; that is to say, the law directs that particular act to be performed, but does not imperatively command it as a condition precedent to anything further."

Cooley then points out that, of course, the phraseology of the statute involved may settle the question, gives some examples, and then continues:

"It is not often, however, that these or similar words are met with in the statutes which define official duties under the revenue laws, and the construction of particular provisions must be left for determination in such light as the obvious purpose they were intended to accomplish may afford. And that purpose, it would seem, ought generally to be conclusive. No one should be at liberty to plant himself upon the nonfeasances or misfeasances of officers, under the revenue laws, which in no way concern himself, and make them the

excuse for a failure on his part to perform his own duty. On the other hand, he ought always to be at liberty to insist that directions which the law has given to its officers for his benefit shall be observed. Many eminent judges have endeavored to lay down a general rule on this subject, by which the difficulties in tax cases may in general be solved. In one of the cases in which this has been attempted the general doctrine is stated as follows: 'There are undoubtedly many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power, or render its exercise in disregard of the requisitions ineffectual. Such generally are regulations designated to secure order, system, and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory, unless accompanied by negative words, importing that the act required shall not be done in any other manner or time than that designated. But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory. They must be followed, or the acts done will be invalid. The power of the officer in all such cases is limited by the measure and conditions prescribed for its exercise.' (French v. Edwards, 80 U.S. [13 Wall.] 506, 511 [20 L.Ed. 702]).

"The same rule in nearly the same terms has been laid down in other cases, and it seems a sound and just rule, and may reasonably be believed to be in accord with the legislative will in the cases to which it is applicable. All legislation must be supposed to take into account the possible, if not probable, mistakes and irregularities of officers in executing the provisions of the law, and it is hardly reasonable to infer an intent, on the part of a legislative body, that a failure of administrative officers to comply with any provision made for the benefit of the state exclusively, or merely as a guide in orderly proceedings, should deprive the state of all benefit to be derived from a compliance with other provisions that embody the main purpose and object of the law."

See, also, *Tallon v. Vindicator, etc., Co.*, 59 Colo. 316, 149 P. 108; *Beirl v. Columbia County*, 73 Or. 107, 144 P. 457. This rule

of construction has been substantially codified in this state by section 3885 of the Political Code, which provides: "No assessment or act relating to assessment or collection of taxes is illegal on account of informality, nor because the same was not completed within the time required by law."

Petitioner contends that the above section applies only to the assessment of property and the collection of taxes, and does not apply to informalities in the levying of a tax. In support of this contention, petitioner relies on certain dicta found in the case of *People v. Central Pacific R. Co.*, 83 Cal. 393, 23 P. 303. At page 400 of 83 Cal., 23 P. 303, 306, the following statement in reference to section 3885, supra, is found: "It will be observed, also, that the section quoted refers to informality in the matters of assessment and collection only. The statute nowhere waives informality in the matter of levy of the tax."

The above-quoted language certainly supports petitioner's contention, but, in our opinion, such language was not necessary to the opinion, was merely dicta, and incorrectly interprets the section. The case in which the language is found was an action by the state to recover taxes alleged to be due the state and to various counties. There was no allegation in the complaint that a tax had ever been levied by the state. In upholding the action of the trial court in sustaining a demurrer to the complaint, and in holding that section 3885 could not cure the total absence of a levy, the court stated: "That an assessment shall not be invalid because of some informality does not excuse the total want of assessment. There can be no assessment unless there is some property assessed; and, to be assessed, there must be some attempt at description of the property. At least, its general character must be shown, and its situs must be shown to be within the state or the county where assessed. It will be observed, also, that the section quoted refers to informality in the matters of assessment and collection only. The statute nowhere waives informality in the matter of levy of the tax. There is no tax until one is levied, and a complaint shows no indebtedness for taxes unless it shows the levy of a tax. In this complaint there is no intimation that a tax either state or county, was ever levied."

[4] It is obvious that the sole question involved in that case was the effect of the failure to allege that any levy had ever been made. No question of informality in a levy

was involved. Whatever was said on that point was clearly dicta. We think that section 3885, supra, is applicable, not only to informalities in the process of ascertaining the value of property for tax purposes, and in the collection of taxes, but is also applicable to informalities in the levying of the tax and proceedings incidental thereto. The word "assessment" is used twice in the section. As used the second time, it is our opinion that the term is broadly used so as to include the entire statutory method of imposing taxes, including the levy of taxes. In 5 Corpus Juris, page 816, et seq., it is pointed out that the term "assessment" can have various meanings. It is then stated, the text being amply supported by authority, that: "As the word is more commonly employed, an assessment consists of the two processes of listing the persons, property, etc., to be taxed, and of estimating the sums which are to be the guide in an apportionment of the tax between them; the designation of the person or things which shall be the subject of taxation and the apportionment of taxation among such persons or things in the ratio prescribed by law; the procedure on the part of the officials by which property is listed, valued, and finally the pro rata declared; not merely the valuation of the property for taxation, but the whole statutory mode of imposing the tax, embracing all the proceedings for raising money by the exercise of the power of taxation from their inception to their conclusion."

We think this second broad meaning should be accorded the term as used in section 3885.

[5, 6] Applying the rules of construction to section 3714, supra, we are of the opinion that the provisions for preparing a preliminary budget; for its printing and publication; for the giving of notice and the holding of hearings; and for the adoption of a budget before the tax rate is fixed are all for the benefit of the taxpayer, are mandatory, and that, if any of these steps had been omitted, the tax levy would be invalid. But here the preliminary budget was prepared, it was printed and published, notice was given, and hearings held. As will later appear, the board, prior to August 31st, had determined to include in the budget the appropriations for the items here in dispute. All that the board failed to do, as required by section 3714, was to have the formal resolution approving the budget properly express its previously expressed intention. This it attempted to do by the

corrective resolution of September 4th. We think that the time limit provisions of section 3714 do not require us to hold that the board had no power to thus correct its mistake of August 31st.

As already stated, prior to August 31st, the board had discussed the items here in dispute, and had agreed that appropriations therefor should be included in the budget. As to several of the items, the exact amount had been determined and agreed upon, while, as to the others, the exact amount was uncertain, depending upon mathematical calculations by the auditor. The proceedings of the board, so far as pertinent here, are set forth in exhibits to the petition. It therein appears that on July 30, 1935, the board adopted a preliminary budget, complete in all details and containing allowances for the items here in dispute. In that budget, it was proposed that an unappropriated reserve fund for the county of \$700,000 be provided. It was also proposed to provide a general reserve for the county of \$5,619,000, divided between reserves for the general fund, the salary fund, and three designated interest and sinking funds. The preliminary budget also provided for a fund of \$250,000 for unappropriated reserves for the flood control district and a general reserve of \$1,652,680.98.

During the course of the hearings on the budget, it developed that many departments had included within their rights proposed expenditures for automotive equipment. After considerable discussion, by formal resolution, it was determined to strike from each department's budget all allowances for automobiles, to aggregate the sums so stricken, and to add this sum to the unappropriated reserves, which had been fixed in the preliminary budget at \$700,000. It was later determined that the sum to be added to the unappropriated reserves for this purpose was \$80,000.

[7] The record shows that the board held numerous hearings and arrived at the various departmental appropriations. The board then held an extended hearing on the question of reserves. A reading of the record indicates that the five members of the board were of the opinion that before fixing the appropriations for these purposes, they should first determine the tax rate, apply that rate to the assessed valuation, deduct from the amount so raised the departmental appropriations, and divide the balance between the various reserve funds. This method of fixing the reserves may not, from an accounting standpoint, be sound,

but there is no principle of law which prevents this method being employed. From the record, it appears that the chairman of the board wanted a rate of \$1.18; Supervisor Jessup wanted a rate of \$1.20; Supervisor McDonough thought the reserves could be cut to fit a \$1.18 rate; Supervisor Quinn believed that safety required a \$1.26 rate; while Supervisor Ford was of the opinion that the rate should be between \$1.18 and \$1.20. Although no formal resolution was passed on the subject, it is quite clear from the record that a majority of the board, after considerable discussion, agreed upon a \$1.19 rate. Towards the close of the discussion, a formal resolution was passed fixing a portion of the general reserves at \$2,175,000, divided between the salary fund and the general fund.

As to the 10 per cent. allowance for anticipated tax delinquencies, it is stipulated that in 1932-1933, the delinquencies amounted to 12.70 per cent.; in 1933-1934, to 11.55 per cent.; in 1934-1935, to 9.97 per cent. These facts were explained to the board. The preliminary budget contained no allowance for this item. The auditor explained to the board at length that this was because in fixing the allowance for reserves in the preliminary budget, he had made them large enough to absorb these anticipated delinquencies. When the board determined to pare the reserves, it was obvious that some allowance for this item would have to be made. Although the record is not as clear as might be desired on this point, it fairly appears that prior to August 31st the board determined to make a 10 per cent. allowance for this item.

There is no ambiguity at all as to the allowance of reserves for the flood control district. While its appropriation was under discussion, the flood control engineer was ordered by the board to pare his budget so as to bring the expenditures within the amount that could be raised by a \$0.19 rate. Pursuant to this order, an amended budget was filed showing expenditures to fit the \$0.19 rate. The amended budget so filed was by formal resolution approved.

It thus appears that as to the flood control district, the board formally approved, before August 31st, a budget containing expenditures requiring a \$0.19 rate. As to the county, it appears that prior to August 31st, the board knew and had determined that some allowances for reserves and anticipated delinquencies had to be made. The amount for each item had not been definitely fixed, except that they should not

exceed the amount, after deducting departmental appropriations, that would be raised by a \$1.19 tax rate. The exact allowances depended upon mathematical calculations and division between the various funds. Under such circumstances, the resolution of August 31st, approving the budget, was drawn up. When the board met on the evening of August 30th (the last day to approve the budget, under section 3714), no formal resolution approving the budget had been prepared. At 12:10 a. m., after an evening of strenuous discussion, the board recessed to have the resolution drafted. At 12:45 a. m., the hastily drawn, incomplete, and skeleton resolution was submitted to the board and passed. This skeleton resolution, aside from its purely formal recitations, contained a mere summary of the departmental appropriations, was clearly incomplete, and did not reflect the true intent of the board, as shown by its prior determinations. The board then adjourned. In the meantime, the auditor had made the necessary calculations. The county tax rate was then fixed at \$1.19 and the flood control district rate at \$0.19, as previously agreed. The auditor's extension sheet, submitted to the board, set forth in detail the amounts, allocated to the items here in dispute. On September 4th, the board met again. A deputy county counsel explained to the board that the resolution of August 31st was not complete. It was recommended to the board that it should "re-adopt" and "ratify" the resolution of August 31st "as now complete * * * the itemizations having since been inserted." This recommendation was followed. It is quite clear from the record that the resolution of September 4th was intended by the board to cure the omissions in the resolution of August 31st. The resolution of September 4th was not an attempt to redetermine the items to be inserted in the budget, nor was it an attempt to insert new items not provided for prior to August 31st, a power it did not possess. It is our opinion that the resolution of September 4th was simply a resolution designed to supply the matters omitted, because of exigencies of time, from the resolution of August 31st. It was simply an attempt to make the record speak the truth. The cases are clear that, under such circumstances, the board had the power, and it was its duty, to correct the resolution so as to make the record accord with the previous determination of the board. *Golden State Milk Products Co. v. Southern Sierras Power Co.*, 117 Cal.App. 121, 3 P.

(2d) 352; *People ex rel. Hawkins v. Wabash R. Co.*, 314 Ill. 513, 145 N.E. 733; *First National Bank v. Isaacs*, 161 Ind. 278, 68 N.E. 288; *Kershaw v. City of Willamina*, 119 Or. 543, 250 P. 235; *Webb v. Strobach*, 143 Mo.App. 459, 127 S.W. 680.

For the foregoing reasons, we find that the two levies of August 31, 1935, here challenged, are valid, and that the petition for the peremptory writ of mandate should be denied.

It is so ordered.



4 Cal.2d 619

TOWNSEND v. STATE BAR OF CALIFORNIA.

L. A. 15344.

Supreme Court of California.

Nov. 26, 1935.

Attorney and client ⇐58

Evidence held to require suspension of attorney for six months on ground that, within three years after one year's suspension from practice of law, attorney with intent to deceive had made statement in sworn declaration of candidacy for election to superior court that for past three years he had been engaged in active practice of law (Code Civ.Proc. § 287; St. 1929, p. 496, § 5; St. 1933, p. 358, § 5).

In Bank.

Application by Corwin A. Townsend to review an order of the Board of Governors of the State Bar of California, recommending suspension of petitioner from practice of law.

Findings and recommendation of the Board of Governors approved, and petitioner suspended.

Corwin A. Townsend, of Los Angeles, in pro. per.

Philbrick McCoy, of Los Angeles, for respondent State Bar of California.

WASTE, Chief Justice.

The respondent State Bar of California has recommended to this court that petitioner be suspended from the practice of the law for a period of six months because of his alleged violation of the provisions of section 287 of the Code of Civil Procedure.

It appears that petitioner was admitted to practice in all the courts of this state on May 23, 1921. On September 30, 1930, he was suspended from the practice for a period of one year for a violation of subdivision 4 of section 287, supra, in that, being an attorney at law, he loaned his name to be used as attorney and counselor by other persons who were not licensed attorneys. *Townsend v. State Bar*, 210 Cal. 362, 291 P. 837. The suspension terminated September 30, 1931. In 1932, the petitioner was a candidate for election to the superior court in and for the county of Los Angeles. In conformity with section 5 of the Direct Primary Law (Stats. 1913, p. 1379, and amendments thereto [as amended by St. 1929, p. 496 and St. 1933, p. 358]), petitioner on June 14, 1932, within a year of the termination of his suspension, filed his sworn declaration of candidacy wherein, as required, he described his "occupation for the past three years" as follows: "Practice of Law. I was admitted to practice as an attorney and counselor in all the courts of California, at a session of the District Court of Appeal, on the 23d day of May, 1921, and have ever since been in active practice thereunder and thereby." Petitioner was not elected. Two years later he again announced his candidacy for the same office. In support thereof he filed his sworn declaration of candidacy on June 22, 1934, within three years of the termination of his suspension from the practice. This latter declaration is identical with the former one in its description of petitioner's "occupation for the past three years."

These sworn statements wherein petitioner described his occupation for the preceding three years as that of an attorney engaged in active practice of the law, when, in fact, he had been under suspension for a portion of the time, constitute the basis upon which this disciplinary proceeding is founded.

At the hearing before the local administrative committee the petitioner, in effect, conceded that the statements were "rash and inconsiderate" and the product of slight consideration. He contended, however, that throughout the period of his suspension he had appeared in court upon numerous occasions in propria persona. He urged that in making the above-quoted statement in each of his declarations of candidacy he "didn't intend to state and I didn't state I was practicing as an attorney. I meant I was practicing with such ability as I had. I

was functioning before the courts.
* * *

At the conclusion of the hearing the committee found, among other things, that the statements were false and that petitioner should have known of their falsity; that it was not the intention of petitioner to deceive the registrar of voters or persons entitled to inspect and rely upon the statements; that petitioner sincerely claimed it was his honest opinion in making oath to the statements that he was not making statements which he considered to be untrue; that he sincerely contended that the words "active practice" were intended to refer to his experience in the law, and that he considered the year of his suspension in which he practiced law in his own proper person had contributed to his experience as an active lawyer; that while these claims of petitioner have little merit, they were advanced in good faith; and that the petitioner did not intentionally perjure himself in subscribing to the declarations of candidacy. However, in view of the finding that the statements were false and that petitioner should have known of their falsity, the committee recommended that petitioner be given a private reprimand.

The Board of Governors rejected these findings, and found that the statements as to petitioner's occupation were false and "made with intent to deceive" the registrar of voters and all persons entitled to rely thereon. The board thereupon recommended to this court that petitioner be suspended from the practice for six months.

We are not impressed with petitioner's attempt to explain away the falsity of his statement upon the ground that it was "rash and inconsiderate" and the product of slight consideration. The fact that the statement was repeated, under oath, after an interval of approximately two years, militates against such a defense. Under the circumstances, the finding of the board that the false statement was "made with intent to deceive" the registrar of voters and all persons entitled to rely thereon is reasonably warranted by the record.

In accordance with the recommendation of the board, petitioner is hereby suspended from the practice of the law in all the courts of this state for a period of six months, effective 30 days from and after the filing of this opinion.

We concur: THOMPSON, J.; SHENK, J.; SEAWELL, J.; CONREY, J.; CURTIS, J.; LANGDON, J.

10 Cal.App.2d 287

PEOPLE v. GRIDER.
Cr. 321.

District Court of Appeal, Fourth District,
California.

Nov. 20, 1935.

1. Criminal law ⇨1159(3)

That there was evidence which would support a judgment contrary to one rendered *held* unavailing on appeal where evidence was conflicting and there was competent evidence supporting judgment rendered.

2. Criminal law ⇨260(11)

Reasonable deduction of criminal intent made from proven facts by trial judge sitting without a jury could not be disturbed, since intent was primarily addressed to trier of facts and might be established by circumstantial evidence and be deduced from circumstances of the crime (Pen.Code, § 288).

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Lee Grider was convicted of violation of provision of Penal Code relating to crimes against children, and he appeals.

Affirmed.

N. D. Meyer, of Santa Ana, for appellant.

U. S. Webb, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for the People.

MARKS, Justice.

Defendant was charged with the violation of section 288 of the Penal Code upon the person of a girl of the age of eight years. He entered the pleas of not guilty, and not guilty by reason of insanity. In trials before the court sitting without a jury he was found guilty, and sane, and judgment was pronounced upon him. The case is here on an appeal from that judgment.

As the sole ground for reversal, defendant urges that the evidence is insufficient to support the judgment. We can discover no good reason for detailing the evidence here.

[1,2] While the evidence is conflicting, and defendant denied any wrongful intent, we find ample evidence in the record to support the judgment. Because there is evidence which would support a judgment contrary to the one rendered, it cannot

avail the defendant where evidence is conflicting and there is competent and material evidence supporting the judgment rendered. *People v. Lizarraga*, 108 Cal.App. 152, 291 P. 434. The question of the intent of defendant in committing a criminal act is primarily addressed to the trial judge if sitting without a jury. The intent, like any other contested fact, may be established by circumstantial evidence and may be deduced from the circumstances of the crime. In this case the trial judge made the reasonable deduction of criminal intent from the proven facts. This deduction having been made by the trier of fact, we cannot disturb it on appeal.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.



10 Cal.App.2d 256

PEOPLE v. HOLLAND et al.
Cr. 2763.

District Court of Appeal, Second District,
Division 2, California.

Nov. 19, 1935.

Hearing Denied by Supreme Court
Dec. 19, 1935.

1. Criminal law ⇨1144(13)

On defendant's appeal, evidence must be viewed most favorably to the prosecution.

2. Conspiracy ⇨48

Verdict in prosecution for criminal conspiracy to commit robbery *held* not void for failure to specify degree of robbery which defendants conspired to commit.

3. Criminal law ⇨641(2)

Where defendants' counsel voluntarily absented himself from trial, proceeding with trial in absence of such counsel *held* not error.

4. Indictment and information ⇨161(6)

Permitting information charging criminal conspiracy to commit robbery to be amended so as to include the name of another person *held* not error, where no substantial rights of defendants were prejudiced (Pen. Code, § 1008).

Appeal from Superior Court, Los Angeles County; Walter Desmond, Judge.

John S. Holland and others were convicted of criminal conspiracy to commit robbery, and first-named defendant appeals.

Affirmed.

William E. Dudney, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John O. Palstine, Deputy Atty. Gen., for the People.

McCOMB, Justice pro tem.

Appellant was convicted after trial by jury of criminal conspiracy to commit robbery. This appeal is from the judgment and from the order denying a motion for new trial.

[1] Viewing the evidence most favorably to the prosecution (*People v. Dukes*, 90 Cal. App. 657, 659, 266 P. 558), the facts in the instant case are:

Appellant and his codefendant entered into a conspiracy to rob J. L. Freedman. These facts were established by the testimony of Fred Gonzales.

Reversal of the judgment is urged on the following propositions:

First. The witness Fred Gonzales was a coconspirator, and independent of his testimony there was no evidence to prove the corpus delicti.

Second. The verdict of the jury is void for the reason that it failed to specify the degree of robbery the defendants conspired to commit.

Third. The trial court erred in proceeding in the absence of defendant's counsel.

Fourth. The trial court committed prejudicial error in permitting the information to be amended to include the name of Frank M. Allen.

As to appellant's first contention, we have examined the record and find that the witness Fred Gonzales was not in fact a coconspirator and his testimony was sufficient to establish the material elements of the offense charged.

[2] Appellant's second proposition is decided adversely to his contention in the case of *People v. Clement*, 97 Cal. App. 238, 241, 275 P. 511, wherein it is held that there is no requirement that the jury fix any degree either of robbery or of conspiracy in returning a verdict of guilty

of the charge of conspiracy to commit robbery.

[3] The third proposition presented by appellant is untenable for the reason that examination of the record fails to disclose that any prejudice resulted to appellant because his counsel voluntarily absented himself from the trial.

[4] As to appellant's final contention, the trial court may permit the amendment of an information at any stage of the proceedings, where, as in the instant case, the substantial rights of the defendant are not thereby prejudiced. Section 1008, Pen. Code.

The judgment and order are, and each is, affirmed.

We concur: CRAIL, P. J.; WOOD, J.



10 Cal.App.2d 321

PEOPLE v. ONE FORD COUPÉ, ENGINE
NO. 18-98810.

Cr. 9880.

District Court of Appeal, First District,
Division 2, California.
Nov. 22, 1935.

1. Evidence ☞222(2)

In suit for forfeiture of automobile used in transporting morphine, testimony of officers as to admissions made by automobile owner and his wife at time of their arrest that they had carried morphine in automobile held admissible, where owner had made himself party to action by claiming damages for seizure, and denying that transportation was unlawful, since admissions were made against interest.

2. Forfeitures ☞5

In suit for forfeiture of automobile used in transporting morphine, where such transportation had been proved by unobjectionable evidence, owner had burden of proving that transportation was for lawful purpose (*St. 1933, p. 788, § 15*).

3. Evidence ☞222(2)

In suit for forfeiture of automobile used in transporting morphine, where, after proof of transportation, owner had burden of showing that such transportation was for

lawful purpose, testimony of officers that owner at time of arrest had admitted that automobile was used for carrying morphine held admissible, since merely going to prove negatively that owner had no valid claim that transportation was lawful (St. 1933, p. 788, § 15).

4. Forfeitures ⇨5

Where use of automobile for transportation of morphine had been shown, forfeiture became mandatory unless owner could establish one of defenses specified in act (St. 1933, p. 788, § 15).

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Proceeding by the People of the State of California for the forfeiture of one Ford Coupé, Engine No. 18-98810. From a judgment entering a nonsuit, plaintiff appeals.

Reversed.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

Fred W. Comba, of Redwood City, for respondent.

NOURSE, Presiding Justice.

The state sued to enforce the forfeiture of an automobile under the provisions of section 15 of the state Narcotics Act (St. 1929, p. 380), as amended by St. 1933, p. 788. The owner of the machine answered and defended the action in the court below. At the close of the people's case the trial court entered a nonsuit, though the record does not show that a motion was made for that purpose or upon what grounds it was considered.

The undisputed evidence is that police officers having followed the owner of the car and his wife for a greater part of the day apprehended them at about 1:30 a. m. in the city of San Mateo. Both were placed under arrest, and a package containing morphine was taken from the wife. Both the owner and his wife then admitted that the morphine was theirs and, when the officers told them that they had noted four or five places in San Francisco where they had been seen to stop and that they intended to go to those places and investigate, the owner of the car said: "Don't do that, here are the keys to my room in

San Francisco where the rest of it is, and that is all I got." The owner of the car also admitted to the arresting officers that he and his wife had carried the morphine in the car, but insisted that it was intended for their own use and not for the purpose of sale.

[1-3] All this testimony was received from two of the arresting officers without objection. When the third officer was asked to relate the admissions of the owner, the respondent herein for the first time raised the objection that it was hearsay. This objection was sustained, and the judgment or order was admittedly based upon the conclusion of the trial judge that all this testimony was inadmissible. This was error for two reasons: First, the owner of the car voluntarily made himself a party to the action by filing an answer claiming damages for the seizure and alleging that the car was not "used in the unlawful transportation of narcotics." Hence all his admissions to the contrary were against interest and the proper subject of testimony from these witnesses. Second, the transportation having been fully proved by unobjectionable evidence, the burden of proof was on the owner to show that possession and transportation was for a lawful purpose within the terms of the act. The ownership of the car was admitted, and the possession and transportation of the narcotics by means of the car was proved by direct evidence. The testimony objected to merely went to prove negatively that the owner had no valid claim that the possession or transportation was for a lawful purpose.

[4] Upon the record the state not only made a prima facie case sufficient to avoid a nonsuit, but made a complete case upon which a forfeiture became mandatory unless the owner could establish one of the defenses specified in the act. The terms of the statute are plain and need no interpretation. If a forfeiture for the transportation of such a small quantity of narcotics seemed a drastic penalty, it nevertheless was a matter within the domain of the Legislature, and was not a matter to guide the judgment of the court.

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.

10 Cal.App.2d 404

ABRAMS et al. v. HUBERT et al.

Civ. 10564.

District Court of Appeal, Second District,
Division 2, California.

Nov. 26, 1935.

Hearing Denied by Supreme Court

Jan. 23, 1936.

1. Appeal and error $\S$ 930(1)

On appeal from judgment entered upon verdict for defendants, reviewing court was bound to consider evidence in light most favorable to defendants.

2. Appeal and error $\S$ 996

On appeal from judgment entered upon verdict for defendants where examination of record disclosed that there was sufficient evidence when considered in connection with such inferences as jury might have reasonably drawn therefrom to sustain every material finding of fact upon which verdict was necessarily predicated, reviewing court would not further consider evidence.

3. Appeal and error $\S$ 205

Where question to which objection was sustained did not itself indicate that answer to it would be favorable to party seeking to introduce the testimony, and such party did not make offer to trial court of what was proposed to be proven, reviewing court would not review ruling, since it could not determine whether proposed evidence would have been material to party offering it.

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by George Abrams and others against Esther W. Hubert and another. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Benjamin Chipkin, of Los Angeles, for appellants.

W. I. Gilbert, of Los Angeles, for respondents.

McCOMB, Justice pro tem.

This is an appeal by plaintiffs from a judgment in favor of defendants after a trial before a jury of an action brought to recover damages resulting from an automobile accident.

[1] Viewing the evidence most favorable to defendants (*Ah Gett v. Carr*, 3 Cal. App. 47, 48, 84 P. 458), the facts in the instant case are:

Plaintiffs were riding in their automobile in an easterly direction on a rain

covered and slippery boulevard, when defendants approached from the opposite direction on the same street at a speed of not more than 25 miles per hour. Defendants' car commenced to skid and passed out of control of the driver, colliding with the car in which plaintiffs were riding. Plaintiffs saw the defendants' car skidding when the cars were at least 100 feet apart, but their car was not stopped nor the brakes applied until there was only a distance of about 6 feet between the two cars.

Plaintiffs rely for reversal of the judgment on three propositions:

First. The evidence is insufficient to support the verdict of the jury.

Second. The trial court committed prejudicial error in (a) instructing the jury and (b) refusing to give certain instructions requested by plaintiffs.

Third. The trial court committed prejudicial error in sustaining an objection to the question, "Now Mr. Williams, bearing in mind the condition of the road on that particular day, bearing in mind that you are traveling at about 20 to 25 miles an hour, now, if you took your foot off the gas would you go into a skid?"

[2] As to plaintiffs' first proposition, an examination of the record discloses there was sufficient evidence considered in connection with such inferences as the jury may have reasonably drawn therefrom to sustain each and every material finding of fact upon which the verdict in favor of defendants was necessarily predicated. We therefore refrain from further discussion of the evidence. *Leavens v. Pinkham & McKevitt*, 164 Cal. 242, 245, 128 P. 399; *Koeberle v. Hotchkiss* (Cal.App.) 48 P. (2d) 104.

Turning to the second proposition, an examination of the record fails to reveal any prejudicial error committed by the trial court either in (a) instructing the jury or (b) refusing to give instructions requested by plaintiffs. The jury was fully and fairly instructed as to the principles of law necessary for it to consider in deciding this case.

[3] The final proposition upon which plaintiffs predicate error may not be urged here. Where a question to which an objection is sustained does not itself indicate that the answer to it will be favorable to the party seeking to introduce the

testimony, before the ruling will be reviewed on appeal by this court, an offer of what is proposed to be proven must first be made to the trial court, so that we can determine whether the proposed evidence would have been material and beneficial to the party offering it. *Grandy v. Southern Pacific Co.* (Cal.App.) 49 P.(2d) 1127; *County of Sonoma v. Hall*, 129 Cal. 659, 662, 62 P. 213; *Marshall v. Hancock*, 80 Cal. 82, 84, 22 P. 61; *Whitelaw v. Whitelaw*, 122 Cal.App. 260, 263, 9 P.(2d) 874. In the instant case, the question asked did not indicate the answer anticipated, nor was there an offer of proof. Therefore, the record fails to show any error in this ruling.

The judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.



10 Cal.App.2d 448

NELSON et al. v. SIGNAL OIL & GAS CO.
et al.

Civ. 10376.

District Court of Appeal, Second District,
Division 2, California.

Dec. 3, 1935.

Automobiles ☞ 172(5)

Operators of truck hauling trailer struck by automobile were not liable for negligence if making reasonable inspection and exercising due care to determine that taillights were burning, even though lights were out when collision occurred (St. 1931, p. 2119, § 110 (a)).

Appeal from Superior Court, Los Angeles County; A. B. Bigler, Judge.

Action by Myrtle M. Nelson and others against the Signal Oil & Gas Company and another. Judgment for plaintiffs, and defendants appeal.

Reversed.

Heaney, Price & Postel and Clarence A. Rogers, all of Santa Barbara (Warner Edmonds, Jr., of Santa Barbara, of counsel), for appellants.

Norris Montgomery, of Santa Barbara, for respondents.

McCOMB, Justice pro tem.

This is an appeal from a judgment for the plaintiffs after a trial by jury in an action brought to recover damages for the wrongful death of the husband of one of the plaintiffs and father of the others.

Viewing the evidence most favorable to plaintiffs (*Ah Gett v. Carr*, 3 Cal.App. 47, 48, 84 P. 458), the facts in the instant case are:

Decedent was one of five men riding in an automobile returning from Los Angeles to Santa Barbara about 2:30 a. m. At a point on the highway approximately three miles south of Carpinteria, the automobile in which decedent was riding collided with the rear end of a trailer owned by defendant Signal Oil & Gas Company and operated by defendant Richardson. Decedent died as a result of the accident. The truck and trailer had left Los Angeles about 8 o'clock the preceding evening, at which time the trailer was equipped with two taillights situated on the chassis and a light fastened onto the extreme rear of an overhanging pipe. Repeated inspections were made of these lights by the defendant Richardson and a companion who accompanied him, from the time they left Los Angeles to a point approximately two miles prior to the scene of the accident. On each of these occasions the lights were observed to be burning brightly.

There was evidence that defendants were negligent in not having at the time of the accident two red lights burning at the extreme end of the load, as required by section 110 (a) of the California Vehicle Act (St. 1923, p. 552, § 110 (a), as amended by St. 1931, p. 2119).

The sole question necessary for us to determine upon this appeal is: Did the trial court commit prejudicial error in refusing defendants' requested instruction reading:

"You are instructed that even though you find that at the time and place of the accident complained of the rear or taillights on the truck and trailer of the defendants' had become extinguished, that fact in itself does not necessarily make the operator of said vehicle guilty of negligence. * * *

"If in this case you find that the defendants made a reasonable inspection of the rear or taillights on said truck and trailer and exercised due care to determine that

said taillights were in fact burning, then you are instructed that the defendants were not guilty of negligence in this particular even though the rear or taillights were out when the collision occurred."

The facts in the instant case are analogous with those in *Berkovitz v. American River Gravel Company*, 191 Cal. 195, 215 P. 675, and the question of law is identical. Our Supreme Court held in *Berkovitz v. American River Gravel Company*, *supra*, that the refusal of the trial court to give a similar instruction was reversible error.

The judgment is reversed.

We concur: CRAWL, P. J.; WOOD, J.



10 Cal.App.2d 292

SOUTHERN CALIFORNIA NURSES REGISTRIES ASS'N et al. v. DIVISION OF LABOR STATISTICS AND LAW ENFORCEMENT OF DEPARTMENT OF INDUSTRIAL RELATIONS OF CALIFORNIA et al.

Civ. 10561.

District Court of Appeal, Second District,
Division 2, California.

Nov. 21, 1935.

Certiorari ¶24

Determination by deputy commissioner of bureau of labor that claim for exemption was filed by nurses' association pursuant to statute regulating private employment agencies held not reviewable by certiorari, since no judicial function was performed by commissioners (Code Civ.Proc. §§ 1068, 1074; St. 1929, p. 166, § 1).

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding by the Southern California Nurses Registries Association and others for certiorari to review acts of the Division of Labor Statistics and Law Enforcement of the Department of Industrial Relations of the state of California and others. From a judgment sustaining defendants'

demurrer to the petition, the plaintiffs appeal.

Judgment affirmed.

Charles F. Lowy, of Los Angeles, for appellants.

Leo L. Schaumer, of Los Angeles, and Charles Dreyfus and Arthur L. Johnson, both of San Francisco (Henry L. Knoop, of Los Angeles, of counsel), for respondents.

GOULD, Justice pro tem.

The Private Employment Agency Law of the state of California (St. 1913, p. 515, as amended), designed to regulate private employment agencies, specifically exempts from its operation certain nonprofit organizations whose membership fees are used solely for the maintenance of such organizations. But to secure exemption from the provisions of the act, it is provided that such nonprofit organizations must file certain documentary evidence with the commissioner of the bureau of labor statistics on or before the first day of April of each year. This was done on February 22, 1935, by California State Nurses Association, District 5. Thereafter appellants herein complained to the bureau that said District 5 association was engaged in activities that brought it without the exemption provisions of the act. A hearing was had before a deputy commissioner, who made certain findings of fact, which in substance were that District 5 association, by filing certain documents in the manner and form provided in the act, had thereby complied with the provisions of section 1 thereof (St. 1913, p. 515, as amended by St. 1929, p. 166). There was no determination as to whether said District 5 was or was not entitled to exemption.

Appellants thereafter filed in the superior court a petition for writ of certiorari, seeking to review the acts of the commissioner and his deputy and asking the court to determine that the division of labor has no right to grant or determine any exemptions under the act in question. Respondents' demurrer to the petition was sustained without leave to amend, and the appeal to this court followed.

Clearly, the lower court was correct. A writ of review lies only when an inferior tribunal, board, or officer has exceeded its jurisdiction, and the writ cannot be extended further than to determine whether

its authority was regularly pursued. Sections 1068, 1074, Code Civ.Proc. Here the act complained of was simply a determination that the claim for exemption was filed, all in pursuance of the terms of the act. No judicial function was performed by respondents in such determination, and the matter, therefore, is not subject to review. *Quinchard v. Board of Trustees*, 113 Cal. 664, 45 P. 856; *Townsend v. Copeland*, 56 Cal. 612.

In the briefs filed herein, discussion is had as to whether District 5 association is in fact entitled to exemption under the act in question. Having determined that the writ does not lie in any event, we deem it unnecessary to consider the point as to such right.

Judgment affirmed.

We concur: CRAIN, P. J.; WOOD, J.



10 Cal.App.2d 132

NOBLE et al. v. KEY SYSTEM, Limited, et al.
Civ. 9682.

District Court of Appeal, First District, Division 1, California.
Nov. 13, 1935.

Rehearing Denied Dec. 13, 1935.

Hearing Denied by Supreme Court
Jan. 10, 1936.

1. Automobiles ⇨181(1)

Under statute permitting recovery when guest's death or injury results from intoxication of driver, word "intoxication" does not mean a drunken stupor or drunkenness, but means any degree of intoxication which, under all the circumstances, proximately causes the doing or refraining from doing of any act which is classified as a negligent act.

[Ed. Note.—For other definitions of "Intoxicated; Intoxication," see Words & Phrases.]

2. Automobiles ⇨242(7)

In action for guest's death when automobile collided with train allegedly because of driver's intoxication, plaintiff, to recover under statute allowing recovery when guest's death results from driver's intoxication, had burden to prove that guest's death was proximate result of driver's intoxication (St. 1931, p. 1693, § 141¼).

3. Automobiles ⇨246(2)

In action for death of guest in automobile collision allegedly caused by driver's intoxication, instruction which defined "intoxication" as an abnormal mental or physical condition due to the influence of alcoholic liquors held sufficient definition of "intoxication" within statute permitting recovery when guest's death in automobile accident results from driver's "intoxication" (St. 1931, p. 1693, § 141¼).

4. Evidence ⇨89

"Disputable presumption" is a species of evidence that may be accepted and acted upon when there is no other evidence to uphold contention for which it stands; and when evidence is introduced supporting such contention, evidence takes place of presumption, and there is no necessity for indulging in any presumption (Code Civ.Proc. §§ 1963, 2061).

[Ed. Note.—For other definitions of "Disputable Presumption," see Words & Phrases.]

5. Evidence ⇨89

Disputable presumption may be controverted by other evidence, and, if such evidence is introduced, jury may weigh evidence and determine whether it sufficiently contradicts presumption (Code Civ.Proc. §§ 1963, 2061).

6. Evidence ⇨89

A disputable presumption has no weight against an admitted fact and cannot prevail against a proved fact, but presumption is not overcome merely because evidence has been introduced in opposition thereto (Code Civ. Proc. §§ 1963, 2061).

7. Appeal and error ⇨1033(5)

In action for death of guest in automobile accident due to driver's alleged intoxication, instructing that law presumes defendant was not intoxicated until contrary evidence has been introduced held not ground for complaint by defendant, in view of other instructions and evidence that defendant was not intoxicated (Code Civ.Proc. §§ 1963, 2061).

8. Automobiles ⇨244(20, 36)

In action for death of guest when automobile collided with train because of driver's alleged intoxication, evidence that driver missed one interurban train by two feet and continued on wrong side of road at speed of 55 miles an hour until he collided with another interurban train, in disregard of warning signals, supported finding of defendant's intoxication, and that guest's death was proximately caused thereby (St. 1931, p. 1693, § 141¼).

9. Appeal and error ⇨996

When sufficiency of evidence to support issue is challenged, inferences reasonably drawn therefrom tending to establish correct-

ness of jury's conclusion must be considered by reviewing court to uphold judgment.

10. Automobiles ⇨242(8)

In action for guest's death when automobile collided with train because of driver's alleged intoxication, evidence of guest's participation with defendant in drinking liquor *held* insufficient to overcome presumption that deceased guest exercised ordinary care for his own safety.

11. Automobiles ⇨154

Motorist on approaching interurban railway crossing has duty to give way to train about to pass at same time, if necessary to avoid collision.

12. Automobiles ⇨154

Rights and obligations of interurban trains when passing through sparsely populated districts are reciprocal with those of motorist.

13. Trial ⇨296(4, 5)

In action for guest's death when automobile collided with train allegedly because of driver's intoxication, instruction that train had right of way, that driver should approach tracks with reasonable care and stop automobile to permit train to pass, that, if driver's failure to give train right of way was due to his intoxication, driver was liable for guest's death in collision with train if guest was not contributorily negligent, *held* proper, when considered with other instructions (St. 1931, p. 1693, § 141¾).

14. Death ⇨99(4)

\$15,000 *held* not excessive for death of married man having 10 children.

15. Jury ⇨97(4)

In action against railroad and motorist for death of guest when automobile collided with train, acceptance as twelfth juror, pensioned employee of railroad company, after motorist had exhausted his peremptory challenges *held* not error, where defense counsel was given ample opportunity to examine prospective juror, who stated that he would not be influenced by motorist's effort to prove that accident was due solely to negligence of railroad.

16. Appeal and error ⇨1015(5)

Weight to be given to allegations of affidavits and counter affidavits on motion for new trial for juror's misconduct is a matter for trial court to decide, and not a matter to be determined upon appeal.

17. New trial ⇨145

In action for death of guest when automobile collided with train, affidavits of attorneys containing admissions of jurors that one juror had visited scene of accident and taken

evidence out of court *held* not to require new trial, where principal question involved was intoxication of driver and not locus of accident.

18. New trial ⇨145

Affidavits of third persons to prove admissions of jurors to impeach verdict are not countenanced by the courts.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Mary Noble and others, by Mary Noble, their guardian ad litem, against the Key System, Limited, M. J. Wiren, and others. From a judgment for plaintiffs, defendant M. J. Wiren appeals.

Affirmed.

Griffith R. Williams, Redman, Alexander & Bacon, and Herbert Chamberlin, all of San Francisco, for appellant.

John T. Wentz and Booth B. Goodman, both of Oakland, for respondents.

WARD, Justice pro tem.

Primarily this appeal involves the definition of the word "intoxication," as used in section 141¾ of the California Vehicle Act (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693). The purpose of the section is to advance the safety of travel on public highways, and to protect the operator of a vehicle from the payment of damages resulting from an accident due to a failure to use ordinary care toward a person who accepts a ride without giving compensation therefor. The section provides that the person responsible for the operation of a vehicle is not relieved of liability for an injury or death proximately resulting from the intoxication of the person responsible for the operation of the vehicle. Appellant contends that the judgment lacks evidentiary support; that the deceased was guilty of contributory negligence; and that the trial court erred in the admission of certain evidence and in giving certain instructions. These matters presented for consideration mainly relate to the subject of intoxication.

[1] The word "intoxication" is not susceptible of a definition so accurate that it could fit the facts of each case. Its meaning necessarily varies, depending upon its application to a situation, contract, or statute. The use of the word in an insurance

policy might be defined in accordance with its association with other words such as "insane" or "delirious." *Bakalars v. Continental Casualty Co.*, 141 Wis. 43, 46, 122 N.W. 721, 25 L.R.A. (N.S.) 1241, 18 Ann. Cas. 1123. Such a definition is distinguishable from the intent of the legislators in its use in section 141¾ of the California Vehicle Act. Appellant presented an instruction which was properly refused, reading in part as follows: "* * * 'intoxication' is synonymous with 'drunkenness.' * * *" The effect of this instruction might have been to leave the jury with the thought that an extreme degree of inebriation was required; that is, that it was necessary that the jury should find the defendant was devoid of physical or mental power. This would bring the jury to the determination that the intoxication should be of such a degree that a person could not drive an automobile. Such a conclusion is not sound when we consider that the statute would be ineffectual unless the car was actually operated. The section does not mean drunken stupor, often used synonymously with "drunkenness." The word "intoxication" in section 141¾ must be given the meaning intended by the legislators. That it refers to the use of alcoholic liquor is unquestionable. A guest is prohibited under this particular section from obtaining redress for the omission of the driver of the vehicle to do something which an ordinarily prudent person would do under similar circumstances, or the doing of something which such person would not have done in the same situation, unless the act performed or the omission to perform the act proximately resulted from the intoxication of the person responsible for the operation of the vehicle. Any degree of intoxication which, under all the circumstances of the case, proximately causes the doing or refraining from doing any act which is classified as a negligent act is a sufficient degree of intoxication to come within the statute. *Knickrihm v. Hazel*, 3 Cal.App.(2d) 721, 40 P.(2d) 305.

[2, 3] The trial court correctly instructed the jury that the death in this case must proximately result from the intoxication of the driver of the vehicle. The jury was also instructed in the language used in the decision of *People v. Dingle*, 56 Cal. App. 445, 449, 205 P. 705, 706, defining the phrase "under the influence of intoxicating liquor." Appellant contends that this instruction authorized a verdict against the defendant for something less than in-

toxication; in other words, that a person may be "under the influence of intoxicating liquor" to such a degree as to deprive him of the ability to exercise ordinary care "and at the same time not be drunk." This question has been answered heretofore. However, the trial judge in the present case, at the request of appellant in an instruction which was modified, defined intoxication as "an abnormal mental or physical condition due to the influence of alcoholic liquors." This instruction, when considered in conjunction with all that has been noted before concerning the subject, is a sufficient and fair determination of the meaning of the word "intoxication" as used in section 141¾ of the California Vehicle Act.

[4-7] The court gave the following instruction: "The law presumes that the deceased exercised reasonable care in all matters connected with the accident. The law also presumes that the defendant was not intoxicated. Such presumptions are a species of evidence that continue with the respective parties unless and until contrary evidence has been introduced." A disputable presumption is a substitute for proof of facts. It is a species of evidence that may be accepted and acted upon when there is no other evidence to uphold the contention for which it stands. When evidence is introduced supporting such contention, the evidence takes the place of the presumption, and, as stated in *Paulsen v. McDuffie* (Cal.Sup.) 47 P.(2d) 709, at page 714, there is "neither necessity nor reason for indulging in any presumption." In appellant's briefs there is no attack upon that portion of the instruction that "the law presumes that the deceased exercised reasonable care in all matters connected with the accident," and we therefore refrain from comment, except to observe that the guest was killed as a result of the accident, and that in the absence of other evidence tending to prove that the deceased had exercised due care plaintiff was entitled to a correct instruction on this phase of the case. *Smellie v. Southern Pacific Co.*, 212 Cal. 540, 299 P. 529. Appellant challenges that portion of the instruction to the effect that the law presumed the defendant was not intoxicated "unless and until contrary evidence has been introduced." A disputable presumption may be controverted by other evidence, but if uncontradicted it is satisfactory. Code Civ. Proc. § 1963. If contrary evidence is introduced, the jury has the right to weigh the

evidence and determine whether it sufficiently contradicts the presumption. In a civil case, if the controverting evidence has more convincing force than the privilege of the presumption that certain facts may be taken for granted without proof, then the presumption vanishes until the party entitled thereto meets the controverting facts with other evidence upholding the theory of the presumption. A disputable presumption has no weight against an admitted fact, and cannot prevail against a proved fact, but it is not overcome merely because evidence has been introduced in opposition thereto. *People v. Milner*, 122 Cal. 171, 179, 54 P. 833; *Pabst v. Shearer*, 172 Cal. 239, 242, 156 P. 466; *Larrabee v. Western Pacific Ry. Co.*, 173 Cal. 743, 747, 161 P. 750. In this case the trial judge instructed the jury that "if the evidence is contradictory, your decision must be in accordance with the preponderance thereof," and that "you are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against * * * a presumption. * * *" Code Civ. Proc. § 2061, subd. 2; *Mar Shee v. Maryland Assur. Corporation*, 190 Cal. 1, 7, 210 P. 269. The challenged instruction in so far as it covered the subject of intoxication, when considered with other instructions, was favorable to appellant. Evidence of non-intoxication was introduced which the jury was permitted to consider in addition to the presumption. Evidence having been introduced that the defendant was not intoxicated, it was not necessary that the court instruct the jury that "the law presumes that the defendant was not intoxicated." *Paulsen v. McDuffie*, supra.

[8] The next question raised on this appeal is, Does the judgment lack evidentiary support of the defendant's intoxication, and was the death of the guest proximately caused thereby? That alcoholic liquor was consumed is a circumstance tending to prove intoxication. The evidence shows that on the morning of the accident defendant was suffering from the results of liquor taken the day before. During the day of the accident he absorbed at least several glasses of wine. Subsequent to the accident he had an alcoholic breath. This evidence, notwithstanding the testimony opposed thereto, was sufficient to warrant the jury in determining that the defendant had partaken of intoxicating liquor. Immediately before the accident, driving

on the wrong side of the street, defendant missed by two feet a collision with an interurban train. This accident was avoided by the motorman using his emergency brakes. With unabated speed of 55 miles an hour, defendant continued for 600 feet straight ahead, passing a wigwag signal with a ringing bell and a red light, and paying no attention to the approaching second interurban train, and crashed on the right side of the front thereof with such force that the automobile was partly telescoped, the cow catcher and bumper of the train bent, and the floor of the motorman's cab splintered. Two guests were killed, and the defendant injured. The evidence relative to the accident was sufficient to convince the jury that the alcoholic liquor consumed caused an abnormal mental or physical condition of the defendant that precluded him from operating his automobile with the care and caution that would be used by a normal person of ordinary prudence under the same circumstances, and that the death of the guest was proximately caused thereby.

[9,10] The cause without which the accident would not have occurred, under the implied findings of the jury, was intoxication. Appellant contends that if the defendant was intoxicated it was superinduced by the participation of the deceased in drinking alcoholic beverages on the day of the accident in the company of the defendant, and that the decedent must have known of the defendant's intoxicated condition, and as the guest of defendant deceased was guilty of contributory negligence by assuming the risk of riding with an intoxicated driver. In the cases cited by appellant, *Jones v. Pacific Gas & Electric Co.*, 104 Cal.App. 47, 57, 58, 285 P. 709; *Whitsett v. Morton*, 138 Cal.App. 628, 637, 33 P.(2d) 54; *Lynn v. Goodwin*, 170 Cal. 112, 113, 148 P. 927, L.R.A. 1915E, 588, and *Schneider v. Brecht* (Cal.App.) 44 P.(2d) 662, 663, there was evidence that the guest knew, or from the circumstances shown by the evidence must have known of the driver's intoxication. In the instant case there is no evidence that the decedent knew that defendant was intoxicated. There is some evidence that decedent and defendant imbibed liquor on the day of the accident. Prior to that date decedent and defendant were strangers. It is possible that the evidence introduced was not sufficient to lead the jurors to believe the decedent must have

known that defendant was intoxicated. When the sufficiency of the evidence to support an issue is challenged, inferences reasonably drawn therefrom tending to establish the correctness of the jury's conclusion must be considered by a reviewing court to uphold a judgment. In this case there was a presumption that the decedent exercised ordinary care for his own safety. *Smellie v. Southern Pacific Co.*, supra. The only evidence to controvert this presumption is the testimony that decedent was present when defendant consumed several glasses of wine. The jury evidently concluded that the evidence was not sufficient to overthrow the presumption.

[11-13] The court gave the following instruction: "The train involved in the collision testified to in this case had the right of way over all automobiles using the said highway, and it was the duty of every driver of an automobile to approach the said tracks with reasonable caution and, if necessary, to slow up and stop his automobile to permit the said train to pass. If the driver of an automobile fails to give the right of way to a train, and if such failure is due to intoxication of the driver, the driver of such automobile is responsible for injuries or death resulting to a guest in his automobile directly or proximately caused thereby, unless the guest is guilty of negligence proximately contributing to his own injuries or death." The issue of right of way was a question of fact. The interurban train was traveling south on Poplar street in the city of Oakland, preparing to turn into a private right of way between Twenty-Fourth and Twenty-Second street junction at a speed of about eight miles an hour. When the train was approaching the curve, the motorman saw the glare of the headlights of the on-coming automobile about 1,500 feet away, traveling north on the same street. Interurban trains under the present means of operation cannot travel except upon rails. To that extent the train had the right of way to which the operators of other vehicles should yield when necessary. *Arnold v. San Francisco-Oakland Terminal Railways*, 175 Cal. 1, 5, 164 P. 798. As stated in *Armock v. United Railroads of San Francisco*, 56 Cal.App. 160, 163, 204 P. 856, 857, referring to a similar instruction, "Standing alone, this instruction no doubt would be misleading," but other instructions in conjunction with the full text of the complained of instruction fully and definitely informed the jurors of the re-

spective rights of the train and the automobile. The jury was instructed that the law required of the Key System, Limited, the duty of exercising ordinary care to protect from injury persons riding in automobiles north on Poplar street as the trains cross from the west to the east side of the street, and that if such failure was the proximate cause of the accident the defendant Wiren was thereby exonerated. The jury was also instructed that if any act or omission on the part of the company in the maintenance of its tracks or in the operation of its trains was the sole proximate cause of the accident, that the verdict should be in defendant Wiren's favor. The rights and obligations of interurban trains when passing through sparsely populated thoroughfares are reciprocal with those of the automobilist, but if all the circumstances are otherwise equal, except the fact that the automobilist may turn or swerve in the operation of his vehicle while the train must remain on its tracks, then this fact gives a privilege of right of way, not absolute or exclusive and subject to the use of due care, to the operators of the train which a prudent automobilist must consider in the operation of his vehicle. *Mathes v. Aggeler & Musser Seed Co.*, 179 Cal. 697, 701, 178 P. 713; 22 R.C.L. 987, 988. In the present case, the train had switched from the right to the left tracks, and other travelers were being protected by lights, bells, and a wigwag signal. Wiren knew that the tracks were used by the interurban train. On the night of the accident defendant Wiren was not approaching from a right or left angle, but was driving his car north, while the train was approaching from the north. The diagrams introduced in evidence indicate a width of the street sufficient to have passed on either side of the tracks. It was a clear night, and there was nothing to obstruct the view of either the motorman or the defendant Wiren. The motorman saw the Wiren automobile 1,500 feet away, and had a right to assume that the operator of the vehicle would slow up, and, if necessary, stop. The impact occurred 4 feet east of the westbound track. From a factual standpoint, the train had the right of way. The jury could not reasonably have reached a contrary conclusion. Considered in conjunction with the entire charge of the court, the complained of instruction cannot be held to be erroneous. In *Hamlin v. Pacific Electric Ry. Co.*, 150 Cal. 776, 783, 89 P. 1109, 1112, the court

said: "It is incumbent upon the party appealing to show, not only abstract error, but error prejudicial to him upon the facts in evidence, and, to avail himself of the point that an instruction was erroneous, he must bring before the court sufficient evidence to show that, upon a proper instruction, there might have been a finding in his favor."

Appellant complains of four instances of the admission of evidence prejudicial to the rights of appellant, based upon conclusions of the witnesses, or that the proper foundation for impeaching evidence had not been presented. It does not appear from an examination of the entire transcript of evidence or from the intrinsic nature of the alleged errors that substantial, if any, injury occurred that would warrant a reversal, or that alleged errors in the court's rulings resulted in a miscarriage of justice. On the contrary, the record is singularly free from error in the court's rulings on objections made to the admission of evidence.

[14] A trial judge is in a better position than a reviewing court to weigh the evidence and determine whether the damages awarded are excessive. Only when it appears that the damages are so disproportionate that passion, prejudice, or corruption must have swayed the jury will appellate courts interfere. In this case a widow and ten children were given \$15,000. If the jury was justified in returning a verdict against the defendant, we conclude from all the facts of the case that the compensation was warranted.

[15] Appellant claims that, by the refusal of the court to permit full examination of prospective jurors and by the misconduct of the jurors, he was denied a fair trial. The Key System, Limited, was a party defendant when the complaint was filed on March 2, 1934. During the month of June of the same year a dismissal without prejudice was filed against the railway company and the case brought to trial before the statutory period of limitation had expired. After the defendant had exhausted his peremptory challenges, a pensioned employee of the Key System was accepted as the twelfth juror. Counsel for defendant was given ample opportunity to examine the prospective juror. The juror was told that the defendant would attempt to

prove the accident was entirely due to the negligence of those running the Key System train, and the following question was propounded and answered: "Q. That will not influence you in deciding our part of the case at all? A. Not at all."

[16-18] On the motion for new trial an affidavit was filed alleging that a certain juror returned from the jury room with a copy of the California Vehicle Act, and that after the return of the verdict affiant, one of the attorneys for the defendant, "learned" that the juror had shown a portion of the Vehicle Act to another juror prior to the conclusion of the case. From the record, the latter portion of the statement was not borne out, and it does not appear that the copy of the Vehicle Act was produced in the jury room. Other affidavits were filed on behalf of defendant wherein it appeared that subsequent to the verdict a juror in conversation with one of defendant's attorneys admitted that during the progress of the trial a juror visited the scene of the accident and took evidence out of court. Counter affidavits were filed to the effect that the juror had merely driven an automobile in the vicinity of the accident, but had not taken evidence out of court. The weight to be given to the allegations of the affidavits and counter-affidavits if admissible was a matter for the trial court to decide and not a matter to be determined upon appeal. *Ham v. County of Los Angeles*, 46 Cal. App. 148, 154, 189 P. 462; *Tunmore v. McLeish*, 45 Cal.App. 266, 269, 187 P. 443. However, the affidavits relied upon by appellant were the affidavits of the attorneys containing admissions of the jurors. Affidavits of third persons to prove admissions of jurors to impeach a verdict are not countenanced by the courts. *Walter v. Ayvazian*, 134 Cal. App. 360, 364, 365, 25 P.(2d) 526, *Siemens v. Oakland, S. L. & H. Electric Railway*, 134 Cal. 494, 497, 66 P. 672. Finally, it does not appear from the affidavits that prejudice resulted from viewing the premises. *Saltzman v. Sunset Tel. & Tel. Co.*, 125 Cal. 501-506, 58 P. 169. The principal question in this case was intoxication, and not the locus of the accident.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

10 Cal.App.2d 309

ROLLING et al. v. HOCKENBERRY.

Civ. 1625.

District Court of Appeal, Fourth District,
California.

Nov. 21, 1935.

Appeal and error ⇨787

Where county clerk's certificate filed in support of motion to dismiss appeal disclosed that notice of appeal was filed on December 24, 1934, that on same date notice was filed with county clerk to prepare transcript, that no transcript had been filed pursuant to statute, and that on July 29, 1935, trial court entered order granting motion to dismiss proceedings for preparation of transcript, appeal *held* dismissible on motion (Code Civ. Proc. § 953a).

missal, nothing has been filed with this court. Respondent's motion is therefore in order and should be granted. Capley v. Clark, 112 Cal.App. 427, 296 P. 898; Ciani v. Dubuque F. & M. Ins. Co., 1 Cal. App.(2d) 379, 36 P.(2d) 658; Bales v. Metropolitan Casualty Ins. Co., 3 Cal.App. (2d) 43, 38 P.(2d) 799.

The appeal is dismissed.

We concur: BARNARD, P. J.;
MARKS, J.



10 Cal.App.2d 152

SERRES v. SOUTH SANTA ANITA SCHOOL
BOARD et al.

Civ. 9799.

District Court of Appeal, Second District,
Division 1, California.

Nov. 13, 1935.

Appeal from Superior Court, San Bernardino County.

Action by Mattie Rolling, individually and as administratrix of the estate of A. Rolling, deceased, against M. B. Hockenberry. From an adverse judgment, plaintiff appeals. On motion to dismiss appeal.

Appeal dismissed.

W. H. Gregory, and Ames Peterson, both of Los Angeles, for appellants.

Joe Crider, Jr., of Los Angeles, and Byrne & Coughlin, of San Bernardino, for respondent.

JENNINGS, Justice.

In support of his motion to dismiss this appeal for appellant's failure to have filed a transcript of the record within the time prescribed by law, respondent has filed the certificate of the county clerk in accordance with the provisions of rule VI of the Rules for the Supreme Court and District Courts of Appeal. The facts stated in the certificate are uncontradicted. It appears therefrom that notice of appeal was filed on December 24, 1934; that on the same date notice was filed with the county clerk to prepare a transcript of the record to be used on appeal; that no transcript has been filed pursuant to section 953a of the Code of Civil Procedure; that on July 29, 1935, the trial court entered its order granting respondent's motion to dismiss the proceedings for preparation of a transcript on appeal. Other than the above-mentioned certificate and this motion for dis-

Pleading ⇨248(11)

Permitting plaintiff to amend during trial complaint in action against school teacher for injuries inflicted upon school child, alleging that while child was engaged at play upon playground of school, teacher "madly and ferociously" struck child, inflicting injuries, to charge that teacher "negligently" did such act, *held* not error as changing cause of action into one of negligence where facts alleged showed that teacher, as in original complaint, was charged with responsibility for his deliberate acts constituting battery (Pen.Code, § 242).

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Glenn Eugene Serres, a minor, by John Serres, guardian ad litem, against the South Santa Anita School Board and K. R. Cutler. From a judgment for plaintiff as against the second-named defendant, the second-named defendant appeals.

Affirmed.

Everett W. Mattoon, Co. Counsel, and Ernest R. Purdum, Deputy Co. Counsel, both of Los Angeles, for appellant.

E. C. Bowen and Albert E. Coger, both of Los Angeles, for respondent.

EDMONDS, Justice pro tem.

This is an action by a minor against the school board and appellant Cutler, a teacher, for damages for personal injuries. Upon trial, the school board's motion for a nonsuit as against it was granted, and judgment was entered against the individual defendant. His appeal therefrom is upon the judgment roll alone, and presents the sole question of whether or not the amended complaint filed during the trial changed the cause of action.

The record which is before us by stipulation of the parties shows from the minutes of the court that during the trial of the case, upon the conclusion of respondent's evidence, appellant's motion for a nonsuit was denied, and that leave to file an amended complaint was granted. Upon this ruling, the trial was continued to a date some thirty days later. To the amended complaint appellant interposed a demurrer, which was overruled. Thereafter the trial proceeded to judgment.

By the original complaint the minor alleged that while "engaged at play upon the play-ground of said school, and while plaintiff was thus engaged, and standing in a bent or stooped position, defendant K. R. Cutler suddenly and without any warning whatsoever, did madly and ferociously rush upon, attack and assault said plaintiff by striking plaintiff with his clenched fist on coccygeal bone of plaintiff's spinal column, and with such great force and violence that said vertebra was then and there fractured." In the amended complaint it is alleged that the minor, while engaged in athletic activities on the school ground, became engaged in an altercation for which appellant proceeded to punish the minor. In doing so, the said amended complaint alleges: "The defendant negligently commanded and required the plaintiff, who was then a youth of slight build, to assume position to receive punishment by a blow on the buttocks, and required plaintiff to bend over and grasp his right ankle with his right hand and at the same time to grasp his left ankle with his left hand, both knees being unbent, which said position was assumed by the plaintiff, and the plaintiff having been placed in said situation by command of the defendant, which

said position was in view of its object dangerous and caused the coccyx bone of plaintiff's spinal column to protrude, and the plaintiff being in such position, the defendant withdrew some distance to give force and momentum to the blow, advanced rapidly and negligently and with the use of great and excessive force delivered with his open palm a violent blow upon the coccyx bone of the plaintiff, and by said blow broke the said coccyx bone and caused to be fractured and detached from the spinal column a broken fragment about one and one-half inches in length."

Appellant insists that the original complaint charged him with a willful and intentional wrong, while the amended complaint alleged a cause of action against him for negligence. About the only basis for this position is the fact that the word "negligently" appears in the amended complaint and is not used in the original complaint. However, each of the complaints states a cause of action for battery, which is the "willful and unlawful use of force or violence upon the person of another." Section 242, Pen. Code. In the first complaint the battery is alleged to have been done "madly and ferociously." In the amended complaint the appellant is charged with having delivered a violent blow upon the respondent with great and excessive force. The fact that the word "negligently" is used in describing appellant's actions does not change the cause of action into one of negligence where the facts alleged show that the appellant is charged with responsibility for his deliberate acts constituting battery.

The amended complaint in its legal effect alleged the same cause of action as that of the first complaint with the exception of the malice of the appellant. The reasons for filing it are not shown. However, the record shows no prejudice to appellant therefrom. "In furtherance of justice courts are very properly liberal in authorizing the amendment of pleadings either before or at the trial." *Deberry v. Cavalier*, 113 Cal.App. 30, 33, 297 P. 611, 612.

The judgment is affirmed.

We concur: HOUSER, P. J.; YORK, J.

10 Cal.App.2d 338

RAMIREZ v. THOMAS PRODUCTIONS,
Limited, et al.
Civ. 5352.

District Court of Appeal, Third District,
California.

Nov. 22, 1935.

Hearing Denied by Supreme Court
Jan. 20, 1936.

1. Fraud ⇨58(4)

Finding of absence of fraud in inducing plaintiff to invest in copartnership held justified under evidence in action for damages.

2. Licenses ⇨39

Action for money had and received will lie to recover money paid to individual or corporation for securities issued in violation of Corporate Securities Act (St. 1917, p. 673, as amended).

3. Licenses ⇨39

Investor, suing corporation to recover money paid for interest in copartnership which later transferred its assets to corporation, had burden to show that corporation, claimed to have violated Corporate Securities Act, received portion of money, or that money was used for corporation's benefit (St. 1917, p. 673, as amended).

Appeal from Superior Court, Los Angeles County; Robert B. Lambert, Judge.

Action by S. Ramirez against the Thomas Productions, Limited, and others. From an adverse judgment, plaintiff appeals.

Affirmed.

Benjamin Chipkin, of Los Angeles, for appellant.

Willedd Andrews and Manuel Ruiz, Jr., in pro. per., both of Los Angeles, for respondents.

MAXEY, Justice pro tem., delivered the opinion of the court.

Plaintiff was solicited by defendant, Manuel Ruiz, Jr., to purchase an interest in a copartnership, having and owning certain patent rights to motion picture and sound devices then owned and held by said copartnership. The defendant, Richard Thomas, was one of the partners in said project, and had personally owned the patent rights above mentioned.

Thomas Productions, Limited, a Delaware corporation, was subsequently organized, and the copartnership transferred all of its assets to the corporation,

in consideration of issuance of stock in said corporation to each of the copartners, in proportion to their several interests in said copartnership.

The complaint is in two counts, the first seeking damages for fraudulent representation in inducing plaintiff to invest his money in the copartnership; and the second, for money had and received by reason of the fact that the moneys of plaintiff were taken from him and invested in said copartnership in violation of the Corporate Securities Act of the state of California (St. 1917, p. 673, as amended).

[1] We have made a careful examination of the record and of the transcript in this case, and find no evidence of any fraud being perpetrated upon the plaintiff. Prior to making his investment, plaintiff carefully investigated the project, attended demonstrations of the patented articles, observed their operation and performance, and entered into the transaction with full knowledge of all that had been done by the copartnership, together with full knowledge of the contemplated acts and actions of the corporation when it had been perfected. The mere fact that the plaintiff made a bad investment is no indication of fraud, and no advantage of any kind appears from the record to have been taken of plaintiff.

We can see no error in the rulings of the learned trial court prejudicial to the interests of the plaintiff herein, nor was the conduct of the trial court in any sense prejudicial to any rights of the plaintiff.

[2, 3] Undoubtedly, an action for money had and received will lie to recover any money paid to an individual or corporation for the issuance of copartnership or corporate securities when such issuance is in violation of the Corporate Securities Act. Plaintiff did not purchase any stock in defendant corporation, Thomas Productions, Limited, at any time. It was not shown that any of the money paid by plaintiff ever reached or was used by this corporation. Before it could be held liable, plaintiff must affirmatively show that the corporation received at least some portion of the money, or that it was used for the use and benefit of such corporation. The burden of showing this fact was upon the plaintiff, and having failed to sustain this burden, cannot recover against the said corporation, Thomas Productions, Limited.

What plaintiff actually purchased was an interest in the copartnership. Neither the copartnership nor any of its members, with the exception of Richard Thomas and Manuel Ruiz, Jr. (sued herein as John Doe), were made parties defendant. The copartnership had secured a permit to issue its securities from the corporation commissioner, and at the time of the sale to plaintiff, had applied for a renewal of its permit, and had been informed by the commissioner of corporations that no permit was necessary under the methods then being pursued by said copartnership. The defendants and the copartnership had done those things required of them by the Corporate Securities Act, and there being no violation thereof, the present action will not lie.

The judgment is affirmed.

We concur: PULLEN, P. J.;
THOMPSON, J.



10 Cal.App.2d 284

NOBLE et al. v. PROVIDENT IRR. DIST.
et al.
Civ. 5502.

District Court of Appeal, Third District,
California.

Nov. 20, 1935.

1. Courts ⇐209(2)

Where emergency which led District Court of Appeal to assume jurisdiction of proceeding by bondholders' committee to compel officers of irrigation district to obtain deeds to lands in district alleged to have been sold for failure to pay assessments had elapsed at time of filing and hearing of amended petition, and questions involved could best be first heard and determined in superior court where facts might more readily be ascertained and accounting had if necessary, District Court of Appeal would not continue its jurisdiction (Gen.Laws 1931, Act 3854, §§ 40-49).

2. Waters and water courses ⇐228

Petition in proceeding by bondholders' committee to compel officers of irrigation district to obtain deeds to lands in district allegedly sold for failure to pay assessments, which failed to state facts relative to assessment, sale, and other proceedings pertaining to property involved, but merely alleged gen-

eral compliance with Irrigation District Act, held insufficient (Gen.Laws 1931, Act 3854, §§ 40-49).

Proceeding by William H. Noble and others, as and being the Provident Irrigation District Bondholders' Protective Committee, against the Provident Irrigation District and others. On demurrer to plaintiffs' amended petition.

Judgment in accordance with opinion.

H. W. McGowan, of Willows, and A. L. Garvey, for petitioners.

George R. Freeman, of Willows, for respondents.

PER CURIAM.

This cause is before us again upon the defendants' demurrer to the plaintiffs' amended petition.

[1] As the petition is still defective, and the demurrer must be sustained; and it appearing to the court that this cause, if prosecuted further, should be prosecuted in the superior court, we summarize the reasons therefor as follows:

The proceeding has for its purpose the compelling of the officers of the Provident Irrigation District to proceed with obtaining deeds to certain lands in the district alleged to have been sold on account of the failure to pay previous assessments. The petition also sets forth that the district has been deprived of several thousand dollars of profit which it should have received in the managements of lands that should have been deeded to the district; asks for an accounting of the profits of certain lands for several years; and for the taking possession of certain crops of rice growing upon the lands that should have been deeded to the district.

In order to determine whether the district is entitled to deeds to the lands referred to in the petition, it would become necessary to examine all the records and proceedings and acts of the district relative to the assessment of the lands, the failure to pay the assessments, the publication of notice of delinquent taxes, and the time and place of sale of lands on account of delinquent taxes, and, generally, to examine into the sufficiency and regularity of all of the proceedings provided to be taken in and by virtue of the provisions of sections 40 to 49, inclusive, of the California Irrigation District Act (St. 1897, p. 254,

as amended [Deering's Gen. Laws 1931, Act 3854]). All of the foregoing would necessitate a trial in this court which should first be had in the superior court of the county where all the proceedings herein referred to were taken and had and the record readily available.

Jurisdiction was taken of this cause without requiring previous action in the superior court, on the representation that an emergency was presented relative to a rice crop growing upon the lands and premises at the date of the filing of the petition.

By reason of the time which has elapsed between the filing of the first petition and the filing and hearing of the amended petition herein, the urgency, if any, has ceased to exist, and the reasons for this court assuming practically the position of a trial court having ceased to exist, it is evident that the questions involved in this action should be first heard and determined in the superior court of the proper county where the facts may be readily ascertained, adjudication had, and also that an accounting may be had, if an accounting becomes proper and necessary.

[2] By reason of the foregoing, we need only consider one of the points made upon demurrer. Instead of setting forth the proceedings relative to the assessment, sale, etc., of the property involved, the petition states only the pleader's conclusions in the following language, to wit: "That each year since the organization of said District, assessments have been regularly levied in accordance with the provisions of Sections forty (40) to forty-nine (49) of the California Irrigation District Act and the various steps necessary in accordance with said act were taken to collect the same, and after publication, as set forth in said act, sales were held to collect the delinquent taxes and assessments against the delinquent lands and land-owners, and, in accordance with said act, a sale was held by the defendant-district and the officers thereof, on August —, 1930, and on August —, 1931, and on August —, 1932, and the said lands of defendants L. M. Benoit and A. E. Moutrey, were then and there sold to the defendant-district for the failure to pay the taxes and assessments mentioned herein." It is further set forth in the petition that the district became the purchaser.

The allegation which we have set forth fails entirely to state the facts concern-

ing the proceedings which were had, and no court could ascertain from the petition that the various steps required to be taken, as set forth in the California Irrigation District Act, had been complied with. The various acts themselves must be set forth, and not the conclusion or opinion of the pleader.

Other objections to the sufficiency of the amended petition are urged in the demurrer, but as those objections may be considered and obviated hereafter, we do not deem it necessary to give attention thereto.

By reason of the petition being defective, as just pointed out, and also having reached the conclusion that this cause should be further prosecuted in the superior court where a trial may be regularly had, it is hereby ordered that the demurrer of the defendants to the plaintiffs' amended petition be, and the same is hereby, sustained, without prejudice to the petitioners to begin and prosecute this action to final determination in the superior court of the proper county.



10 Cal.App.2d 375

**WARNER et al. v. INDUSTRIAL ACCIDENT
COMMISSION et al.**
Civ. 1943.

District Court of Appeal, Fourth District,
California.
Nov. 25, 1935.

1. Master and servant ☞373

Employee, to recover for illness caused by exposure to weather, must have been subjected by his employment to special exposure beyond that to which commonalty is subjected.

2. Master and servant ☞405(4)

Evidence showing nature of shelter provided for county deputy sheriff detailed as inspector at international border who died from pneumonia held to make prima facie case for compensation award on ground that there had been special exposure in employment.

Proceeding by Frances E. Warner and others, claimants, to review an award

denying compensation for the death of Stephen Warner, made by the Industrial Accident Commission in a proceeding brought under the Workmen's Compensation Act.

Award annulled and cause remanded.

Russell V. Grant, of San Diego, for petitioners.

Everett A. Corten, of San Francisco, for respondents.

BARNARD, Presiding Justice.

This is a proceeding to annul an award of the respondent commission denying compensation on account of the death of Stephen Warner, the husband and father, respectively of the petitioners. Stephen Warner was a deputy sheriff in the employ of the respondent county. On January 8, 1935, he served as a bailiff in one of the superior courts in that county until 5 o'clock in the afternoon. Thereafter he was detailed for duty as an inspector at the international border line between the United States and Mexico. He worked there from 6 o'clock p. m. on that day until 2 a. m. the following morning and continued to work there during those hours of each day until January 13, 1935, his duty being to inspect automobiles crossing the border line. On January 13, 1935, a respiratory infection became manifest and he was compelled to quit work early in the evening and return to his home. He was taken to the United States Naval Hospital at San Diego the same night and died from pneumonia on January 20, 1935.

[1] The commission found that the death of Warner was not caused by an injury arising out of or in the course of his employment. It is well established that to permit a recovery in cases of this nature the employee must have been subjected by his employment to a special exposure which was beyond that to which the commonality is subjected. The essential question here is whether the implied finding that the employment in question subjected the deceased to no special exposure is sustained by the evidence.

[2] It appears from the transcript that the only shelter provided for such inspectors was a platform adjoining a building, with an overhanging roof. In performing his duties the deceased had to leave this platform and go into the street and inspect each car as it crossed the

border. Mrs. Warner testified that her husband was in good health up to the time he began this work, and that about two days after he began the work he complained that he got his feet wet there, that it had been wet all of the time, that there was no shelter, and they had to be out of doors all of the time. She also testified that he caught a cold but continued to work every night, and that on the 13th he came home about 9 o'clock in the evening complaining of a pain in his chest and saying that he was very cold and damp as it had rained there for several days. Earlier in the week her husband had told her that he was exposed all of the time and that he had to stay out in the wind and the cold and the mud. Another inspector testified that he saw the deceased during the week in question; that it was cold and damp at the border during that entire week; that it was raining intermittently and that there was a depression in the pavement and the pavement was constantly covered with water; that that was a cold spot to work in and there was a cold wind from the east during the evening; that the shelter was a protection when the rain fell straight down, but the wind usually comes from the sea and that "you can get good and cold and wet both"; and that when a car came along it was necessary to step out into the open through some loose dirt which got wet when it rained. A medical report from the naval hospital was introduced in which it was stated that the deceased had been exposed to rain for three days prior to January 10 and that death was due to pneumonia.

The respondents rely entirely upon a weather report from San Diego, which is approximately 17 miles from the border, and upon a report from a physician in San Francisco based upon his examination of certain records, including this weather report. The weather report showed a low temperature ranging from 49 degrees to 54 degrees during this week with an extreme wind velocity ranging from 9 to 20 miles an hour. It also gave an average temperature ranging from 54 degrees to 60 degrees and an average wind velocity ranging from 4.4 miles per hour to 8.5 miles per hour. While it showed that it was cloudy on each day during this week, there was rain only on the 9th and 11th, the rain on the 9th being between 6 o'clock p. m. and 9 o'clock p. m. and on the 11th between 4 o'clock

a. m. and 6 o'clock p. m. This weather report was introduced in evidence with the understanding that it was not necessarily conclusive as to the weather conditions at the point at which the deceased was employed. The respondents argue that the rain on January 11th, as shown by this report, could not have affected the deceased since it fell between 4 o'clock a. m. and 6 o'clock p. m. and while the deceased was not at work. The report shows that .56 of an inch fell that day at San Diego, and if the same amount fell at the border at the same time, it may have materially contributed to a wet condition of the ground and pavement during the succeeding hours when the deceased was there employed. The report of the physician referred to after setting forth that three individuals stated it was quite rainy at the border during that week, sets forth that the temperatures and wind velocity were practically the same at the border as at San Diego during that week and states there is nothing to indicate that the deceased man's clothing became wet while on duty, and that the widow expressly stated that her husband did not become wet though his feet became damp when it rained. While the report admits that long-continued chilling of the body and exposure may lower the resistance and make the body more susceptible to infection, it goes on to state that no such condition existed here. The report is rather unusual in that instead of being an expression of expert opinion on facts for the guidance of the commission, it reviews all of the evidence and undertakes to decide the question before the commission, namely, whether or not there was a special exposure in the employment in question. In so doing, the report misquotes a part of the evidence and the conclusion therein is almost entirely based upon the weather report referred to and the assumption that the weather was identical at the two points during that week.

There is nothing in the record to show that the weather conditions at the two points were identical and the only evidence before us is to the contrary. The testimony as to the actual weather conditions at the border is not contradicted. The evidence introduced by the petitioners made out at least a prima facie showing of a special exposure to which the deceased was subjected by his employment. This was not overcome by anything in

the weather report or in the report of the San Francisco physician, relied upon by the respondents. The record fails to sustain the implied finding of the commission to the effect that there was no special exposure in this employment.

The award is annulled and the cause remanded for further proceedings.

We concur: MARKS, J.; JENNINGS, J.



AMBASSADOR HOLDING CORPORATION,
Limited, v. CITY OF LOS ANGELES. *
Civ. 9461.

District Court of Appeal, Second District,
Division 1, California.
Nov. 8, 1935.

Rehearing Denied Dec. 4, 1935.

Hearing Granted by Supreme Court
Jan. 6, 1936.

1. Eminent domain ☞271

Municipality is liable for damages to property due to change of grade of public street upon which property abuts.

2. Eminent domain ☞280

Property owner's cause of action for damages to property due to change of grade of street upon which property abutted held not barred, nor waived, by property owner's failure to object to proposed improvement before city council, where statute under which city acted failed to provide for ascertainment of damages or inclusion of them in assessment (St. 1911, p. 733, as amended by St. 1929, p. 1652, § 3; St. 1911, p. 730, as amended; Const. art. 1, § 14).

3. Eminent domain ☞267

Failure of part of Improvement Act authorizing lowering of street grade to provide for ascertainment of damages or inclusion of them in assessment could not be supplied by another part of the act, where such parts were independent, as regards liability of city for damages resulting from change of grade, notwithstanding property owner's failure to object to proposed improvement before city council (St. 1911, p. 733, as amended by St. 1929, p. 1652, § 3; St. 1911, p. 752, as amended).

4. Eminent domain ☞266

Property owner damaged by change of grade of public street on which property abutted had choice of suit to enjoin proposed im-

provement or an action for damages (St. 1911, p. 733, as amended by St. 1929, p. 1652; p. 730, as amended; Const. art. 1, § 14).

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by the Ambassador Holding Corporation, Limited, against the City of Los Angeles. From a judgment for defendant, plaintiff appeals.

Reversed and remanded.

Overton, Lyman & Plumb, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Arthur Loveland, Deputy City Atty., all of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from a judgment in favor of defendant and respondent in an action to recover damages resulting from a change of grade of a public street on which the property of appellant abutted. Briefly, the facts are as follows:

Appellant owns certain real property on West Eighth street in Los Angeles, improved with an apartment house. Respondent, city of Los Angeles, pursuant to the Improvement Act of 1911 (St. 1911, p. 730, as amended), lowered the grade in front of appellant's property, as a result of which the remodeling of appellant's building was required. Appellant filed a claim for the cost thereof with the board of public works and the city council; said claim was denied and the action for damages ensued.

The case was submitted upon stipulated facts. It was stipulated, among other things, that appellant was damaged in the amount claimed; had received no compensation therefor; and that no part of said premises had been condemned. Also, that said improvement proceedings were instituted and proceeded under the provisions of part 1 of the Improvement Act of 1911, approved April 7, 1911 (St. 1911, p. 730), and all acts amendatory thereof and supplementary thereto; that appellant made no objection or protest, in writing or otherwise, to or against the proposed grade or the change or modification thereof.

Any other facts hereinafter assumed or referred to are included in said stipulation.

The only issue involved is, Did appellant waive its right to damages by having failed to comply with the requirements of section 3, of part 1, of the Improvement Act of 1911? No issue was raised as to the procedural steps followed by respondent city of Los Angeles.

Respondent takes the position that appellant, having failed to appear before the city council and make "objection" as required by section 3, waived any claim for damages. It is conceded by appellant that, if such provision is one which appellant would legally be required to conform to, then appellant cannot recover.

Section 3 of part 1 (St. 1911, p. 733, as amended by St. 1929, p. 1652), abbreviated for convenience, is as follows:

"Before ordering any work done or improvement made which is authorized by this act, the city council shall pass a resolution of intention to do so. * * * Said resolution shall contain also a notice of the day, hour and place when and where any and all persons having any objections to the proposed work or improvement may appear before the legislative body and show cause why said proposed improvement should not be carried out in accordance with said resolution. * * *

"Any property owner whose property is to be assessed to pay the costs and expenses of the proposed improvement may at the time fixed in the resolution of intention for hearing of objections to the proposed work and improvement, appear before the city council and make objection to the proposed grade or proposed modification of grade. A failure to make objection at such time shall be deemed to be a waiver of all objections to the proposed grade or proposed change or modification of grade and shall operate as a bar to any claim for *damages* or any subsequent action looking to the prevention of the work or the recovery of *damages* on account of the performance of the work to such grade or changed grade." (Italics added.) The foregoing sentence contains the only reference to damages in part 1 of the act.

The California Constitution, article 1, § 14, provides: "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner, * * * which compensation shall be ascertained by a jury, unless a jury be

waived, as in other civil cases in a court of record, as shall be prescribed by law."

The ordinance of intention for the improvement of West Eighth street was adopted April 10, 1930. The ordinance ordering the work to be done was adopted June 2, 1930. Appellant, on or about September 17, 1930, made demand upon the city of Los Angeles by filing with the city council and the board of public works a claim for damages, which claim was thereafter rejected and refused. The action for damages was filed April 25, 1931.

[1] That a municipality is liable for such damages is well settled. *Bigelow v. Ballerino*, 111 Cal. 559, 44 P. 307, 309; *Elliott v. County of Los Angeles*, 183 Cal. 472, 191 P. 899; *Duncan v. Ramish*, 142 Cal. 686, 76 P. 661, 664; *Rockridge Place Co. v. City of Oakland*, 61 Cal.App. 791, 216 P. 64, 65.

[2] Appellant's cause of action is not barred nor is its claim for damages waived because of the failure to "make objection" as required by section 3 of the improvement act in question.

Quoting from *Sala v. City of Pasadena*, 162 Cal. 714, 124 P. 539, 541, involving a like question, the court said: "It is well settled, however, that the state Legislature, in the matter of public improvements concerning which they are authorized to legislate, may require the property owner to assert his claim for compensation for the taking of his property or injury there-to before the commencement of the improvement, upon reasonable notice of the proposed taking or injury, may prescribe in what manner and within what time he shall do this, and further provide that his failure to assert a claim within the prescribed time shall operate as a waiver of all claims and constitute a bar to any subsequent action looking either to a prevention of the work or the making of compensation." Also, quoting further: "While it is unquestionably competent to the Legislature to provide the several steps to be pursued in the assertion of his claim for compensation, the prescribed procedure must not destroy or substantially impair the right itself. A reasonable opportunity must be afforded him to claim and receive his damages; then if, being so afforded, it be not availed of, the statute may provide that such failure should constitute a bar to his claim."

In an action for damages resulting from a change of grade, *Rockridge Place Co. v. Oakland*, supra, the court said, referring to a defense of waiver that, "waiver of a constitutional right ought not to be lightly inferred." In *Bigelow v. Ballerino*, supra, the court declared, "But, where there is no such waiver, the property owner may rest secure in the protection which the constitution affords him that his property shall not be taken or damaged without compensation first made. It is not incumbent upon him to demand that the authorities shall respect his rights; the duty is theirs to work no unlawful invasion of them."

The case at bar is similar to the case of *Duncan v. Ramish*, supra, wherein the court, referring to a street improvement act then in effect, held as follows: "It is clear that the nonpayment of any such damages does not affect the assessment to pay the cost of the work of grading, graveling, and curbing. The two are entirely distinct and independent. The street work act makes no provision for damages, nor does it refer thereto. The right to damages arises solely from the constitutional provision that private property cannot be damaged for public use without compensation having been first made to the owner. * * * If the owner desires to preserve his right to antecedent payment, he must sue to enjoin the work—not the collection of the assessment. But whether he does enjoin the work or not, *the right to damages is an independent right against the city*, and does not affect the power to tax the district for a different purpose, namely, to raise funds to pay the expenses of grading and improving the street." (Italics added.)

There appears to be no logical reason why the rule with respect to the taking of property, as set forth in *Curran v. Shattuck*, 24 Cal. 427, should not apply with like effect in the case at bar. The *Curran* Case contains the following pertinent language: "The Board or officer must find the power to ascertain the compensation within the statute. A resort cannot be had for that purpose to implication. * * * If the statute has failed to provide, directly, the means or mode, it simply results that the compensation cannot be ascertained, and, therefore, the land cannot be taken for public use without the consent of the owner. The Board cannot insert into the statute

provisions conferring further powers, however necessary they may be to carry into effect the supposed intention of the Legislature."

Part 1 of the Improvement Act of 1911 (St. 1911, p. 730), as amended fails to provide, directly or indirectly, the means or mode, or the power, to ascertain the compensation to which appellant is entitled. It falls far short of affording a reasonable opportunity to claim and receive damages. As a matter of fact and of law, part 1 makes no provision whatever for the assessment to include damages. It provides that the city council may make the expenses of such work or improvement chargeable upon a district, which the said city council shall, in its resolution of intention, declare to be the district benefited by said work or improvement, and to be assessed to pay the costs and expenses thereof. Section 4, St. 1911, p. 733, as amended by St. 1923, p. 107. It provides that, when the city council shall determine that serial bonds shall be issued to represent the expenses of any work or improvement, it shall so declare in the resolution of intention to do said work. Section 59 and section 61 as amended by St. 1931, p. 1577. The words "work" and "improvement" as defined in section 79a, as added by St. 1913, p. 57, amended by St. 1927, p. 635, do not include damages. With the exception of the appearance of the word damages twice in section 3, the whole of part 1 is destitute of any reference to the subject.

The decisions hold, in effect, that when any legislation of the character herein considered undertakes to set up a procedure to be followed in claiming such damages or compensation, and also includes a bar or waiver for failure to comply with such procedure, then and in that case, it must further provide, but in accord with article 1, § 14, of the Constitution, for the manner and method of ascertaining and considering such claim and the settlement thereof. The inadequacy of part 1 on this subject is evident; consequently, the failure to comply with section 3 thereof does not operate to bar appellant from the right to an action for damages. The isolated reference to damages in section 3 is but an empty threat, a defiance of which cannot destroy a substantial right.

Snoffer v. City of Los Angeles (Cal. App.) 43 P.(2d) 852, relied on by re-

spondent, is unavailing. The sufficiency of the ordinance of intention was the only question determined in the Snoffer Case; no attack was made on the adequacy of part 1 of the Improvement Act of 1911.

[3] Part 2 of the Improvement Act of 1911 (St. 1911, p. 752, as amended) cannot supply the deficiencies of part 1; the two parts are separate and independent, so far as the question raised herein is concerned.

[4] Appellant had the choice of two remedies; a suit to enjoin or an action for damages. *Rockridge Place Co. v. Oakland*; *Elliott v. County of Los Angeles*, supra.

By virtue of the stipulation between the parties, appellant was and is entitled to judgment.

The judgment is reversed and cause remanded.

I concur: YORK, J.

HOUSER, P. J., deeming himself disqualified, does not participate in the decision.



10 Cal.App.2d 369
DEVONSHIRE et ux. v. LANGSTAFF et al.
Civ. 5455.

District Court of Appeal, Third District,
California.
Nov. 25, 1935.

Hearing Denied by Supreme Court
Jan. 23, 1936.

1. Landlord and tenant ☞94(1)

Provision in lease authorizing termination by lessors by thirty days' notice, following sixty-day period after breach of condition or covenant by lessees, held not against public policy (Civ.Code, § 1946).

2. Landlord and tenant ☞94(1)

Parties may, in their lease, provide for termination thereof on notice different from and superseding notice prescribed by Code (Civ.Code, § 1946).

3. Landlord and tenant ☞94(1)

Lessors who exercised option given in fixed term lease to terminate lease on thirty days' notice for breach of covenant, but thereafter attempted to withdraw notice of ter-

mination, could not complain that forfeiture was involved, where lessees raised no issue of forfeiture.

4. Landlord and tenant ⇨94(1)

Lessees on receiving notice of termination of fixed term lease for breach of covenant were not required to notify lessors of their intention to move, and notice of acceptance sent to lessors was immaterial on question of termination of tenancy.

5. Landlord and tenant ⇨94(1)

Lessors who gave thirty-day notice of termination of fixed term lease pursuant to provision thereof for termination on breach of covenant could not by attempted withdrawal of termination notice during thirty-day period effect continuance of lease relationship without lessee's consent.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by A. D. Devonshire and wife against William E. Langstaff and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Morin, Newell, Brown & Hamill, of Pasadena, for appellants.

A. G. Allen, of Pasadena, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

In 1927 plaintiffs and appellants herein, who will hereafter be known as lessors, entered into a lease with respondents whom we will hereafter refer to as lessees. As a part of the arrangement in the lease, lessees also entered into a declaration of trust wherein they pledged with First Trust & Savings Bank of Pasadena certain stock as security for the performance of the obligations of the lease.

Unpaid rentals accrued under the lease on April 1 and on May 1, 1933. Lessees also failed to pay certain taxes provided for in the lease, which had become delinquent December 5, 1932.

The important provision of the lease is known as paragraph VIII, which reads as follows:

"In case Lessees shall fail to perform any condition, covenant or obligation under the terms of this lease, Lessors may at their election either expend such sum as may be necessarily required in meeting the breach

of such covenant, and thereafter maintain an action against the Lessees for the amount of said disbursement, together with interest, costs and reasonable attorney's fee; or at the election of Lessors, Lessors may terminate this lease by notifying Lessees not less than thirty days prior to the date of the proposed termination of the fact of said breach and of the purpose of Lessors so to terminate, and at the expiration of said period of thirty days following a period of sixty days after the fact of breach, the lease shall terminate ipso facto, and without further act on the part of Lessors, and under these circumstances Lessees shall place Lessors in full possession of the premises and every part thereof. In case of any action at law necessarily or reasonably begun or maintained by Lessors in or about any right pertaining to this lease, the Lessees shall, in addition to any other relief awarded Lessors, pay all court costs and a reasonable attorney's fee.

"In addition to the foregoing remedies, and notwithstanding them, Lessors shall have all rights otherwise expressed or implied in this lease, to bring an action for the collection of rentals, and to provisional remedies appropriate thereto, including attachment, and to all other appropriate actions in the premises, and in addition to the recovery of the relief otherwise due Lessors, with costs, there shall become due and payable reasonable counsel fee."

On the 13th day of April, 1933, lessors issued a notice in writing addressed to and served upon lessees, reading as follows:

"To William E. Langstaff and Flora I. Langstaff:

"You Will Please Take Notice that the undersigned, pursuant to paragraph VIII of that certain Lease dated the 1st day of November, 1927, where you leased from the undersigned that certain real property situate in the City of Pasadena, County of Los Angeles, State of California, described as follows: * * * Which lease was recorded on the 3rd. day of December, 1927, in Book 7761, at Page 115 of Official Records of Los Angeles County, have elected to terminate said Lease on account of your failure to carry out certain of the obligations thereof, to-wit: Your failure to pay the first installment of the Los Angeles County taxes for the year 1932-1933, on said property hereinabove described which installment of taxes became delinquent on

the 5th day of December, 1932, and your failure to pay the City of Pasadena taxes for the year 1932 on said property, which City of Pasadena taxes became delinquent on the 8th day of February, 1933. This is intended as a thirty (30) day notice as provided for in said Paragraph VIII of said lease.

"Dated this 13th. day of April, 1933.

"A. D. Devonshire

"Mary L. Devonshire."

On April 29, 1933, lessors issued a subsequent notice in writing to lessees attempting to recall, reconsider, and rescind the notice of April 13, 1933. Thereafter, in May of 1933, lessors paid all taxes and notified the First Trust & Savings Bank of Pasadena, as trustee, of the defaults in the payment of the taxes and rentals and demanded the sale of enough of the securities in pledge with the trustee to pay lessors the amount of said taxes and rentals due and unpaid.

On May 11, 1933, lessees sent a written communication to lessors purporting to consent to the cancellation and termination of the lease as of May 12, 1933, and also, on May 11, 1933, notified their subtenant henceforth to attorn to lessors because of the termination of the lease by lessors. Lessors immediately rejected the purported acceptance and rejected an offer of the subtenants to establish a relationship with them upon the basis that the lessees' lease was terminated.

[1,2] Appellant claims that the judgment in favor of defendant can be sustained only upon the doctrine of election or the doctrine of conditional limitation, and then cites numerous authorities to show that neither doctrine is applicable to the case at bar. However, the judgment need not rest upon either doctrine suggested by appellant, but rather upon the contractual relationship of the parties and their specified method of termination of the lease. There is nothing stipulated in the lease that is beyond the power of the parties. There is nothing in the contractual provision for the termination of the lease that violates any rule of public policy, and that parties may, in their lease, provide for the termination thereof upon notice different than and superseding that prescribed by the Code is well established. *Conner v. Jones*, 28 Cal. 59, 60; *Watkins v. McCartney*, 57 Cal.App. 643, 207 P. 909; *Buhman v. Nickels & Brown Bros.*, 1 Cal.App. 266, 82 P. 85; *Jameson v. Chanslor-Canfield*

Midway Oil Co., 176 Cal. 1, 167 P. 369; *Wisner v. Richards*, 62 Wash. 429, 113 P. 1090, Ann.Cas.1912D, 160; section 1946, Civ.Code.

If, therefore, the parties could by agreement waive compliance with the sections of the Civil Code prescribing notice, then we need not concern ourselves with the requirements of the various Code sections dealing with notice of termination of lease.

[3-5] Neither are we concerned with the element of forfeiture. If the provision for the termination of the lease is a lawful subject of contract, undoubtedly it was embodied in the present lease for the benefit of the lessors; if forfeiture is in any way involved, it is the forfeiture of the leasehold interest of the tenant. But here the tenant, the party against whom the forfeiture would operate, has raised no issue of forfeiture and is not claiming any rights under the principals of law or equity applicable to forfeiture. Lessors, therefore, being beneficiaries under the terms of the lease as to forfeiture, assuming it is found, cannot be heard to complain or raise the issue, it affecting only the rights of the lessees. An examination of the lease also discloses that the method selected for repossessing the property of the lessors was not the only remedy provided in the lease, for lessors had reserved all the remedies provided by law, including the right to serve a three-day notice as provided in section 1161 of the Code of Civil Procedure, clearly indicating that the parties contemplated, in their contractual agreement, methods other than the statutory means of termination of the lease. Under the terms of the lease and the method chosen by lessors to recover their property, they could, after lessees had been in default for sixty days, serve a thirty-day notice to vacate; during the prior sixty days of default lessees could, at any time, by paying the rentals and taxes due, restore themselves to good standing, but after service of the thirty-day notice they had no further option in the matter. It then became lessees' duty to arrange for their own removal. Although the record is silent as to any steps taken by them during this period, we must assume they were preparing to comply with the terms of their agreement. It was not required of them that they notify lessors of their intention to move or that they would comply with the agreement; they had by joining in the execution thereof, consented thereto. The notice of accept-

ance sent by lessees to lessors notifying lessors that they would surrender the premises on the day specified in lessors' notice was immaterial. If, therefore, lessees had no alternative under the thirty-day provision in the lease, it would manifestly be unfair for the court to read into the contract any such right on the part of the lessors. Also, if the lessors could withdraw their notice of cancellation after it was issued, they could serve notice of cancellation each month, and at the end of the twenty-ninth day withdraw the same and reduce the estate of the lessees from a tenancy of years to a tenancy at will, clearly not the intention of the lease.

Tiffany on Landlord and Tenant, page 1462, concerning the withdrawal or waiver of notice to quit, says:

"It has been decided in England that a party who has given a notice to quit cannot afterwards withdraw or 'waive' such notice without the assent of the other party to the tenancy, that is, that a notice once given operates to terminate the tenancy at the time therein specified unless both parties consent that it shall not so operate. Presumably the courts of this country would take a like view, but the question appears never to have been presented. (*Western Union Tel. Co. v. Pennsylvania R.*, [C.C.] 120 F. 362, 385.)"

Likewise 1 Wood, Landlord and Tenant, (2d Ed.) § 44, states the rule:

"When a valid notice to quit is given by landlord or tenant the party to whom it is given is entitled to count upon it and it can not be withdrawn without the consent of both parties."

In *Western Union Tel. Co. v. Pennsylvania Railroad Company*, supra, it is said:

"It will be observed that withdrawal of a notice to quit is not, like a waiver of forfeiture, the act of one party, but requires the assent of both; and, when such joint assent is given, it creates a new tenancy. The question, then, whether there was a waiver of a notice to quit is one of intent on the part of both parties to the tenancy. 'When a valid notice to quit is given by the landlord or tenant, the party to whom it is given is entitled to count upon it, and it cannot be withdrawn without the consent of both parties. If such consent is given, there is a new agreement between the parties, and a new tenancy is created, which exists only under that new agreement.'"

Appellants have presented a learned brief in support of their contention, but mistakenly, as we believe, assert that the rights of the parties hereto are governed by the provisions of section 1161 of the Code of Civil Procedure. For that reason, we have not attempted to consider the many authorities cited. We are of the opinion, answering the contention of appellants, a landlord may not, under a fixed term lease, withdraw a notice of termination previously issued, because of breach of covenant, prior to the time of termination as fixed in his notice, so as to effect a continuation of the lease relationship.

The judgment is affirmed.

We concur: PLUMMER, J.; THOMPSON, J.



10 Cal.App.2d 279

CAHILL v. GOECKE.

Civ. 5442.

District Court of Appeal, Third District,
California.

Nov. 20, 1935.

Hearing Denied by Supreme Court
Jan. 16, 1936.

1. Gifts ⇨49(6)

Evidence that owner of investment certificate in building and loan association delivered passbook and certificate without written assignment to donee, stating "this is yours," and that donee's name was written in passbook apparently by employee of association, and that donee retained possession thereof until donor's death, held to constitute "gift" so as to entitle donee and not donor's executor to proceeds of certificate.

[Ed. Note.—For other definitions of "Gift," see Words & Phrases.]

2. Witnesses ⇨178(3)

Cross-examination by executor of deceased donor of donee as to gift, words used, and manual delivery of passbook and certificate, held waiver of statute prohibiting opposite party testifying to matters occurring in lifetime of deceased (Code Civ.Proc. § 1880, subd. 3).

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Mary Elizabeth Cahill against Emil C. Goecke, executor of the estate of

W. L. Waldo, deceased. From a judgment for plaintiff, defendant appeals.

Affirmed.

Doyle, Clark, Thomas & Johnson, of Long Beach, for appellant.

A. E. Garten and Vern E. Garten, both of Long Beach, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

At the conclusion of the trial of the above-named action, the court made its findings of fact No. 111, which reads as follows: "That the said sum of One Thousand Seven Hundred Sixty-nine and $\frac{2}{100}$ Dollars (\$1,769.28), now on deposit with L. E. Lampton, County Clerk of Los Angeles County, California, belongs to, and is the property of, plaintiff, Mary Elizabeth Cahill, and should be paid to the said plaintiff, Mary Elizabeth Cahill."

Judgment was thereupon entered in favor of the plaintiff, from which judgment the defendant appeals.

The money mentioned in the finding and judgment is the value of a certain building and loan certificate which was converted into cash during the pendency of the trial and the money placed in the custody of the clerk of the court to await the termination thereof.

Some time prior to the year 1931, W. L. Waldo and Laura Waldo, his wife, acquired an accumulative investment certificate of the Mutual Building & Loan Association at Long Beach. The certificate was attached to a passbook, and on the front of the passbook the name of "W. L. Waldo" was written. The records of the association show that the certificate just mentioned belonged to W. L. Waldo and Laura Waldo, as joint tenants with the right of survivorship. Laura Waldo died during the year 1931, and while it appears that no proceedings were taken to obtain a decree of any court that the wife's interest in the certificate had terminated and that W. L. Waldo became the sole owner thereof by reason of the right of survivorship, it is sufficient to say that by reason of the right of survivorship under the certificate, the sole ownership immediately vested in W. L. Waldo without any adjudication of court evidencing that fact. The decree of the court establishing the death of Laura Waldo would be an evidence of title, and an evidence that the title had passed to W. L. Waldo, but would not constitute, in and of

itself, transfer of title, as the title would have already passed by operation of law.

The plaintiff in this action appears to have been a foster daughter of W. L. Waldo and Laura Waldo, and had lived with them for a great many years. It appears in the record that some time during September, 1932, W. L. Waldo handed to the plaintiff a joint tenancy card and asked the plaintiff to sign the same. This card was signed, returned by the plaintiff, but just what became of the card does not appear. However, it does appear that the name of the plaintiff was thereafter written upon the passbook just referred to by some one other than the plaintiff. The record would indicate that it was written by some officer, clerk, or employee of the Mutual Building & Loan Association. The passbook with the certificate attached remained in possession of W. L. Waldo until on or about the 6th or 7th day of February, 1933, at which time the passbook was handed to the plaintiff by W. L. Waldo, together with the statement made by W. L. Waldo to the plaintiff that "this is yours." Shortly thereafter W. L. Waldo, who had been ill for several months, was taken to an hospital, where he subsequently died. It appears that small sums of money were drawn from the building association both by W. L. Waldo and also by the plaintiff. After the delivery of the passbook, with the certificate attached, to the plaintiff, it remained in her custody and control. Upon the death of W. L. Waldo, the executor of his estate claimed the ownership of the property. Hence, this action.

[1] No question is raised as to the competency of W. L. Waldo at the time of the delivery of the passbook and certificate to the plaintiff. No question is raised that the passbook and certificate were delivered to the plaintiff by W. L. Waldo during his lifetime. The argument of the appellant is simply directed to the point that the transaction did not amount to a transfer of whatever title and ownership W. L. Waldo had in the passbook and certificate, and did not constitute a gift.

Some contention is made by the appellant that the complaint is so worded that the finding of a gift of the passbook and certificate by W. L. Waldo to the plaintiff could not be sustained by testimony showing an immediate gift and transfer of title by the delivery of the passbook, on the theory that the title passed only upon the

death of W. L. Waldo. Just to what extent the court was influenced by the character of the pleading filed by the plaintiff does not seem to us to be very material. The testimony in the case, if accepted by the court and acted thereon, was amply sufficient to support a finding that the title to the passbook and certificate passed immediately upon the handing of the same by W. L. Waldo to the plaintiff, with the statement that the passbook and certificate was then and there the property of the plaintiff. True, W. L. Waldo used the language, "this is yours," but that is equivalent to any language importing a gift. We think it is just as effective as though W. L. Waldo had said to the plaintiff, "I am making a gift of this passbook and certificate to you, and am handing it to you to take possession of, keep, and have as your own property." At the time of the delivery of the passbook with the certificate attached, there was no written assignment entered thereon by W. L. Waldo. This, however, was unnecessary.

In the case of *Dellepiane v. Hynes*, 83 Cal. App. 604, 257 P. 180, the absence of a signature to a chose in action when delivery thereof is made, with the intention of transferring title by way of gift, is wholly immaterial. The decision in that case, supported by numerous citations, is well indicated by one of the syllabi, which we quote: "The delivery of a pass-book covering a savings account, with the intention of making a gift of the deposits represented by it, is sufficient to pass title to the deposits without written assignment or order, under section 1146 of the Civil Code, defining a gift, section 1147, relating to verbal gifts, section 663, defining personal property, and section 953, defining choses in action."

In *Crane v. Reardon*, 217 Cal. 531, 20 P. (2d) 49, 50, we find the following: "While it has been held that under our statute there cannot be a valid oral gift of a chose in action not evidenced by a writing (*Adams v. Merced Stone Co.*, 176 Cal. 415, 178 P. 498, 3 A.L.R. 928), it is well settled that, where the chose in action is evidenced by a written instrument such as a note, bank passbook, bill of exchange, etc., mere manual delivery without written endorsement is sufficient. *Dellepiane v.*

Hynes, 83 Cal.App. 604, 257 P. 180. The same rule should be applied, and has been held to apply, to the delivery of shares of stock. *Leyson v. Davis*, 17 Mont. 220, 42 P. 775, 31 L.R.A. 429; *Grimes v. Barndollar*, 58 Colo. 421, 148 P. 256; *Talbot v. Talbot*, 32 R.I. 72, 78 A. 535, Ann.Cas. 1912C, 1221; *Mechem, Gifts of Corporation Shares*, 20 Ill.L.Rev. 9; 28 C.J. 700."

[2] The appellant urges as a further ground for reversal that the testimony in this case showing a gift of the passbook and certificate is supported only by the testimony of the plaintiff, and that under the provisions found in subdivision 3 of section 1880 of the Code of Civil Procedure, her testimony cannot be considered. The record shows the cross-examination of the plaintiff in which all of the details of the transaction were covered very fully, and the plaintiff made to testify as to the gift, the words used, and the actual manual delivery of the passbook with the certificate attached. Under such circumstances, the prohibitions found in subdivision 3 of section 1880, supra, must be held to have been waived. This appears conclusively established by the opinion in the case of *Deacon v. Bryans*, 212 Cal. 87, 298 P. 30, 32. In that case, the court said: "There is no question but that the provisions of subdivision 3 of section 1880 of the Code of Civil Procedure may be waived by an executor." Citing *Kinley v. Largent*, 187 Cal. 71, 200 P. 937; *McClenahan v. Keyes*, 188 Cal. 574, 206 P. 454. To the same effect is the case of *Davis v. Mitchell*, 108 Cal. App. 43, 290 P. 887.

There being no conflicting evidence as to what took place in this case, the only point being as to whether a gift could be made in the manner set forth and the justification of the trial court in acting upon the testimony of the plaintiff, we do not deem it necessary to cite any authorities as to what acts are necessary to constitute a gift, other than those which we have cited to the effect that a written assignment in this case was unnecessary.

Finding no merit in the appeal, the judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

9 Cal.App.2d 624

**OIL WELL SUPPLY CO. v. SUPERIOR
COURT IN AND FOR LOS AN-
GELES COUNTY.
Civ. 10483.**

District Court of Appeal, Second District,
Division 1, California.
Nov. 1, 1935.

1. Courts ⇨40

Order made by court which has no jurisdiction of subject-matter before it is void.

2. Courts ⇨4

Court has no jurisdiction of matter which is not action or special proceeding provided by statute unless it involves wrong which requires judicial action, and for which there is no adequate statutory remedy (Code Civ.Proc. § 22).

3. Trusts ⇨298

Superior court held without jurisdiction to hear and approve account of trustee appointed by court to administer private trust or to fix rights of beneficiary thereunder in absence of action brought for that purpose, since attempted accounting was not "action" and was not authorized by statute as special proceeding (Code Civ.Proc. § 22; Civ.Code § 2287).

[Ed. Note.—For other definitions of "Action; Action at Law," see Words & Phrases.]

Petition for a writ of prohibition by the Oil Well Supply Company against the Superior Court of the State of California, in and for the County of Los Angeles.

Peremptory writ issued.

Joseph J. Rifkind, A. I. McCormick, and George Elstein, all of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, D. De Coster, Chief Deputy Co. Counsel, and Victor P. Showers, all of Los Angeles, for respondent.

EDMONDS, Justice pro tem.

Petitioner seeks a writ of prohibition against the superior court to prevent it from hearing the account of a trustee of a private trust and making an order thereon. The facts, as we shall state them, are undisputed.

A number of years ago Wigle & McBride, Inc., a corporation, executed a trust agreement for the benefit of its

creditors, of which petitioner is one. L. T. McCutcheon, Harold A. Gilman, and Frank H. Madden were named as trustees, and administered the property of the trust for some time. On March 10, 1930, each of the three trustees had either died or resigned. On that date the predecessor in interest of petitioner filed a petition in the superior court, alleging the existence of the trust without any trustee to administer it, and requesting the court to appoint a trustee. Upon a hearing of this petition, the court made an order appointing L. T. McCutcheon sole trustee. This order further provides "that the said L. T. McCutcheon be and he is hereby authorized and empowered to take possession of any and all books, records, files and papers of said trusteeship and to prepare and render an account of said trusteeship and the business and conduct thereof from its inception to this date." No appeal was ever taken from this order.

Some three years later, L. T. McCutcheon filed his "First Account Current, Report and Petition for Instructions," which was set down for hearing. Thereafter the respondent court made an order therein approving and settling the account and instructing the trustee as to several matters. In July, 1935, the trustee filed his "Second Account Current, Report and Petition for Instruction." Thereupon the superior court made an order that the account, report, and petition be set for hearing and that notice be given to the creditors and beneficiaries under the trust agreement by publication of the order once and by posting it in three public places in the county not less than ten days prior to the hearing. Petitioner here asserts that the court has no jurisdiction to hear the trustee's account and fix the rights of itself and others by this proceeding.

[1-3] Unless the superior court has jurisdiction of the subject-matter before it, any order made will be wholly void. "Jurisdiction in any proceeding is conferred by law; that is, by the Constitution or by statute. Jurisdiction of the subject-matter cannot be given, enlarged, or waived by the parties." *Harrington v. Superior Court*, 194 Cal. 185, 188, 228 P. 15, 16. The attempted accounting of the trustee is not an action (section 22, Code Civ.Proc.), and there is no authority

for it under the statutes as a special proceeding, which is the other classification of judicial remedies. In fact, no provision for it is found in our statutes. In such a situation the court has no jurisdiction unless there is a wrong which requires judicial action, and there is no adequate statutory remedy. But a complete procedure for the determination of all of the property rights brought before the court by the challenged petition is available in the ordinary action. The established procedure must therefore be followed.

In a case involving a similar question, where jurisdiction of the accounting of an express private trust was attempted to be upheld upon the ground that it was a special proceeding, it was said: "The phrase 'special proceeding' is a mere generic term to designate the character of all civil remedies which are not included within the ordinary characterization of actions. Sections 22, 23, Code Civ.Proc.; Words and Phrases, First Series, vol. 7, 6587; In re Central Irr. Dist., 117 Cal. 382, 387, 49 P. 354; In re Herman, 183 Cal. 153, 156, 191 P. 934. Jurisdiction in special proceedings is generally conferred by statute. Part 3 of the Code of Civil Procedure authorizes the maintenance of certain special proceedings. Among others which are thus provided for are the contest of elections, the dissolution of copartnerships, a change of names, the operation of sole traders and the establishment of official newspapers of general circulation. In the absence of statutory provisions authorizing special proceedings, the mere fact that a private transaction does not involve 'the enforcement or protection of a right, the redress or prevention of a wrong or the punishment of a public offense,' does not necessarily constitute it a special proceeding over which a court may exercise jurisdiction." *Gillette v. Gillette*, 122 Cal. App. 640, 643, 10 P.(2d) 760, 761.

The same conclusion was reached by the Supreme Court in a case which also involved a private trust, for which the superior court had appointed a successor-trustee after the resignation of the trustee named in the declaration of trust. Thereafter the trustee so appointed filed his account and report, to which objection was made upon the ground that the superior court had no jurisdiction to hear

such account and make an order thereon. In an original proceeding brought to compel the superior court to entertain jurisdiction and to proceed with the hearing of the account, the court said: "The respondents rely principally upon the cases of *Gillette v. Gillette*, 122 Cal.App. 640, 10 P.(2d) 760, and *State v. Muench*, 217 Mo. 124, 117 S.W. 25, 129 Am.St.Rep. 536, to support their contention that the respondent court has no jurisdiction to settle the account filed by the trustee or to hear the petition for his removal as trustee. We may take the declaration in the case of *State v. Muench*, supra, to be a correct statement of the law, where not inconsistent with pertinent statutory provisions, viz., that the court in the matter of a private trust having appointed a new trustee and provided for his bond and invested him with title, has exhausted its jurisdiction over the subject-matter and that the court thereafter has no power to administer the trust or settle the account of the trustee. In the case of *Gillette v. Gillette*, supra, it was determined that the court was without jurisdiction to settle an undisputed voluntary account of the trustee of a strictly private trust, or to fix the amount of compensation to be paid the trustees and their attorneys for their services in such a matter. The court there, however, excluded from the effect of its declaration any such matter as to which there was a dispute or controversy.

"We may, on the facts presented, assume that if the account voluntarily filed by the trustee is in truth and in fact an account strictly of his activities, receipts, and disbursements in relation only to the private trust, the court in said proceeding numbered 266277 had no further jurisdiction to act in the matter. We may also assume without deciding that in such a case, where a controversy exists, the processes of the court in an independent proceeding should be invoked." *Middlecoff v. Superior Court*, 220 Cal. 410, 415, 31 P.(2d) 200, 202.

The superior court had jurisdiction to appoint petitioner L. T. McCutcheon as trustee under the provisions of section 2287 of the Civil Code. But this jurisdiction cannot be enlarged or extended to include the determination of rights of property in the trust estate except in an action brought for that purpose, where

constitute a competent and brave officer of the law, and renders his situation exceedingly regrettable. His strong suspicion that said two strangers were marauding criminals proved to be well founded. In fact, he diagnosed the situation perfectly. It turned out that said two strangers who, but a few moments before they were accosted by applicant and Sergeant Edward Johnson, a police officer of the city of Long Beach, as they stepped from the elevator exit to the sidewalk, were returning from the commission of a robbery which they had committed but a few moments before in a business office on the tenth floor of the building from which they emerged. Neither applicant Agal nor policeman Johnson were aware of this robbery at the time they encountered the bandits.

The facts upon which applicant relies as sufficient to sustain the award may now be considered. On the day applicant received his wounds he was and had been for some time prior thereto an employee of the J. B. Worley Detective Agency, a private agency operating in the city of Long Beach. His attention was directed to the bandits, while in said employment, at about 9:30 o'clock in the morning as he passed the car in which they were sitting. Both appeared to be nervous and were scrutinizing him as he walked closely to the car in which they were sitting and looked in upon them. He observed the unusual condition of the license plate and felt convinced that it had been designedly tampered with for "get-away" purposes. He then proceeded to a nearby telephone and called up Captain Worley, the head of the detective agency which employed him. He told him of the presence of the two suspicious characters and gave it as his belief that they were preparing to "stick up the bank or pull some job." The bank was nearby the place where they had parked. Captain Worley replied that he was unable to get away, but instructed applicant, to quote his language, "to get hold of the police and, if you can assist them in any way, why do so." Applicant hurried back to the place where the car was parked and observed that one of its occupants had gotten out and was nervously looking up and down the street. Finally, the other got out of the car and walked rapidly toward, and entered the Farmers' & Merchants' Bank Building. Applicant, observing police officer Hill across the street, hailed him and related his suspicions as to the two strangers and "suggested that they ought to look them over." They then went to the car and

Hill raised the door of the luggage compartment and observed that it contained a rifle. Hill, upon coming to the sidewalk where applicant stood, told him that the automobile contained a rifle and remarked that it did not look good to him. Applicant said that if he had seen the two fellows who got out of the car it would have looked even worse to him. Hill then said to him, "You keep an eye on that car and I will go in and telephone to the station." Officer Hill and applicant took a position against the building near the car and in a few minutes Sergeant Johnson of the city police force arrived. All agreed that Hill, who was in uniform, should not be present when the bandits returned. Not more than two or three minutes after Hill had left, the two men came out of the building and applicant informed the officer of their approach. As they reached a point in front of said bank building, they suddenly halted and the driver of the car went north toward the parked car, while the other man turned southerly. Applicant remarked to officer Johnson, "I think we are in for a jam." With this he started in pursuit of the bandit who had turned in a southerly direction and upon passing him a few feet the bandit suddenly turned and headed in the direction of the parked car when he was overtaken by applicant who grabbed him by his coat sleeve, turned him around and pulling out his badge, said, "I would like to check on you, buddy." The bandit shook his right hand free and said, "I don't need to be led." Having gained the freedom of his right arm he thrust his hand down under his sweater, and applicant, becoming suspicious that he was reaching for his arms, undertook to draw his pistol, but discovered that he had left it at his home and that he was absolutely unarmed. He then reached for his "sap" or club as he saw the bandit drawing his pistol from beneath his sweater, and struck at the bandit, but he warded off the blow by throwing up his arm and the blow fell lightly on the bandit's chin. The bandit closed in, and, pressing his gun close to applicant's stomach, shot him through the stomach, exclaiming as he fired: "Take that, you rat." The other two shots were fired in rapid succession and the bandit and his partner in crime both made good their escape.

It is the claim of the city of Long Beach that the finding by the commission that applicant, Verlin K. Agal, was an employee of said city of Long Beach on May 22, 1934, and that said injuries sustained by him

arose out of or occurred in the course of his employment by said city as special police officer or as an employee in any capacity or at all is not sustained by the evidence and is contrary to law. In addition to the facts above set forth, there may be added others which applicant stresses, as amounting to convincing proof that he was an employee of said city but which, it will be found upon examination, whether considered singly or in connection with the context of his testimony, fall far short of establishing a case of compensatory liability. Prior to the hour at which he was instructed by the head of the private detective agency, his employer, to report the presence of said suspects to the city police officers and to give them any assistance that he could render, he had not been in the employ of the city, except that some five years prior to May 22, 1934, he served a former city manager for a period of six months in the capacity of investigator, but admittedly he was not an employee of said city at the time he was injured, unless it can be said that the conversations had with the officers under the instructions of his employer amounted to a contract of employment. He cannot qualify as an officer or as an employee of the city by force of any of the several provisions of law cited and relied upon, or by the authority of any decision of this state construing the law, even if strained to the utmost limit. In reporting the presence of the suspects to his employer rather than to the police department, the applicant was, no doubt, moved by the desire that credit for the discovery and apprehension of the suspected criminals should be given to the detective agency of which he was an employee. That applicant expected the agency would act independently of the local police is given emphasis by the fact that he requested or suggested to his employer that he assist him in completing his investigation. The employer being otherwise engaged, he instructed him to report the matter to the local police and to give them such assistance as he could render. In what we have here said it is not intended to deprecate the motives of applicant in the slightest degree. While it shows commendable loyalty to his employer, it also tends to prove that he owed the peace officers of the city no official allegiance.

Other portions of the conversations which he had with officers Johnson and Hill on the day of the shooting, heretofore noticed, and which applicant would interpret as conferring official authority upon him, cannot be so construed. In fact, he took an ac-

tive and leading part in directing the investigation. He was obeying his employer's instructions. The suspects were not under arrest, as they had not committed any violation of law known to the officers or applicant. He initiated the investigation. The investigation was in line with his training as a private detective, and he was the first to suggest that the strangers be "looked over," which meant that they should be stopped and questioned as to their business and identity. At the time he related his misgivings concerning the suspects to officers Johnson and Hill, Johnson (quoting applicant's words) "said to him to stay and we will probably shake these birds down—something to that effect." As the two bandits came out of the bank building and separated applicant said to Johnson, "I think we are in for a jam." He then started south and undertook to do what he had suggested at the outset, to "look them over," or "shake them down." His first words to the bandit whom he halted were that he would like to "check" on him.

Applicant testified that he thought the man he intended to check on was trying to make a getaway and his first thought was to trail him and see where he was going. There is nothing in the testimony of applicant that would justify the finding that he was impressed into public service by any one clothed with official authority, nor is there any evidence to warrant a finding that an official demand was made upon applicant to assist in the arrest of either of said suspects. In fact, it is not claimed that any attempt at arrest was made. Neither the applicant nor the officers of the law had any reason to believe that the suspects had committed any specific offenses, nor did any of the grounds set forth in section 150, Penal Code, which empowers "any sheriff, deputy sheriff, coroner, constable, judge, or justice of the peace, or other officer concerned in the administration of justice," to organize a posse comitatus or to impress into service any male person above the age of 18 years in the prevention of a breach of the peace or any criminal offense, exist. No such extraordinary situation which justifies action under the provision of the Penal Code confronted the constabulary. In fact, one peace officer had been dismissed from the investigation because he was in uniform.

It is very clear from the record that there was no deputation by the local peace officers, or any occasion to do so. The fact that the officer asked him to keep his eye upon the men and the automobile

while he went to the telephone was not an extraordinary request and is one that an officer may have properly made of any citizen who happened to be near by.

[1] Our conclusion, as above announced, renders it unnecessary to decide whether or not section 159 of the charter of Long Beach has any application to or is germane to the question here presented. It provides that the "city manager may appoint additional patrolmen and officers for temporary service and that no person shall act as special policeman, or detective, or other special officer for any purpose whatsoever, except upon written authority from the city manager. Such authority shall be exercised only under the direction and control of the chief of police, and for a specified time."

Its provisions are merely regulatory of the method by which appointments shall be made, and it was not intended thereby to abridge or conflict with the general laws of the state enacted for the purpose of suppressing riots or for the prevention of threatened breaches of the peace when such tumultuous occasions arise as are within the contemplation of sections 150 and 723, Penal Code.

We find nothing in County of Monterey v. Industrial Accident Commission, 199 Cal. 221, 248 P. 912, 913, 47 A.L.R. 359, that helps applicant. The facts in that case basically differ from those which make up the instant case. There the applicants were the widow and the daughter of one N. H. Rader, who was commandeered into service by the sheriff of the county of Monterey against his protest, under the following circumstances: "He [decendent] had attended a meeting of a fraternal organization on the night of July 6, 1925, and was returning to his home at about the hour of 11 o'clock, at which time he was commanded by the sheriff of Monterey county, who was then organizing a party of officers for the purpose of apprehending and placing under arrest certain violators of the Wright or Volstead Acts * * * who were criminally connected with landing or seizing by force a cargo of intoxicating liquors, and who had earlier in the evening while engaged in said

unlawful enterprise, fired upon the sheriff's deputies, and were lurking under cover of night at or near Moss Landing, said county, to join said party of officers in the pursuit of said violators of the law. The sheriff, as he was about to depart for Moss Landing, observed the presence of N. H. Rader, and commanded his services. The party then consisted of the sheriff, a regularly appointed deputy sheriff, and the chief of police of the city of Salinas. The sheriff had been in search of the constable of Salinas township to complete his aide, but, being unable to find him, mustered said Rader into service in his stead. A firearm, furnished by the deputy sheriff, was placed in the hands of Rader. Upon arriving at the objective spot at about 12 o'clock midnight, the party or posse was divided into two groups. While they were in the act of being stationed at certain points to block the avenues of escape and there to await the coming of day, they were viciously fired upon by the persons whom they were attempting to place under arrest and who were armed with machine guns, with the result that a bullet fired from a machine gun operated by said persons pierced the heart of Rader, and he was instantly killed."

[2] All of the California authorities cited by applicant are reviewed in the above-cited case, but none supports him as to the point that the city of Long Beach, in the circumstances of the instant case, was his employer. If he was a deputy sheriff of the county of Los Angeles, as intimated, his claim should have been against said county. Unquestionably, he was in the employ of the Worley Detective Agency, engaged in performing the services of a private detective in obedience to his employer's orders, at the time he was wounded.

We are not able to find a ground upon which liability against the city can be fairly placed. Our conclusion, therefore, is that the order of the District Court annulling the award made against said city was properly made as a matter of law, even though placed on different grounds from those herein assigned.

The award is, therefore, annulled.

4 Cal.2d 662

FILOLI, Inc., v. JOHNSON, State Treasurer.
S. F. 15093.

Supreme Court of California.
Nov. 29, 1935.

1. Constitutional law ☞190
Taxation ☞53

Imposition in August, 1931, of additional franchise tax for 1931 under amendment to franchise act effective February 27, 1931, changing method of computing franchise tax for second taxable year of new corporation *held* proper as against contention that such imposition gave amendment unconstitutional retroactive effect, where tax was for privilege of engaging in business in 1931 (St. 1929, p. 20, § 4; St. 1931, p. 65, § 13; Const. art. 13, § 16, subd. 2 (a), adopted in 1928).

2. Taxation ☞53

Under constitutional provision for franchise tax, Legislature could institute system of computing tax to insure payment of annual tax exacted for privilege in year in which privilege was exercised (Const. art. 13, § 16, subd. 2 (a), adopted in 1928).

3. Taxation ☞376(1)

Amendment to franchise tax act changing method of computing tax for second taxable year of new corporation did not permit computation of tax for second year on basis of tax paid for first year, but required computation of tax on basis of net income for first taxable year (St. 1931, p. 65, § 13).

In Bank.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by Filoli, Incorporated, against Charles G. Johnson, State Treasurer of the State of California. From a judgment for the defendant, the plaintiff appeals.

Affirmed.

Theodore J. Savage and Eliot G. Stoutenburgh, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for respondent.

SHENK, Justice.

The plaintiff appeals from a judgment for the defendant in an action to recover a portion of the franchise tax assessed against the plaintiff for the year 1931 and paid under protest.

The plaintiff was incorporated under the laws of California and commenced to do

business on July 1, 1930. At the time of its incorporation it paid the minimum tax of \$25 required by the Bank and Corporation Franchise Tax Act (St. 1929, p. 19, as amended), for the privilege of exercising its franchise in the year 1930. The plaintiff's fiscal year is the calendar year. In compliance with section 13 of the act, the plaintiff filed its return at the close of the year 1930 showing its net income for the period July 1-December 31, 1930. The return disclosed a franchise tax due for the taxable year 1930, computed at 4 per cent. of net income for the stated period, less allowable offsets, of \$1,527.27. The plaintiff paid this amount less the \$25 minimum theretofore prepaid. At the same time the plaintiff made an identical return showing its net income for the same period and the net tax due of \$1,527.27, as a basis for computing and imposing its franchise tax for the year 1931, which sum it also paid. In August 1931 the franchise tax commissioner assessed against the plaintiff an additional tax of \$8,017.66 for the year 1931. It is this additional tax, together with added penalties and interest, which is sought to be recovered. The plaintiff has abandoned its protest and asserted cause of action as to \$696.60 of said amount, which was the proportion of the tax measured by the percentage of income from tax exempt bonds. The decision in the case of Pacific Company, Ltd., v. Johnson, 285 U.S. 480, 52 S.Ct. 424, 76 L.Ed. 893, filed since this action was commenced, holds adversely to the plaintiff's grounds of protest as to that amount. It sought recovery for the balance of the additional tax on the theory that there was no lawful basis for imposing such tax.

The power of the Legislature to impose the franchise tax here involved was derived from section 16 of article 13 of the Constitution adopted on November 6, 1928. Subdivision 2 of that section provided: "(a) All financial, mercantile, manufacturing and business corporations doing business within the limits of this state, subject to be taxed pursuant to subdivision (d) of section 14 of this article, in lieu of the tax thereby provided for, shall annually pay to the state for the privilege of exercising their corporate franchises within this state a tax according to or measured by their net income. The amount of such state tax shall be equivalent to four per cent of their net income. Such tax shall be subject to offset, in a

manner to be prescribed by law, in the amount of personal property taxes paid by such corporations to the state or political subdivisions thereof, but the offset shall not exceed ninety per cent of such state tax. In any event, each such corporation shall pay an annual minimum tax to the state, not subject to offset, of twenty-five dollars. (b) The legislature, two-thirds of all the members elected to each of the two houses voting in favor thereof, may provide by law for the taxation by any other method authorized in this Constitution of the corporations, or the franchises, subject to be taxed pursuant to subdivision (a) of paragraph 2 of this section or subdivision (d) of section 14 of this article."

In 1929 (St. 1929, p. 19) the Legislature enacted the Bank and Corporation Franchise Tax Act. Section 4 of the act provided: "Every financial, mercantile, manufacturing and business corporation doing business within the limits of this state, of the classes referred to in subdivision 2 (a) of section 16 of article thirteen of the constitution of this state, shall annually pay to the state, for the privilege of exercising its corporate franchises within this state, a tax according to or measured by its net income, to be computed, in the manner hereinafter provided, at the rate of four per centum upon the basis of its net income for the next preceding fiscal or calendar year." The section also made provision for offsets and for payment of the minimum tax of \$25, and that the annual tax shall accrue on the first day after the close of the "taxable year," which is defined by section 11 to mean either the calendar year or the fiscal year ending during such calendar year upon the basis of which the net income is computed.

Section 13 (St. 1929, p. 1555) provided: "A bank which locates or commences to do business within the limits of this state, and a corporation which commences to do business in this state, after the effective date of this act, shall thereupon prepay the minimum tax hereunder, and upon the filing of its return within two months and fifteen days after the close of its taxable year its tax for that year shall be adjusted upon the basis of the net income received during that taxable year. Said return shall also, in accordance with sections 23 to 26 inclusive, be the basis for the tax of said bank or corporation for its second taxable year."

It is the plaintiff's contention that the return for the year 1931, its second year, showing a tax due of \$1,527.27, made pursuant to the foregoing sections, is the correct and only return required of it.

On February 27, 1931 (St. 1931, pp. 64, 65), the Legislature amended section 13 of the act by adding thereto, after the portion hereinabove quoted, the following: "Except that in every case in which the first taxable year of a bank or corporation constitutes a period of less than twelve months, the net income to be used as the measure of the tax for the second taxable year shall be in the same proportion to the net income for the first taxable year as the number of months in the second taxable year bears to the number of months covered by the return for the first taxable year." This was passed as an emergency measure, by two-thirds of both Houses of the Legislature.

[1] It was subsequent to the effective date of said amendment to section 13 that the tax commissioner imposed the additional tax of approximately \$8,000 for the year 1931, which was based on 4 per cent. of double the net income of the plaintiff for the period July 1-December 31, 1930, less the appropriate offsets. It is contended that the imposition of the additional tax was pursuant to said amendment, and that so to impose the same was to give the amendment of February 1931 an unconstitutional retroactive effect. That the contention is without merit is plainly indicated by the decision in *Fullerton Oil Company v. Johnson*, 2 Cal.(2d) 162, 39 P.(2d) 796, 802. A similar contention was made in that case with respect to the amendment at the same time of section 8 (g) of the act changing the method of computing depletion allowances. Likewise in that case the contention was made that the law in force on the accrual date, viz., "the first day after the close of the 'taxable year,'" which was January 1, 1931, fixed the liability of the taxpayer, and that the amendment enacted subsequently could not be applied retroactively. This court disposed of the question adversely to the contention, stating: "The retroactivity alleged is more apparent than real. If the 1931 amendment be applied in computing the 1931 tax, such application is to give the amendment a prospective rather than a retroactive operation. Although under the act the net income earned in 1930 is used as a base for computing the tax due

for 1931, the tax collected in 1931 is not for the privilege of doing business in 1930 but is a tax for the privilege of doing business as a corporation in California for 1931. It is a tax for the privilege of exercising a corporate franchise for the entire year 1931—that is the current year when the act here involved became effective. The privilege being taxed is a present and continuing privilege, the amount of the tax being measured by the transactions of a prior year. Although, under the act, the tax accrued on January 1, 1931 and became a lien on the first Monday in March, 1931, the tax imposed for that year was for the entire current year. There is no reasonable or legal basis for contending that a taxpayer is entitled, regardless of legislative action, to have current taxes computed on the same basis as past taxes have been assessed. It is well settled that taxes for the current year may be changed any time during the year, and, in fact, additional taxes may be imposed during the current year on the same subject of taxation." (Citing cases.) The same reasoning disposes of the question here adversely to the plaintiff's contention.

[2] There is no merit to the further contention that by the provisions of the Constitution it was contemplated that the tax for 1931 should be based on the income for that year and not on the income for the preceding year. The Legislature was conferred with power sufficiently broad to warrant the institution of a system of computing the tax to insure payment of the annual tax exacted for a privilege in the year in which the privilege was exercised. This system of computation has been employed in similar legislation in this state since 1910, and has been approved inferentially at least in the following cases: *Pacific Gas & Elec. Co. v. Roberts*, 176 Cal. 183, 167 P. 845; *Pullman Co. v. Richardson*, 185 Cal. 484, 197 P. 346; affirmed 261 U.S. 330, 43 S.Ct. 366, 67 L.Ed. 682; *People v. Ford Motor Co.*, 188 Cal. 8, 204 P. 217; *Pacific Co., Ltd., v. Johnson*, 212 Cal. 148, 298 P. 489; affirmed 285 U.S. 480, 52 S.Ct. 424, 76 L.Ed. 893; *Fullerton Oil Co. v. Johnson*, 2 Cal.(2d) 162, 39 P.(2d) 796. See, also, *Educational Films Corporation v. Ward*, 282 U.S. 379, 51 S.Ct. 170, 75 L.Ed. 400, 71 A.L.R. 1226; *New York v. Jersawit*, 263 U.S. 493, 44 S.Ct. 167, 68 L.Ed. 405; *Anderson v. City of Birmingham*, 205 Ala. 604, 88 So. 900.

[3] The plaintiff does not show error in the computation of the tax by the tax commissioner. There is no justification in the language of the act for the computation of the 1931 tax, the tax for the second year, by doubling the tax payable for the first year. The statute plainly requires the adjustment to be made on the basis of the net income for the first taxable year, rather than on the basis of the tax paid for that year.

Other points made are equally without merit.

The judgment is affirmed.

We concur: WASTE, C. J.; THOMPSON, J.; LANGDON, J.; SEAWELL, J.; CURTIS, J.



4 Cal.2d 634

KERR, Registrar of Voters, v. RUSSELL,
Purchasing Agent.
S. F. 15552.

Supreme Court of California,
Nov. 27, 1935.

Statutes $\hookrightarrow$ 35½

Where initiative act for permanent registration of voters precluded Legislature from requiring periodic re-registration, legislative amendment to prior requirement of statute so as to provide for re-registration held not to violate constitutional provision prohibiting legislative amendment of initiative measures, since initiative measure only abolished periodic re-registration and did not abridge legislative power to require permanent re-registration (Pol.Code, § 1094, as amended by St. 1931, p. 2177, § 1, and as amended by St. 1935, c. 715; Const. art. 4, § 1).

In Bank.

Proceeding in mandamus by William M. Kerr, as Registrar of Voters of the County of Los Angeles, against H. E. Russell, as Purchasing Agent of the County of Los Angeles, to compel the respondent as purchasing agent to purchase supplies requisitioned by petitioner for the purpose of registering the qualified voters of that county.

Peremptory writ of mandate issued.

Shattuck, Davis & Story, of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and Fred M. Cross, Deputy Co. Counsel, both of Los Angeles, for respondent.

Clarence E. Todd and Warren H. Pillsbury, both of San Francisco, amici curiæ.

THOMPSON, Justice.

By this proceeding in mandamus it is sought to compel the respondent, as purchasing agent of Los Angeles county, to purchase the paper, printing, materials, and supplies requisitioned by petitioner for the purpose of registering the qualified voters of that county. The controversy arises out of an amendment to section 1094 of the Political Code, adopted by the Legislature at its last session. (Chapter 715).

Section 1 of article 4 of the State Constitution, provides in effect that no initiative measure adopted by the people at the polls shall be amended or repealed except by a vote of the electors, "unless otherwise provided in said initiative measure." On November 4, 1930, the people adopted an initiative act (Stats. 1931, p. lxxxix) for the permanent registration of voters, whereby several sections of the Political Code were amended, including section 1094. Section 11 of the act (Stats. 1931, p. xcvi) provides as follows: "Any section of this act may be amended by the Legislature, except that no amendment by the Legislature shall provide for a general biennial or other periodic re-registration of voters."

Prior to the legislative session of 1935, section 1094, Political Code (as amended by St. 1931, p. 2177, § 1), provided in substance that, commencing with the year 1932, all of the voters of the state should be registered in a new and complete registration thereof. Other sections amended by the initiative measure indicate that such registration was intended to be permanent and that the affidavits of registration were to remain in effect until canceled by the person registered or by the county clerk or registrar of voters for any of several causes enumerated by the act. See section 1106, Pol. Code (as amended by St. 1931, p. 2324, § 3).

During the last session of the Legislature section 1094 was amended by substituting the year 1936 in the place and stead of 1932.

The respondent contends that the amendment contravenes the section of the Constitution to which we have referred. He does not contend that the duty to order the supplies is not imposed upon him by law, if the amendment is constitutional. We are of the opinion that the amendment must be held to be a valid exercise of the legislative power. The prohibition of the permissive section of the act is that no amendment "shall provide for a general biennial or other periodic re-registration of voters." The question is: What do the words mean? Or, what was the purpose sought by the limiting language? It appears manifest to us that the words mean that no amendment should provide for a general re-registration of voters every two years or for general re-registration of voters every four or six or other fixed period of years or time. The purpose sought to be accomplished by the language was undoubtedly to do away with the system theretofore existing of requiring a re-registration of voters every two years. Aside from effecting this object, the act plainly indicates that the power of the Legislature should remain unabridged. As amended, a new and permanent registration is required, commencing with the year 1936. No doubt the Legislature considered, as it is empowered and authorized to do, that conditions were of such a character that the general welfare and the purity of subsequent elections would be served by the re-registration of the voters, commencing with next year. We cannot assume from the present amendment that the Legislature will periodically amend the section of the law so as to defeat the purpose of the limitation. This we would have to do in order to lend weight to respondent's argument. On the other hand, if we were to sustain the contention of respondent, it would mean, if carried to its limit, that the Legislature would be without power ten, twenty, or even fifty years from now to provide for the permanent re-registration of voters regardless of the conditions then existing. In view of this conclusion the peremptory writ ought to issue.

It is ordered that the peremptory writ of mandate issue as prayed.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; CONREY, J.; LANGDON, J.

4 Cal.2d 632

**NATIONAL AUTOMOBILE INS. CO. et al. v.
INDUSTRIAL ACCIDENT COMMIS-
SION et al.
L. A. 15251.**

Supreme Court of California.
Nov. 26, 1935.

1. Master and servant ⇨382

Where employee within three days twice inhaled ammonia fumes, suffering disability therefrom for several weeks immediately thereafter, and another period of disability a year after, injuries and periods of disability held inseparable, and hence compromise agreement, notwithstanding it recited that date of injury was date of first injury, barred further recovery sought on theory of a second injury and second period of disability.

2. Master and servant ⇨398

Claim for compensation for disability resulting from inhaling ammonia fumes held barred where claim was filed more than six months after time employee had notice of compensable injury by reason of a disability of several weeks' duration, notwithstanding claim was filed within six months of commencement of second period of disability, which was period for which compensation was sought.

In Bank.

Petition under the Workmen's Compensation Act by the National Automobile Insurance Company, insurer, and R. J. H. Forbes, employer, to review an award of the Industrial Accident Commission in favor of Albert Wells, employee.

Award annulled.

F. Britton McConnell and W. H. Abrams, both of Los Angeles, for petitioners.

Everett A. Corten, of San Francisco, for respondents.

LANGDON, Justice.

This is a petition to review an award of the Industrial Accident Commission. The employee, Wells, was a carpenter. He had a latent inactive pulmonary tuberculosis which exhibited no symptoms. On May 30, 1933, while in the course of his employment, he inhaled escaping ammonia fumes, which caused a coughing attack. He went home for the rest of that day, but worked the following day. The next day, June 1, 1933, he again inhaled am-

monia vapors and suffered another coughing spell. Thereafter he received medical treatment for "severe bronchitis and small hemorrhage." He was bedridden for a week, and disabled for several weeks.

Wells then entered into negotiations with the insurance carrier of his employer, resulting in a compromise and release of claims, in consideration of the sum of \$155.61, plus a smaller sum in payment of the doctor's bill and medicines used. The Industrial Accident Commission approved the agreement on July 27, 1933.

Thereafter Wells continued to work for various employers as a carpenter until June 30, 1934, when his lung difficulties made it impossible to continue. On July 3, 1934, he filed application with the commission for adjustment of claim, alleging injury (inhaling of ammonia fumes) on June 1, 1933. The commission made an award for disability beginning June 30, 1934, and continuing indefinitely; and it also found that the claim was not barred by the statute of limitations.

The award of the commission rests solely upon a single sentence in the compromise and release agreement, reading: "The date of injury was May 30, 1933." The commission's theory is that Wells received two separate injuries, in each case the inhalation of ammonia fumes, one on May 30, 1933, and another on June 1, 1933; that the injury of May 30, 1933, was compromised as above stated; that the injury of June 1, 1933, culminated in disability June 30, 1934; and that the filing of claim a few days later, though more than a year after the date of injury, was within six months of the commencement of disability, and therefore timely. See Marsh v. Industrial Acc. Comm., 217 Cal. 338, 339, 18 P.(2d) 933, 86 A.L.R. 563.

[1,2] We are unable to agree with the commission's conclusion. The mention of the date of May 30, 1933, in the compromise agreement, cannot establish, contrary to the facts, two separate and distinct injuries, resulting in two separate and distinct periods of disability. Within three days the employee twice inhaled ammonia fumes, and was treated for several weeks thereafter. How can it be said that the inhalations on the first day caused the immediately following first disability, while those on the third day were not felt until a year later? The medical testimony in-

licated that both injuries contributed to the disability which followed them, and the claim for this disability was compromised and released. Moreover, the disability of several weeks' duration, following the last inhalation, gave the employee notice of a compensable injury, and under the decision in *Marsh v. Industrial Acc. Comm.*, supra, the statute of limitations commenced to run at that time, and constitutes a bar to the present claim.

The award is annulled.

We concur: WASTE, C. J.; CONREY, J.; CURTIS, J.; THOMPSON, J.; SHENK, J.



4 Cal.2d 611

KRENWINKLE v. CITY OF LOS ANGELES
et al.

L. A. 15177.

Supreme Court of California.

Nov. 20, 1935.

1. Municipal corporations ⇨864(3)

Lease of land to city at annual rental for term of years for municipal airport with option to purchase *held* not to create "indebtedness" for future rentals within constitutional limitation on municipal debt for any one year (Const. art. 11, § 18).

[Ed. Note.—For other definitions of "Indebted; Indebtedness," see Words & Phrases.]

2. Municipal corporations ⇨276

Maintenance of airport *held* not beyond power of municipality as engaging in "commercial or industrial enterprise" forbidden by charter (St. 1927, p. 485).

[Ed. Note.—For other definitions of "Commercial or Industrial Enterprise," see Words & Phrases.]

In Bank.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Fred A. Krenwinkle against the City of Los Angeles and others. From a judgment of dismissal, plaintiff appeals.

Affirmed.

George E. Cloud, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., and Frederick Von Schrader, Asst. City Atty., both of Los Angeles, for respondent city of Los Angeles.

James L. Patten, of Los Angeles, for respondents Martin and Comino Co.

Call & Murphey, Frank P. Doherty, and Robert B. Murphey, all of Los Angeles, for respondent Title Co.

O'Melveny, Tuller & Myers, Louis W. Myers, and Robert N. Frick, all of Los Angeles, for respondent Los Angeles Extension Co.

WASTE, Chief Justice.

Plaintiff, a taxpayer, brings this action to compel cancellation of two lease agreements pertaining to land used as a municipal airport and to compel the city of Los Angeles to discontinue and abandon the operation of the airport established and being maintained on the demised premises. Four demurrers to the amended complaint were sustained without leave to amend. Plaintiff appeals from the judgment of dismissal entered on the motion of defendants, following the order sustaining the demurrers.

The cause of action is based upon the contentions, as alleged in the amended complaint, that the leases are void because, first, the aggregate of the total amount of rental installments to be paid by the city exceeds the income and revenue provided by the city for the necessary and requisite expenditures of the city for the year, and therefore works a violation of article 11, section 18, of the State Constitution, which provides that a municipal debt incurred in any year shall not exceed the income and revenue provided for such year without the assent of the voters of the city, given at an election held for the purpose, nor unless other provisions of the Constitution have been complied with.

A second contention is that the charter of the city of Los Angeles prohibits the city from engaging in any "purely commercial or industrial enterprise" without the approval of the voters of the city manifested at an election. The conduct of a municipal airport, it is contended, falls within the inhibition. No phase of the question of the lease or maintenance of

the airport was submitted to the voters of the city for ratification at an election.

In addition to answering the two principal contentions just noted, the respondents advance a number of technical objections to the sufficiency of the amended complaint, raised by special demurrers, but we deem discussion of them unnecessary, for we are of the view that the demurrers were properly sustained on the general ground of failure of the plaintiff to state a cause of action. We therefore confine our discussion to the two main contentions advanced by the appellant.

[1] It is well-settled law in this state that the execution of a bona fide lease for a term of years does not create an immediate indebtedness or liability in excess of the installment of rent presently due. Appellant has apparently marshaled the total of the amounts of the installments to fall due during the terms of years of the leases in order to allege an aggregate of the purported positive, direct liability or municipal debt. Such construction of the leases is not a proper one under the authorities. This court has held that contracts like the leases here being examined do "not create any liability at the time they [are] executed, except a contingent future liability." *Doland v. Clark*, 143 Cal. 176, 180, 76 P. 958, 960. "The city had the right," says the court in the opinion, 143 Cal. 176, at page 181, 76 P. 958, 960, "to make contracts, if otherwise unobjectionable, to continue for 5 years," and to provide for payments at different times (citing other decisions of this court). "In order for these contracts to appear void under the Constitution," continues the court, "it must appear that an indebtedness or liability has been incurred for some year exceeding the income and revenue provided for such year." Plaintiff's complaint fails to show any such situation. The leading cases on this subject in this state are *McBean v. Fresno*, 112 Cal. 159, 44 P. 358, 361, 31 L.R.A. 794, 53 Am. St. Rep. 191, and *Smilie v. Fresno County*, 112 Cal. 311, 44 P. 556. In those cases, the authorities from other states are reviewed, and the provision of the Constitution, *supra*, is analyzed. All the city contracted to pay in the case of the leases now before us was one sum for the first year of the term, payable in advance, and an agreed annual rental thereafter, payable in equal monthly installments. Such a lease is valid and creates no indebtedness for future rentals. *Walla Walla v. Water Co.*,

172 U.S. 1, 19, 20, 19 S.Ct. 77, 43 L.Ed. 341; *City of South Bend v. Reynolds*, 155 Ind. 70, 57 N.E. 706, 707, 49 L.R.A. 795.

Nowhere in the leases under consideration is there anything to indicate nor does appellant claim, that the lease contracts are anything more than leases. Each lease, it is true, contains an option granting to the city the right to purchase the leased property when all rentals and other charges are paid, and the city has otherwise complied with the terms and provisions of the leases. The purchase price does not decrease with the amount of rent paid; neither can the rentals paid be applied on the option price. The leases provide that the rental paid is for and in consideration of the use and occupation of the property which the city receives and for the continued quiet use and enjoyment of it during the term for which the installment is paid. The sole debt or liability created by the leases is "that which arises from year to year in separate amounts" (*McBean v. Fresno*, *supra*), as the lessor furnishes the quiet use and enjoyment of the leased premises. The nature and effect of these leases serve to distinguish them from the leases construed in such cases as *City and County of San Francisco v. Boyle*, 195 Cal. 426, 233 P. 965, *Mahoney v. San Francisco*, 201 Cal. 248, 257 P. 49, 57, and other cases in which the leases create a "direct or indirect" obligation on the lessees to pay the total price at the time the leases are entered into, even though the payments are to be made over a term of years. As to such contracts, see *California Pac. Title & Trust Co. v. Boyle*, 209 Cal. 398, 407, 287 P. 968. In cases like that presented by the leases at bar, the indebtedness is not created until the consideration has been furnished; in the others, the debt is created at once, the time of payment only being postponed. *Walla Walla v. Water Co.*, *supra*.

[2] The second contention of appellant requiring discussion is that the city of Los Angeles is prohibited from maintaining and conducting the airport, as it will be thereby engaging in a purely commercial or industrial enterprise, the doing of which is forbidden by the city charter. This question must also be decided against appellant. The state of California has authorized the acquisition and maintenance of airports by municipalities. St. 1927, c. 267, p. 485. No provision of the Los Angeles city charter forbids it. The conduct and maintenance of an airport by a municipality is

a public enterprise, not "purely commercial or industrial." No better statement of this proposition has been called to our attention than is found in the discussion of the subject by Mr. Justice Cardozo in *Hesse v. Rath*, 249 N.Y. 436, 164 N.E. 342. Because of the advance in the science of aviation, and the universally recognized need of making provision for navigation of the air, a quotation from the opinion is here appropriate: "A city acts for city purposes when it builds a dock or a bridge or a street or a subway. *Sun Printing & Pub. Assn. v. New York*, 152 N.Y. 257, 46 N.E. 499, 37 L.R.A. 788. Its purpose is not different when it builds an airport. *Wichita v. Clapp*, 125 Kan. 100, 263 P. 12 [63 A.L.R. 478]. Aviation is to-day an established method of transportation. The future, even the near future will make it still more general. The city that is without the foresight to build the ports for the new traffic may soon be left behind in the race of competition."

The judgment is affirmed.

We concur: SHENK, J.; CONREY, J.; CURTIS, J.; LANGDON, J.; THOMPSON, J.; SEAWELL, J.



10 Cal.App.2d 288

GARRETT v. BOMASH et al.

Civ. 10522.

District Court of Appeal, Second District,
Division 2, California.

Nov. 21, 1935.

Rehearing Denied Dec. 13, 1935.

Hearing Denied by Supreme Court
Jan. 20, 1936.

1. Principal and surety ⇨169

Where husband and wife executed note which husband delivered to holder's assignor under contract showing intention that note was to be collateral for obligation of husband and his son-in-law as guarantors of another note and not collateral for payment of other note, wife held not a "surety" and not entitled to have realty originally hypothecated for guarantors' note applied to discharge of other note before action could be maintained against her.

[Ed. Note.—For other definitions of "Surety," see Words & Phrases.]

2. Principal and surety ⇨169

Where husband and wife executed note which was delivered by husband to holder's assignor to secure an obligation of husband and his son-in-law guaranteeing another note which was also secured by a trust deed, even if wife was merely a surety, she was not entitled to have realty securing other note applied to debt before action could be maintained against her by holder, where she made no demand that mortgaged realty be first applied to debt.

3. Principal and surety ⇨108(1)

Where husband and wife executed note which husband delivered to holder's assignor to secure an obligation of husband and his son-in-law guaranteeing another note, that son-in-law secured extension of his obligation which was void because not supported by consideration, was no defense in action by holder against wife.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by A. F. Garrett against Louis Bomash and Fannie Bomash. From an adverse judgment, defendant Fannie Bomash appeals.

Judgment affirmed.

Dudley Robinson and Proctor K. Perkins, both of Los Angeles, for appellant.

Lloyd Wright, Charles E. Millikan, and Richard M. Goldwater, all of Los Angeles, for respondent.

GOULD, Justice pro tem.

Defendants, husband and wife, executed their promissory note for \$18,000 payable to bearer. The wife's signature was given, so she testified, because her husband wanted to borrow some money on the note, and she accordingly signed it. The husband took possession of the executed note and thereafter delivered it to plaintiff's assignor, concurrently with an agreement executed by himself and his son-in-law by which they guaranteed the payment of a \$37,000 note, which was also secured by a trust deed upon real property. The \$18,000 note, which is the subject of this action, was by said agreement transferred to plaintiff's assignor "by way of pledge * * * as additional security" for the performance of the obligations and duties of defendant Louis Bomash and his son-in-law as guarantors of the \$37,000 note. Other security was also pledged by the same agreement, and at a later date, without the knowledge

of his coguarantor, the son-in-law secured an extension of time to meet his obligations as guarantor.

Suit in this action was upon the \$18,000 promissory note, admittedly past due and unpaid; defendant Louis Bomash was eliminated by bankruptcy proceedings, and judgment for the full amount of principal and interest was entered against the wife, who prosecutes this appeal.

[1] Appellant urges that she received no consideration for the execution of the note. This is refuted by her own testimony; but in any event section 3110 of the Civil Code imposes full liability upon an accommodation party in favor of a holder for value. She also contends that, having delivered the note to her husband and co-signer, he became her agent, and his subsequent act in pledging the note as security at most constituted her in law only a surety, and as such surety she has the right to demand that the property mortgaged for the \$37,000 debt shall first be exhausted and applied to the discharge of the obligation before the surety is called upon to make good any deficit. In this contention we believe that appellant misconstrues the terms of the contract by which her note was pledged. By that contract it was never intended that the note should be collateral for the payment of the \$37,000 note, but rather that it was collateral for the performance of the obligations of the guarantors of said note. Appellant's note was specifically denominated a pledge, and provision was made for the application of its interest and principal payments and for suit in case of default, as well as other pertinent recitals as to the "pledge" and "collateral." In bringing this action respondent has proceeded in accordance with the provisions of the guarantors' agreement, and appellant may not complain that the terms of the contract are now being carried out. In such a case the ordinary rules as to construction of a contract are to be observed, and the instrument shall be reasonably interpreted as other contracts are, to the end that the object for which it was given shall be effectuated. *Sather Banking Co. v. Arthur R. Briggs Co.*, 138 Cal. 724, 72 P. 352.

[2] Holding as we have indicated, that the note was a pledge for the performance of the obligations of the guarantors, appellant cannot complain that the real property originally hypothecated for the \$37,000 note was not first resorted to, nor that

other pledged collateral was not called upon to satisfy the obligation. No claim is made here, and there was no evidence introduced or offered, that appellant made any demand upon the creditor that the property of the principal should first be applied to the discharge of the debt. The California Supreme Court has stated that a surety has the "unquestioned right" to make such demand (*Adams v. Wallace*, 119 Cal. 67, 51 P. 14), but no authority is cited to the effect that the creditor may not sue the surety until he has first proceeded against the principal. Thus, adopting for the moment appellant's thesis that she is nothing more than a surety, we must hold that the within action was nevertheless properly brought.

[3] Holding as we have indicated concerning the nature of the obligation resting upon appellant, it was a matter of no concern to her that her husband's coguarantor upon the \$37,000 note secured an extension of his obligation. Even assuming that the point might be pertinent here, the contention is of no weight because the coguarantor's extension was void for the reason that it was not supported by a consideration. *Stroud v. Thomas*, 139 Cal. 274, 72 P. 1008, 96 Am.St.Rep. 111.

Judgment affirmed.

We concur: CRAIL, P. J.; WOOD, J.



10 Cal.App.2d 445

**WORTMAN v. MACK-INTERNATIONAL
MOTOR TRUCK CORPORATION**

et al.
Civ. 10566.

District Court of Appeal, Second District,
Division 2, California.
Dec. 3, 1935.

1. Master and servant §80(1/2)

Written contract between employer and salesman giving employer discretion to modify or change in full compensation on special sales requiring remuneration to other salesmen held not binding on salesman where employer reduced commissions on such ground without compensating other salesmen; hence salesman was entitled to recover such commissions.

2. Master and servant ⇨70(1)

Written contract between employer and salesman giving employer discretion to modify or change in full compensation on special sales if employer thought compensation should be reduced *held* not binding on salesman unless judgment so exercised was free from fraud or mistake.

3. Limitation of actions ⇨100(2)

Where salesman did not discover until within three years of his action for commissions that employer had fraudulently withheld commissions, evidence of commissions earned prior to four years preceding filing of complaint was admissible.

4. Accord and satisfaction ⇨20**Release** ⇨16

Signing of general release and receipts "in full to date" by salesman for commissions for which he later brought suit *held* not to constitute "accord and satisfaction" of salesman's claim for commissions where salesman did not know that employer was fraudulently withholding part of commissions.

[Ed. Note.—For other definitions of "Accord and Satisfaction," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Suit by J. A. Wortman, Jr., against Mack-International Motor Truck Corporation and others. From a judgment for plaintiff, named defendant appeals.

Affirmed.

Overton, Lyman & Plumb, of Los Angeles (William R. James, of Los Angeles, of counsel), for appellant.

P. E. Keeler and Davis & Thorne, all of Los Angeles, for respondent.

GOULD, Justice pro tem.

Respondent in a trial by jury was awarded \$6,050.63 against appellant for commissions earned while working as salesman for appellant, and which, respondent claimed, should have been paid to him, but were wrongfully withheld by his employer.

Respondent was working under a written contract and a modification thereof, one of the provisions of which was that the employer reserved the right "to modify or change in part or in full the * * * working basis or compensation on special deals where in the company's judgment the compensation should be reduced or adjusted, and their decision shall be accepted as final." Provision also was made for pay-

ment of one-half commission only in case where profits on sales were split with company branches outside Los Angeles branch territory. This suit arose out of sales where the employer withheld one-half of the commissions upon the plea that it was obligated to pay the portion withheld to salesmen employed in outside districts. Such payments to outside salesmen were never made, the complaint alleges, but appellant wrongfully and to respondent's damage retained the payments for itself.

[1, 2] Appellant claims that the contract of employment, leaving to the employer's "judgment" the reduction or adjustment of compensation and stipulating that the employer's decision shall be final, precludes respondent from recovery. Cases such as *Manning v. Dallas*, 73 Cal. 420, 15 P. 34, and *Moulin v. Columbet*, 22 Cal. 508, are cited in support of this contention. But those cases involve a situation where the rate of compensation was at the entire discretion of the employer. Here a rate was fixed, with provision for reduction on special deals where in the judgment of the employer the remuneration should be reduced. We hold with respondent that in such a case the judgment so exercised must be free from fraud or mistake. *Hollingsworth v. Colthurst*, 78 Kan. 455, 96 P. 851, 18 L.R.A.(N.S.) 741, 130 Am.St. Rep. 382; *Long v. Chronicle Publishing Co.*, 68 Cal.App. 171, 228 P. 873. In the case before us it was alleged that appellant practiced fraud in withholding the commissions sued for. In line with the view indicated on this point, the rulings of the lower court overruling appellant's general demurrer and objection to the introduction of evidence were correct. Likewise, the court correctly denied appellant's motion for nonsuit. Also involved in this same point is appellant's objection to the court's instruction to the jury with relation to the contract of employment, charging the fact-finders that the provisions in question were valid and binding on respondent except in event that appellant did not exercise its discretion in good faith. We think the instruction complained of contains a fair statement of the law applicable to the exercise of the employer's judgment in this case.

[3] Also stressed by appellant is the point that because the commissions for which respondent sued were earned prior to September, 1930, and the action upon

the contract was not filed until September 21, 1934, error was committed in allowing evidence for any period prior to four years before the filing date of the complaint. Respondent, however, properly pleaded that he did not discover the alleged fraud until within three years before the action was begun, and that the fraud was committed under such circumstances that he would not be presumed to have knowledge of it at the time; and also the times and circumstances under which the facts came to his knowledge were alleged. Proof was adduced in accordance with the allegations of the complaint. The pleading comes within the rule of Consolidated, etc., Co. v. Scarborough, 216 Cal. 698, 16 P.(2d) 268, and the evidence supporting the pleading was believed by the jury. Its determination upon that point may not be disturbed when, as here, substantial evidence supports the verdict.

[4] Respondent at various times in the course of his employment signed writings acknowledging receipt in full to date of commissions, specifying the commissions for the various sales for which he later brought suit. He also signed a written general release. But this does not constitute an accord and satisfaction, as claimed by appellant. At the time the receipts and release were signed respondent was ignorant of the alleged fraud which he later discovered, and therefore he could not be bound by receipts signed in ignorance of the facts constituting the alleged fraud. In any event, this point was also impliedly determined by the jury adversely to appellant.

Judgment affirmed.

We concur: WOOD, J.; CRAIL, P. J.



10 Cal.App.2d 353

GILMORE v. PARIS INN.
Civ. 10569.

District Court of Appeal, Second District,
Division 2, California.
Nov. 23, 1935.

Hearing Denied by Supreme Court
Jan. 20, 1936.

1. Civil rights ¶13

In action to recover for discrimination in restaurant accommodations, evidence held to

sustain finding for defendant (Civ.Code, § 51).

2. Appeal and error ¶882(10)

In action to recover for discrimination in restaurant accommodations, plaintiff who called for record showing advance reservations for evening in question and then objected to its introduction could not on appeal object to court's ruling sustaining his objection.

3. Appeal and error ¶1046(5)

Remarks of trial court, made after plaintiff had called for production of record in defendant's possession and on its production had objected to it, were not part of findings and could not be made basis for reversal of judgment.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Benjamin M. Gilmore against the Paris Inn. From an adverse judgment, the plaintiff appeals.

Judgment affirmed.

Hugh Culler, of Los Angeles, for appellant.

Canepa & Castruccio, of Los Angeles, for respondent.

WOOD, Justice.

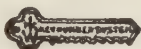
[1] Plaintiff commenced this action against defendant to recover damages alleged to have been sustained by him by reason of the refusal of defendant to accord him full and equal accommodations of his place of business, a café, in violation of section 51 of the Civil Code. Plaintiff, accompanied by a young lady, visited the café on the night of February 5, 1935, and requested that he and his companion be seated at a table in order that they might be served with meals and be permitted to dance. There was a conflict in the evidence as to the conversation which took place at that time, plaintiff stating that he was informed by an employee of defendant that the Paris Inn was a private club; that he was asked if he were a member of this private club and was told that he could not receive service unless he were a member. Defendant's witnesses stated that all space not actually occupied when plaintiff entered was reserved for the members of a private organization who would arrive at a later hour. The case was tried by the court without a jury, and from a judgment in defendant's favor plaintiff prosecutes this appeal.

Plaintiff's contention that the findings are not supported by the evidence cannot be sustained. The record discloses substantial evidence to support the findings of the court, and such being the case the action of the trial court may not be disturbed on appeal.

[2, 3] During the trial plaintiff called for the production of defendant's record showing advance reservations for the evening in question. When defendant produced the reservation book, plaintiff objected to its introduction and the objection was sustained. He is not now in a position to complain of the action of the court. His complaint is based upon certain remarks made by the trial judge on the subject. These remarks are not part of the findings and may not be made the basis for a reversal of the judgment.

The judgment is affirmed.

We concur: CRAIL, P. J.; McCOMB, Justice pro tem.



10 Cal.App.2d 213

In re HARTMAN.
Cr. 322.

District Court of Appeal, Fourth District,
California.

Nov. 15, 1935.

1. Habeas corpus ⇨92(1)

Sufficiency of evidence to support conviction may not be reviewed on application for habeas corpus.

2. Physicians and surgeons ⇨6(3)

Provision of Chiropractic Act authorizing licensed chiropractor to practice chiropractic as taught in chiropractic schools together with necessary mechanical hygienic and sanitary measures incident to care of body held not to include use of hypodermic syringe and needle for injection of antitoxin in treatment of cancer (Gen.Laws 1931, Act 4811, § 7; St. 1933, pp. 758, 1276, §§ 8e, 17).

Proceeding in the matter of the application of E. B. Hartman for a writ of habeas corpus.

Writ discharged, and petitioner remanded.

Ralph W. Eckhardt, of San Bernardino, for petitioner.

Stanley Mussell, Dist. Atty., and James L. King, Deputy Dist. Atty., both of San Bernardino, for respondent.

BARNARD, Presiding Justice.

The petitioner alleges that he was charged, in separate counts of a criminal complaint filed in the justice's court of San Bernardino township, with the unlawful possession of a hypodermic syringe and needle in violation of section 8e of the Poison Act (Deering's Gen. Laws, Act 5994, as amended by St. 1933, p. 758), with a violation of the state Chiropractic Act (Deering's Gen. Laws, Act 4811) by unlawfully applying to himself the term "physician," and with a violation of the Medical Practice Act (Deering's Gen. Laws, Act 4807, § 17, as amended by St. 1933, p. 1276) by practicing medicine without a license; that he was tried upon a written stipulation of facts and found guilty on all three counts; that a fine was imposed on each count with the alternative of a jail sentence; that he appealed to the superior court of San Bernardino county, which court affirmed the judgment and sentence as to each count; and that the sheriff has taken him into custody on account of his refusal to pay any of said fines or any part thereof.

The petition purports to set forth the stipulation of facts referred to. Among other things, it was stipulated that the petitioner was a licensed chiropractor under the Chiropractic Act; that he was not a licensed physician and surgeon under the Medical Practice Act; that he was possessed of the degree of naturopathic doctor (N. D.) issued by a chiropractic college, but that he held no certificate to practice as a naturopathic physician in California; that he knowingly had in his possession a hypodermic syringe and hypodermic needle when he was not a physician, dentist, registered nurse, veterinary, or pharmacist licensed to practice in this state; that said instruments had not been purchased by him through or with an order signed by a licensed physician, dentist, veterinarian, or a person licensed to practice osteopathy; that he knowingly practiced and advertised himself as practicing a system or mode of treating the sick within this state in that he diagnosed and treated the disease of cancer according to the "Koch" method, by injection of a fluid called an "antitoxin" or split-protein; that this method of treating cancer

is taught in chiropractic schools and colleges in this state; that the use of a hypodermic syringe and hypodermic needles is taught in chiropractic schools and colleges in this state in connection with the subjects of bacteriology, obstetrics, and gynecology; that the method of healing and treating the sick known as "naturopathy" is taught in chiropractic schools and colleges in this state, and that the words "naturopathic physician" mean one who has taken the prescribed course and who has the degree of naturopathic doctor or N. D.; that two licensed physicians and surgeons, who are named, would qualify as experts in medicine and surgery and would testify that in their opinion the use of a hypodermic syringe, a hypodermic needle, and antitoxin is a part of the practice of medicine and surgery; and that a named licensed chiropractor would qualify as an expert and testify that in his opinion the use of a hypodermic needle and syringe and an antitoxin is not the practice of chiropractic.

The petitioner relies on section 7 of the Chiropractic Act, which provides that a license to practice chiropractic shall authorize the holder thereof "to practice chiropractic in the state of California as taught in chiropractic schools or colleges; and, also, to use all necessary mechanical, and hygienic and sanitary measures incident to the care of the body, but shall not authorize the practice of medicine, surgery, osteopathy, dentistry, or optometry, nor the use of any drug or medicine now or hereafter included in *materia medica*." His position is that since the use of a hypodermic syringe and needle, the diagnosing and treatment of cancer by the use of an injection of antitoxin, and the treatment of the sick by naturopathy are all taught in chiropractic schools in California, he was lawfully entitled to possess a hypodermic syringe and needle, to call himself a naturopathic physician, and to diagnose and treat cancer by injecting an antitoxin.

In the second count of the complaint the petitioner was charged with willfully and unlawfully using the term "physician," and unlawfully representing and advertising himself to be a physician. The only point raised by the petitioner with reference to this charge is that the evidence, as stipulated to at the trial, is not sufficient to sustain a conviction thereon. The stipulation of facts as set forth in the petition states that the petitioner had in his possession printed letterheads, a copy of which is stated to be attached thereto and marked Exhibit A, and

that he also had in his possession printed cards which were in a place accessible to the general public, and two of which were attached to the front door of his office where they could be readily seen by any one entering the office, and a copy of which is stated to be attached thereto and marked Exhibit C. Reference is also made to a letter written by the petitioner on one of these letterheads, which is said to be attached thereto and marked Exhibit B. These three exhibits, thus referred to, which were before the trial court and the superior court on appeal, are not included in the stipulation set forth in the petition and are not brought before us in any manner.

[1] The rule is well established that the sufficiency of the evidence may not be reviewed in such a proceeding as this. The petitioner cites two cases in support of his contention that the evidence may be here reviewed, both of which involve charges of contempt of court. Such cases are distinguished and the reasons for certain exceptions to the general rule are pointed out in the case of *In re Cutler*, 1 Cal.App.(2d) 273, 36 P.(2d) 441. A further consideration is that the failure of the petitioner to include all of the evidence in the record here makes it impossible for us to pass upon the sufficiency thereof, as requested by him.

A somewhat similar situation appears with reference to the charges set forth in the other two counts. The first of these relates to the possession of certain hypodermic instruments and the second to the use of these instruments in injecting an antitoxin in the treatment of cancer. It is argued that the petitioner was authorized to possess and make such use of these instruments by the above-quoted portion of section 7 of the Chiropractic Act, since the use of such instruments is taught in chiropractic schools or colleges, and also because it is merely a measure incident to the care of the body.

[2] We think this cannot be held to be merely a measure incident to the care of the body within the meaning of that section, both because that clause of the section refers to general hygienic and sanitary measures, even though mechanical, and not to the treatment of diseases and ailments, and because the section contains the further limitation that the authorization granted shall not extend to the practice of medicine or surgery. If the possession and use of such instruments is authorized by this section, it is only because the license provided for authorizes such methods of treat-

ment as a part of the practice of chiropractic. While the section contains the additional clause "as taught in Chiropractic schools or colleges," the entire section must be taken as a whole and it cannot be taken as authorizing a license to do anything and everything that might be taught in such a school. A short course in surgery or one in law might be given, incidentally, and it would not follow that the section would then authorize a licensed chiropractor to engage in such other professions. It is not sufficient that a particular practice is taught in such a school. Under the terms of the statute it must meet the further test that it is a part of chiropractic, whatever that philosophy or method may be, and, further, that it shall not violate the provision which expressly forbids the practice of medicine. If such a practice is not a part of chiropractic but does constitute the practice of medicine, it is not authorized under this license even though it may be taught in such a school.

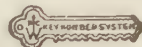
It cannot be told, aside from the evidence, whether the method of treatment here in question is or is not a part of the practice of chiropractic. What constitutes chiropractic and what is included in such a practice is not defined in this act and could only be determined by the taking of evidence. As the court said in *Evans v. McGranaghan*, 4 Cal.App.(2d) 202, 41 P.(2d) 937, 938: "The intent of the statute is clear upon its face: That the license shall authorize the holder to practice chiropractic as taught in chiropractic schools or colleges. But the court has no way of determining the scope of chiropractic as taught in such schools and colleges in the absence of evidence on that subject, and hence a resort to such evidence would be proper." Even if we could properly review the evidence in this proceeding, there is no evidence in the record before us which would support a finding that the use of a hypodermic needle or the injection of an antitoxin is a part of chiropractic or included in whatever is covered by that word, and no evidence to the effect that such forms of treatment do not constitute the practice of medicine. On the other hand, the only evidence in the record is to the effect that two physicians, as expert witnesses, would testify that in their opinion these things constitute the practice of medicine and surgery, and that a licensed chiropractor as an expert witness would testify that in his opinion the methods in question would

not constitute a part of the practice of chiropractic.

In so far as appears from anything before us in this proceeding, the petitioner is not entitled to be released from custody.

The writ is discharged, and the petitioner is remanded.

We concur: MARKS, J.; JENNINGS, J.



10 Cal.App.2d 436

GUSTASON v. BOARD OF OSTEOPATHIC EXAMINERS et al.

Civ. 9732.

District Court of Appeal, Second District,
Division 1, California.

Dec. 2, 1935.

Hearing Denied by Supreme Court
Jan. 30, 1936.

1. Physicians and surgeons ⇨2

Statute creating board of osteopathic examiners held not unconstitutional (Gen.Laws 1931, Act 5727).

2. Physicians and surgeons ⇨11(3)

Complaint before board of osteopathic examiners charging osteopathic physician with unprofessional conduct in language of statute is sufficient (St. 1913, p. 732, § 14).

3. Physicians and surgeons ⇨11(3)

Evidence that osteopathic physician had in separate listings in telephone directory advertised as specialist in twenty or more services and diseases, and that he was without special training, post-graduate work, or research experience in such services and diseases, held to justify revocation of license on ground that physician advertised with intention to deceive ignorant persons, and in such manner as was harmful to public morals and safety (St. 1913, p. 732, § 14, subd. 3).

Appeal from Superior Court, Los Angeles County; Isaac Pacht, Judge.

Proceeding by David G. Gustason, petitioner, against the Board of Osteopathic Examiners of the State of California and others, to review the action of the Board in suspending petitioner's license. From a judgment denying the petition for review, petitioner appeals.

Affirmed.

Wm. G. Condron, of Los Angeles, for appellant.

Otis D. Babcock, of Sacramento, for respondents.

ROTH, Justice pro tem.

Appellant appeared before the above-entitled board and the members thereof on a complaint filed with said board, charging appellant with unprofessional conduct under subdivision third, section 14, chapter 354, of the Statutes of 1913. Unlawful advertising is forbidden by the said section to members of the medical profession. The pertinent portion of said section reads as follows: "All advertising of medical business which is intended or has a tendency to deceive the public or impose upon credulous or ignorant persons, and so be harmful or injurious to public morals or safety." Stats. 1913, pp. 732, 733.

From the evidence, the respondent board found that appellant had in separate listings in the telephone directory of the city of Los Angeles advertised and held himself out to the public as a specialist in the following services, illnesses, and diseases: Accident, illness, health service, blood diseases, cancer, eye, ear, genito-urinary, goiter, hemorrhoid, hernia, lung, men's diseases, nervous diseases, nose, plastic surgery, general surgery, skin diseases, syphilis, throat, tonsil, women's diseases, X-ray and clinical services, blood pressure, bone, chest, and children's diseases, epilepsy, gland, heart, kidney diseases, and practically everything else known to the science of medicine and surgery.

Appellant was found guilty by the board of the violation of the section quoted, and his license was revoked. On petition for a writ of review in the superior court and on a hearing pursuant thereto, the writ was denied. This appeal is from the judgment of the superior court denying the petition for review.

[1] Appellant's first contention is that the law creating defendant board (Gen. Laws 1931, Act 5727) is unconstitutional. The legality of the board is, however, settled. *Board of Osteopathic Examiners v. Riley*, 192 Cal. 158, 218 P. 1018; *Suckow v. Alderson*, 182 Cal. 247, 250, 187 P. 965.

[2] The next contention of appellant is that the allegations of specific misconduct in the complaint upon which he was tried by the defendant board were by way of recital, and that any other allegations in said

complaint charged misconduct in the general language of the statute and were therefore insufficient. We do not find that the allegations of specific misconduct were by way of recital. On the contrary, the original complaint is replete with numerous allegations of specific acts of false advertising. But even if the allegations were by way of recital, a general charge in the language of the statute is sufficient. *Suckow v. Alderson*, 182 Cal. 247, 187 P. 965; *Winning v. Board of Dental Examiners*, 114 Cal. App. 658, 300 P. 866.

[3] As to the sufficiency of the evidence to support the finding of the board to the effect that appellant advertised with the intention to deceive or impose upon credulous or ignorant persons and in such a manner as was harmful to public morals and safety, we adopt the opinion by the learned trial judge filed at the time decision was pronounced denying the petition for review:

"We now come to a consideration of the principal question in the case—does the listing of petitioner in the 'Buyers' Guide' as a 'specialist' in some twenty or more ailments or diseases constitute unethical or unprofessional advertising? Did it have a tendency to deceive the public and impose on credulous persons? Was it harmful and injurious to public safety? To properly answer these questions, some consideration must be given to that part of the record dealing with the nature and extent of the petitioner's professional training. It appears that he is a graduate of the College of Osteopathic Physicians and Surgeons, class of 1917. While attending the college he served as an interne for three months; while in the United States army in 1918 petitioner did some X-ray work at Fort Oglethorpe, Ga., and for three of four months assisted in giving anaesthetics at a government hospital at McDonald Field. No post-graduate work was ever done by the petitioner, nor has he taken any special training in any hospital or medical college as to any of the branches of medicine and surgery in which he styled himself as a specialist. Under examination by members of the board he was unable to name a standard work on some of the various branches of medicine in which he represented himself to be an expert and it further appears that at the date of the hearing he had only performed two operations over a period of five years.

"The claims of the petitioner as reflected in his listings in the 'Buyers' Guide' were manifestly extravagant and false and in-

serted for the purpose of attracting to his office credulous and ignorant people who knew nothing of petitioner's professional background and experience. His advertisements in the 'Buyers' Guide' indicated that he was equally ready to treat as a specialist such unrelated diseases as syphilis and cancer—tuberculosis and women's diseases—hemorrhoids and nerves—ear, eye, nose and throat and epilepsy—stomach diseases and skin diseases; and his surgical talents (as a specialist) were advertised to cover so wide a field as goiter, facial plastic surgery, bone surgery, ocular plastic surgery, and others. And in addition to all of the foregoing, he claimed to be an X-ray specialist.

"Eminent doctors, both of the allopathic and homeopathic schools, testified before the board that no doctor in the ordinary span of life could specialize in the many diseases of the human body and mind enumerated in petitioner's listings. 'One who holds himself out as a specialist in the treatment of a certain organ, injury or disease,' says Mr. Presiding Justice Conrey, 'is bound to bring to the aid of one so employing him, that degree of skill and knowledge which is ordinarily possessed by those who devote special study and attention to that particular organ, injury or disease, its diagnosis and its treatment, in the same general locality, having regard to the state of scientific knowledge at the time.' Hopkins v. Heller, 59 Cal. App. 447, 452, 210 P. 975. Is the medical profession helpless to protect its good name and the public interest against the palpably false claims of such a charlatan? Is it not against the public safety to permit a man utterly without specialized training, post-graduate work, or research experience to hold himself out as a specialist in bone surgery, when upon his own admission he has not performed more than two operations in five years? And is it not dangerous to the public welfare for such a man to treat as a specialist such a dread disease as syphilis, when he shows himself so ignorant (as the record indicates) as not to know the name of the manufacturer of the specific medicine commonly employed in its arrest and cure? Unless we are prepared to concede that the State has no interest to protect the health and lives of its citizenry and is ready to surrender its power of supervision over the practice of the learned professions we must conclude that upon the record as made, it was not only within the power of the Board of Osteopathic Examiners to

discipline the petitioner but that it would have been derelict in its duty if it had failed to take official cognizance of his unprofessional conduct."

The judgment is affirmed.

We concur: HOUSER, P. J.; YORK, J.



10 Cal.App.2d 96

JORDAN v. ASSOCIATED DISCOUNT CORPORATION, Limited, et al.

Civ. 5445.

District Court of Appeal, Third District,
California.

Nov. 8, 1935.

Appeal and error ⇐78(3)

Order sustaining defendant's motion to strike and demurrer to plaintiffs' second amended complaint without leave to amend **held** not appealable (Code Civ.Proc. § 963).

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Action by Daisy M. Jordan and another against the Associated Discount Corporation, Limited, and others. From an order sustaining defendant Harold Fisch's motion to strike and demurrer, plaintiffs appeal.

Appeal dismissed.

William G. Condron, Ernest A. Tolin, and Ernest P. Morgan, all of Los Angeles, for appellants.

Edward Flam, of Los Angeles, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This is an appeal from the order of the superior court sustaining defendant Harold Fisch's motion to strike and demurrer to plaintiff's second amended complaint, without leave to amend. No appeal lies from such order. Section 963, Code Civ.Proc.; Braren v. Reliable Carpet Works, Inc., 125 Cal.App. 489, 13 P.(2d) 972, and cases cited.

Appeal dismissed.

McGEE v. CITY OF LOS ANGELES. *

Civ. 9981.

District Court of Appeal, Second District,
Division 1, California.

Nov. 7, 1935.

Hearing Granted by Supreme Court

Jan. 6, 1936.

1. Stipulations Ⓒ3

Condemnee and condemnor may stipulate value of condemned property, and courts will regard stipulation as establishing facts stipulated and as taking place of evidence with regard thereto.

2. Eminent domain Ⓒ246(5)

On abandonment of condemnation proceedings, condemnor is not liable for payment of any award.

3. Estoppel Ⓒ62(4)

Estoppel may be invoked against municipal corporation in exceptional cases where justice and right require.

4. Estoppel Ⓒ107

Plaintiff, whose action is based on estoppel, must plead facts constituting estoppel.

5. Stipulations Ⓒ18(1)

Condemnee's complaint, based on stipulation with city as to value of corner building which was removed for benefit of two street widening projects, alleging that, after final decree of condemnation for one project, condemnnee demolished building "on orders from * * * city," did not authorize recovery of amount of interlocutory judgment awarded in action, abandoned by city, to condemn for second project, either on theory that stipulation constituted contract for purchase of building, or on theory that city was estopped to deny contract after condemnnee acted thereon, or on theory that city was indebted on implied contract (Gen. Laws 1931, Act 8198, § 14).

HOUSER, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by William M. McGee against the City of Los Angeles. Judgment for defendant, and plaintiff appeals.

Affirmed.

George E. Cryer and R. Alston Jones, both of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and G. Ellsworth Meyer, Deputy City Atty., all of Los Angeles, for respondent.

EDMONDS, Justice pro tem.

Appellant brought this action against the city to recover the amount of a judgment awarded to him in a condemnation action. His amended complaint alleged that although the condemnation action had been abandoned by the city, it was liable to him for the amount of the judgment because of a certain stipulation which had been entered into concerning the value of a building sought to be condemned and his demolition of the building thereafter "on orders from the said defendant city." The general demurrer of the city was sustained without leave to amend, and the appeal is from the judgment subsequently entered.

The question presented on appeal concerns the effect of the stipulation. The appellant claims that it amounts to an agreement by the city to purchase a building owned by him for an amount payable in installments, the first installment to be the amount of a judgment agreed upon in one condemnation action, the second installment to be the amount of the judgment agreed to be entered in another action. The city paid the amount of the first judgment, but abandoned the proceedings in which the second judgment was entered. It asserts that the stipulation goes no further than to fix the value of appellant's building by agreement rather than by evidence presented to the court, and that appellant is in exactly the same position as any property owner whose property is condemned in proceedings which are later abandoned after interlocutory judgment.

The building in controversy was located on the corner of Olive street and Venice boulevard in the city of Los Angeles. The respondent city proposed to widen each street, and brought an action to take a strip of the land owned by appellant facing Olive street and on which a portion of his building was situated. At the same time the respondent city announced that it would shortly bring another action to take a strip of land along Venice boulevard for the widening and straightening of that street. By this latter proceeding the city proposed to take a portion of appellant's land facing Venice boulevard with that part of his building located thereon.

In the course of the trial of the Olive street action, it was stipulated between appellant and the city that the proposed improvements would destroy appellant's building beyond the possibility of practical re-

ⒸFor other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 57 P.2d 925.

pair and reconstruction. It was further stipulated that the value of the building was \$58,777 and that this amount should be awarded appellant in two sums, \$44,083 in the Olive street action and \$14,694 in the Venice boulevard action to be thereafter commenced. The Olive street action was prosecuted to final decree and respondent city paid appellant the stipulated award therein. The Venice boulevard action proceeded to interlocutory decree. Thereafter it was abandoned. In the meantime, however, appellant had entirely removed his building and erected another built to the property lines as the city proposed to establish them in the two actions. This suit was brought to recover the sum of \$14,694 which by the stipulation was to be awarded to appellant in the Venice boulevard action.

The stipulation which is the basis of the controversy was entered into between the deputy city attorney in charge of the Olive street action and appellant's then attorney. It recites that:

"Whereas, the improvements and conditions herein described will destroy said brick building beyond practical repair and reconstruction, and it appears that the least expensive and most practical solution is the purchase of the said building by the City of Los Angeles, a municipal corporation, plaintiff in this action, and its removal entirely; and

"Whereas, the said building will probably be removed by the proceedings in the above entitled action before Referees or Court make an award to this defendant for the damage caused the defendant in the action for the opening, widening and straightening * * * of Venice Boulevard from Main Street to Figueroa Street, and it is intended by stipulation to fix the damage in each of said actions so that the plaintiff may proceed at once in the improvement contemplated in the above entitled action, to-wit, action No. 201340; and

"Whereas, the value of said building is hereby agreed to be the sum of \$58,777.-34, * * *

"Now, Therefore, it is hereby stipulated, in view of the foregoing facts, all of which are made a part of this stipulation, that in the above entitled action No. 201340, the defendant William M. McGee shall be awarded the sum of \$44,083.00 as the damage accruing to him by reason of the removal of said building, and that in the action * * * for the widening and straightening of Venice boulevard from

Main Street to Figueroa Street, which action is not yet filed, but it is contemplated will soon be filed, the defendant shall be awarded the sum of \$14,694.34 as the damage accruing to him by reason of the removal of said building."

Appellant relies upon this stipulation as a contract by the city for the purchase of his building, alleging in his complaint that immediately after the entry of the final decree of condemnation in the Olive street action "on orders from the said defendant city" he proceeded to and did entirely demolish his building.

[1-5] In a condemnation action, the owner of land may agree with the agents of the condemnor as to the value of his property (*Pool v. Butler*, 141 Cal. 46, 74 P. 444), and may stipulate accordingly. "Such stipulations have always been regarded by the courts as establishing the facts stipulated and as taking the place of evidence with regard thereto." *City of Los Angeles v. Oliver*, 102 Cal.App. 299, 332, 283 P. 298, 311. The trial court by its findings accepted the stipulated value of the buildings and made an award based on such value in each of the condemnation cases. The purpose of the stipulation had then been fulfilled. Appellant was awarded the total stipulated value of his building by the two decrees, but neither of them amounted to a contract for the purchase of the property. *Pool v. Butler*, *supra*. Certainly a stipulation fixing the value of property can have no more binding effect than the decree which awards a litigant that value. And the decree in the abandoned action was made pursuant to the Street Opening Act of 1903, p. 376, as amended (*Deering's Gen. Laws*, 1931 Ed., Act 8198, § 14), which provides that the condemnor "may, at any time prior to the payment of the compensation awarded the defendants, abandon the proceedings." Upon abandonment of condemnation proceedings, there is no liability upon the condemnor for the payment of any award. *Lamb v. Schottler*, 54 Cal. 319.

Appellant insists that the city is estopped to deny its contract with him after he has acted thereon. While estoppel may be invoked against a municipal corporation in exceptional cases where justice and right require [*Times-Mirror Co. v. Superior Court* (Cal.Sup.) 44 P.(2d) 547; *City of Los Angeles v. Cohn*, 101 Cal. 373, 35 P. 1002], no facts constituting estoppel are pleaded. The only suggestion in the complaint of any acts on the part of the city

which might constitute an estoppel is that the building was demolished by the appellant "on orders from the said defendant city." This is a conclusion of law. "That a plaintiff, whose cause of action is based upon an estoppel, must plead the facts constituting the estoppel is clearly the law." Fritz v. Mills, 12 Cal.App. 113, 116, 106 P. 725, 726.

In a second cause of action, appellant alleged that the city is indebted to him upon an implied contract. The city did not take any property of the appellant nor receive any benefit from the demolition of his building. A city cannot be held liable upon an implied contract under the facts shown in this case. Nash v. City of Los Angeles, 78 Cal.App. 516, 248 P. 689.

The judgment is affirmed.

I concur: YORK, J.

I dissent: HOUSER, P. J.



10 Cal.App.2d 478

LOCKE v. LOS ANGELES RY. CORPORATION et al.
Civ. 9758.

District Court of Appeal, Second District,
Division 1, California.
Dec. 5, 1935.

1. Negligence ☞136(8)

When only conclusion from admitted facts is one of negligence, question of negligence is one of law.

2. Carriers ☞333(10)

Where passenger, having alighted from northbound street car and started across street, allegedly looked north at point on westerly northbound track from which she could see 700 or 800 feet, and first saw southbound street car 250 feet away, passenger who was struck thereby held properly found contributorily negligent as matter of law.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Clara Locke against the Los Angeles Railway Corporation and another.

From a judgment of nonsuit, plaintiff appeals.

Affirmed.

William R. Law, of Los Angeles, for appellant.

Gibson, Dunn & Crutcher, of Los Angeles (Penn Cummings, of Los Angeles, of counsel), for respondent.

ROTH, Justice pro tem.

At 8 o'clock in the evening of May 2, 1932, plaintiff and appellant alighted at the intersection of Eagle Rock boulevard and Avenue 33 from a northbound street car operated by defendant corporation. At that point, and for a considerable distance to the north and south, a street car proceeds on a right of way owned by said defendant. A cement sidewalk crosses the right of way from the east to the west. Having alighted from the street car, appellant proceeded to a point on said sidewalk across the easterly northbound track to the westerly northbound track, paused, and looked to the north. The night was clear. Appellant, according to her testimony, was 62 years of age, and her faculties of sight and hearing were good. At a point on the westerly northbound track, plaintiff said she looked and she could see 700 or 800 feet to the north. From this point she took "about three steps" to the west, looked again to the north, and did not see a car. She was asked: "When did you first become aware that there was a street car coming from the north." She replied: "As I had my right foot across this rail, here, and my left foot, here, in the middle of the track." The point referred to by appellant was a point between the westerly tracks. She testified that when she was at this latter point, she looked to the north and the street car was 250 feet to her north. She then testified: "I didn't have my hand up, though; and I couldn't get across; it was coming too fast; and I stepped back; I took three steps back; took a step with my left foot first and my right foot next and then my left again, and the street car struck me." Plaintiff further testified that the interior lights and the headlight of the street car were burning; that she would walk a mile in ten minutes, although she was not walking at that rate on the occasion in question. She admitted, however, that she was "moving along briskly." There was no evidence that there

were any obstructions of any kind between her line of vision and a point 700 or 800 feet to the north, when she first looked before crossing the right of way, or at any other time as she was crossing the right of way. The car was proceeding at approximately 35 miles per hour, coasting from the north to the south on a grade which is present at that point; it made little or no noise, and sounded no gong or bell.

The foregoing recital of facts is taken from the testimony of appellant and that of other witnesses who testified for her. The court granted a motion for nonsuit, and, from the judgment of nonsuit, this appeal is taken.

Appellant was undoubtedly a trifle optimistic when she testified that she normally walked at the rate of a mile in ten minutes, but irrespective of the pace maintained by appellant in crossing the right of way it is difficult to understand why the approaching street car was not observed by her in ample time to prevent the accident. She admitted that her faculties of sight and hearing were good and the uncontroverted evidence demonstrates that she had an unobstructed view of 700 to 800 feet to the north, and that she could see that far.

[1,2] It is settled that when the only conclusion which can be drawn from admitted facts is one of negligence, the question of negligence is no longer one of fact, but becomes one of law. *Griffin v. San Pedro, etc., R. R. Co.*, 170 Cal. 772, 774, 775, 151 P. 282, L.R.A.1916A, 842. Irrespective of any negligence of respondent, and irrespective of what may have been the continuing duty of respondent to a passenger to permit such passenger "a reasonable opportunity of leaving the carrier's premises" (*Miller v. Pac. Electric Ry.*, 169 Cal. 107, 110, 145 P. 1023, 1024), it is clear from the foregoing facts that if appellant had looked to the north when she was at the point where, according to her testimony, she did look, she would have had a clear view of the approaching street car. It seems clear to us that the trial court properly concluded that appellant was guilty of contributory negligence as a matter of law. *Jones v. Southern Pac. Co.*, 34 Cal.App. 629, 168 P. 586; *Finn v. Los Angeles Ry. Co.*, 119 Cal.App. 513, 6 P.(2d) 548; *Riney v. Pacific Electric Ry. Co.*, 45 Cal.App. 145, 187 P. 50;

New York, etc., Co. v. United Railroad of San Francisco, 191 Cal. 96, 215 P. 72; *Martz v. Pac. Electric Ry. Co.*, 31 Cal. App. 592, 161 P. 16.

The judgment is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.



10 Cal.App.2d 329

LAM ONG v. PACIFIC MOTOR TRUCKING CO. et al.
Civ. 10456.

District Court of Appeal, Second District,
Division 2, California.

Nov. 22, 1935.

Rehearing Denied Dec. 10, 1935.

Hearing Denied by Supreme Court
Jan. 20, 1936.

1. Descent and distribution ⇨71(6)

In death action, evidence held to establish heirship of persons alleged to be decedent's wife and children.

2. Death ⇨75

In action for death, absence of proof that heirs mentioned in testimony were not the only heirs of decedent, held not to preclude recovery by administrator, where action was in behalf of all the heirs.

3. Automobiles ⇨245(72)

Contributory negligence of pedestrian struck by motortruck while he was crossing street at intersection held for jury.

4. Judgment ⇨199(3)

Motion for judgment notwithstanding verdict should not be granted if there is substantial evidence to support verdict, and in determining existence of such substantial evidence party favored by verdict is entitled to have evidence construed in light most favorable to him (Code Civ.Proc. § 629).

5. Judgment ⇨199(3)

In action for death of pedestrian struck by truck as he was crossing street at intersection, evidence held insufficient to justify granting of defendants' motion for judgment notwithstanding verdict (Code Civ.Proc. § 629).

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Lam Ong, as administrator of the estate of Lim Duck Ning, deceased, against the Pacific Motor Trucking Company and another. Judgment for defendant notwithstanding the verdict, and plaintiff appeals.

Reversed, with directions.

Harry M. Irwin and Everett H. Mills, both of Los Angeles, for appellant.

W. I. Gilbert, of Los Angeles, for respondents.

WOOD, Justice.

This action was filed by the administrator of the estate of Lim Duck Ning, deceased, for damages for the wrongful death of decedent alleged to have been caused by the negligence of defendants. Decedent was struck and killed by the automobile truck of defendant corporation, driven by its employee, defendant Downer, on February 15, 1934, while decedent was on foot crossing Alameda street at its intersection with Marchessault street in Los Angeles within the lines of the pedestrian safety zone. After the denial of defendants' motion for a directed verdict, the jury rendered a verdict for plaintiff, whereupon defendants moved for judgment notwithstanding the verdict. This motion was granted, and plaintiff appeals.

[1] Defendants contend that the evidence was insufficient to establish a marriage between deceased and Lim Wong Shee, his widow, or the heirship of the surviving children of deceased. Plaintiff's witnesses Hoy, Ong, and Quong testified that decedent had repeatedly declared that the persons alleged to be such were his wife and children, and that those persons had been maintained and supported by decedent in his home and had been received and accepted by his family, friends, and associates as his wife and children. Decedent's cousin Ong testified that his grandfather and decedent's father were brothers; that he had been in decedent's house in China and saw decedent with his wife and children therein upon many occasions; that decedent had introduced them to the witness as his wife and children and that decedent had gone "many times" in company with his wife to the home of the witness. Plaintiff's witnesses also testified that decedent supported his wife and children by sending money to them on various occasions; that they took to China and delivered to his wife sums

which decedent had requested them "to take home" to her for the support of herself and their children, and that on their return to Los Angeles they brought reports and messages to decedent from his family. The heirship of the persons alleged to be decedent's wife and children is sufficiently established. *Pearson v. Pearson*, 46 Cal. 609; *In re Estate of Flood*, 217 Cal. 763, 21 P.(2d) 579.

[2] Defendants' contention that the judgment cannot be upheld, for lack of proof that the heirs mentioned in the testimony were not the only heirs of decedent, cannot be sustained. The action was commenced by the administrator in behalf of all the heirs and not by the heirs themselves. Even if an additional heir should appear, defendants could not be subjected to another judgment growing out of the same cause of action. *Salmon v. Rathjens*, 152 Cal. 290, 92 P. 733. It is evident that if another child existed whose existence was not shown by the evidence in this case, the omission would be to the pecuniary advantage of defendants. *Rabe v. Western Union Tel. Co.*, 198 Cal. 290, 244 P. 1077.

[3] It is contended by defendants that deceased was guilty of contributory negligence as a matter of law. Witnesses testified that decedent's face was turned toward defendants' approaching truck; that before he entered the path of the truck in the course it was then traveling the decedent stopped or hesitated near the center of the street; that thereupon defendant Downer suddenly turned or swerved the truck to the left, directly toward the decedent; that decedent then took a step or two forward in an obvious effort to get out of the path of the truck as it was swerved toward him by defendant Downer, and that he was struck down by the truck within the lines marking the pedestrian safety zone. Defendant Downer testified that he turned or swerved his truck to the left toward decedent in order to avoid a collision with another automobile which entered Alameda street from Marchessault street; but other witnesses testified that no automobile, other than the defendants' truck, was at or near the intersection at that time, and, in particular, that no automobile entered Alameda street from Marchessault street while the defendants' truck was in or near that intersection. Clearly it was the jury's function to determine the question of contributory negligence.

[4, 5] It is provided in section 629, Code of Civil Procedure, that the granting of a motion for judgment notwithstanding the verdict depends upon the existence of grounds for the granting of a motion for a directed verdict. A motion for judgment notwithstanding the verdict should not be granted if there is substantial evidence to support the verdict, and in determining the question whether there is such substantial evidence plaintiff is entitled to have the evidence construed in a light most favorable to his cause of action. *Barthelmess v. Cavalier*, 2 Cal.App.(2d) 477, 38 P.(2d) 484; *In re Estate of Flood*, 217 Cal. 763, 21 P.(2d) 579; *In re Estate of Caspar*, 172 Cal. 147, 155 P. 631. The evidence in the case before us did not justify the granting of the motion.

The judgment is reversed, with instructions to the court below to enter judgment in accordance with the verdict or in its discretion to grant a petition for new trial if such be filed.

We concur: CRAIN, P. J.; GOULD, Justice pro tem.



10 Cal.App.2d 379

PEOPLE v. RICHARDSON.

Cr. 316.

District Court of Appeal, Fourth District,
California.

Nov. 25, 1935.

1. Burglary ☞41(1)

Evidence authorized conviction for second-degree burglary.

2. Burglary ☞41(5)

Evidence held insufficient to sustain conviction of unarmed defendant for burglary in first degree because of insufficiency of showing that burglary was committed in nighttime (Pen.Code, §§ 463, 1097).

3. Criminal law ☞1183

Conviction of first-degree burglary was modified by reducing crime to second-degree burglary, without ordering new trial, where evidence authorized conviction for second, but not for first, degree burglary (Pen.Code, § 1097; § 1181, subd. 6).

Appeal from Superior Court, Orange County; Arthur Coats, Judge.

Gerald Richardson was convicted of burglary in the first degree, and he appeals.

Modified and remanded, with directions.

Joseph W. Ryan, or Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

MARKS, Justice.

Defendant was convicted of the crime of burglary in the first degree. He has appealed from the judgment and from the order denying his motion for new trial. He presents two grounds for a reversal of the judgment and order; first, that the evidence is insufficient to sustain his conviction of burglary in either the first or second degrees, and, second, that it is insufficient to sustain his conviction of burglary in the first degree.

S. B. Clasbey owned an orange grove west of Anaheim in Orange county. On it was situated a house in which he and his family resided. On March 31, 1935, the Clasbeys left the house at about 1 o'clock in the afternoon, leaving it thoroughly locked. They returned at about 8:30 o'clock that same evening, found the back door broken open, and that a shotgun, two watches, a gold cigarette lighter, and some jewelry had been stolen.

Defendant and one Leo Marlowe became acquainted in Dallas, Tex., in 1931. They again met while prisoners in a San Quentin prison road camp in northern California. Defendant was released in the fall of 1934, and Marlowe in the latter part of March, 1935.

On his release defendant went to Los Angeles and lived with J. R. Mailman, who did not know of his prison record. Defendant secured employment as a truck driver with the Beggs Produce Company. On each day of the week, except Saturday, he drove a truck on the round trip between Los Angeles and Carlsbad, usually ending the trip in Los Angeles around 8 or 8:30 o'clock at night.

Marlowe appeared at the Mailman home in Los Angeles on March 24, 1935. During the ensuing week he spent several nights there as the guest of defendant, both occupying the same room. The first trip on which Marlowe accompanied defendant was

on March 31, 1935. Upon this trip, when the truck was opposite the Clasbey home, Marlowe asked defendant to stop, saying he had to get something there. The truck was stopped and Marlowe went toward the house where he remained some time. Defendant became impatient, alighted from the truck and went through the orchard toward the rear of the house from which place he called to Marlowe, who appeared bearing a bundle wrapped in paper. The two returned through the orchard to the truck and the journey to Carlsbad was resumed. Marlowe spent the night with defendant and the gun was placed in the closet of the bedroom. The foregoing facts are all gleaned from the testimony of defendant, who maintained he did not know that Marlowe had entered the house and stolen the property.

We learn from other evidence that the tracks of the truck were found in the soft dirt along the roadside by the Clasbey property; that the defendant's footprints were found leading from the tire tracks through the soft orchard dirt to within about 15 feet of the rear door of the Clasbey house, and that defendant's and another's footprints returned through the orchard to the tire tracks. On the morning of April first three men saw an automobile belonging to defendant driven along an unused road in Lacy Field Playground in Los Angeles and stopped where weeds were high. A man alighted from the auto, took an object from it which he hid in the weeds. It was found to be the stolen shotgun. One of the three men identified defendant as the man who drove the automobile and secreted the shotgun. A second could not identify defendant, and the third was of the opinion that the man was not defendant. About two weeks later the same automobile was driven to the same spot. The driver alighted and made a search in the weeds. The shotgun had been removed. There is other evidence in the record which we need not detail or rely upon, as the foregoing is sufficient to support the conviction.

[1] It is not disputed that Marlowe actually committed the burglary. There are sufficient incriminating inferences to be drawn from defendant's testimony to furnish circumstantial evidence to support the conviction against him. Marlowe was a stranger to the scene of the burglary while defendant had passed the Clasbey house many times. Would Marlowe, knowing nothing of the Clasbey home or habits, select that place as the scene of his crime without advice from one familiar, or who had an opportunity to

become familiar, with them? When defendant became impatient, why did he go through the orchard and halloo near the back door instead of going to the front door and ringing the bell to call the residents and inquire of them for Marlowe if he had not been of the belief that the residents were absent? Marlowe went empty-handed to the house, which defendant seemed by his actions to believe unoccupied, and returned with a package which was placed in the truck driven by defendant where it remained until the return to Los Angeles. The shotgun remained in the closet of defendant's bedroom during the ensuing night. It was hidden by defendant next morning. These facts show a guilty knowledge. The conclusion that defendant and Marlowe were engaged in a joint criminal venture in which Marlowe did the breaking, entering, and stealing, and defendant acted as his "look-out," was one reasonably and properly drawn by the jury.

[2] While we are of the opinion that the evidence shows defendant guilty of burglary, we have reached the conclusion that he was proven guilty of burglary in the second degree only. The Attorney General does not contend that defendant was armed, or that he armed himself, during the burglary, as the stolen shotgun was "knocked down." The question of the hour of the burglary is determinative of its degree in this case.

Section 1097 of the Penal Code provides: "When it appears that the defendant has committed a public offense, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of such degrees only."

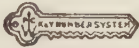
There is not sufficient evidence in the record to satisfy any one that the burglary was committed in the nighttime as that term is defined by section 463 of the Penal Code. A careful study of the record leaves us with the opinion that it was committed during the daytime.

[3] When it appears to us that the defendant is guilty of a lesser degree of a crime than that of which he was convicted, we have the power to modify the judgment without ordering a new trial. Section 1181, subd. 6, Pen.Code; *People v. Kelley*, 208 Cal. 387, 281 P. 609; *People v. Howard*, 211 Cal. 322, 295 P. 333, 71 A.L.R. 1385; *People v. McIntyre*, 213 Cal. 50, 1 P.(2d) 443; *People v. Harvey*, 109 Cal.App. 111, 292 P. 654; *People v. Connors*, 124 Cal.App. 216, 12 P.(2d) 43; *People v. Peter*, 125 Cal.App.

657, 14 P.(2d) 166; *People v. Harshaw*, 128 Cal.App. 212, 16 P.(2d) 1025; *People v. Warwick*, 135 Cal.App. 476, 27 P.(2d) 396.

The judgment of burglary of the first degree is modified. The cause is remanded to the trial court, with directions to enter a judgment against defendant finding him guilty of burglary of the second degree, and thereupon to pronounce judgment upon him as prescribed by law. As modified, the judgment and the order denying the motion for new trial are affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.



**COLBURN BIOLOGICAL INSTITUTE et al.
v. DE BOLT et al. ***

Civ. 10632.

District Court of Appeal, Second District,
Division 2, California.

Nov. 22, 1935.

**Hearing Granted by Supreme Court
Jan. 20, 1936.**

1. Exceptions, bill of ☞43(2)

Appellant failing to serve and file bill of exceptions within statutory period had duty to show affirmatively in the record a legal excuse for the delay (Code Civ.Proc. § 650).

2. Exceptions, bill of ☞43(1)

Orders extending time within which to file transcript held not to relieve appellant from default in failing to serve and file bill of exceptions within requisite period, where appellant had been in default for more than six months prior to making of earliest extension order, since court was then without jurisdiction to grant extension (Code Civ.Proc. § 650, and § 473, as amended by St. 1933, p. 1851, § 34).

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by the Colburn Biological Institute and others against Ethel M. De Bolt and another. Judgment for plaintiffs, and the named defendant appeals, and plaintiffs moved to dismiss the appeal.

Motion granted, appeal dismissed, and judgment affirmed.

Chas. M. Easton and Palmyra Pressly, both of Los Angeles, for appellant.

D. W. Richards and H. F. Poyet, both of Los Angeles, for respondents.

McCOMB, Justice pro tem.

Respondents move to dismiss the appeal in this action.

The sole question presented for determination is: Was appellant's proposed bill of exceptions served and filed within the period prescribed by section 650 of the Code of Civil Procedure?

[1] Notice of entry of judgment was served on June 19, 1933. May 21, 1934, appellant served and filed a proposed bill of exceptions, which was settled by the trial judge August 7, 1934. It thus appears that appellant's time to serve and file a proposed bill of exceptions expired July 9, 1933, in the absence of an order or stipulation extending the time within which to perform this act. Section 650, Code Civ.Proc. When a proposed bill of exceptions is not served and filed within the period prescribed by the Code of Civil Procedure, it is the duty of appellant to show affirmatively in the record a legal excuse for the delay. *Rossi v. Scott*, *Magner & Miller*, 41 Cal.App. 646, 647, 183 P. 263. The record in the instant case is devoid of any such showing.

[2] Appellant directs our attention to several orders of this court made in 1935 extending time within which to file a printed transcript on appeal. These orders cannot be construed to relieve appellant from her default in failing to serve and file her proposed bill of exceptions within the requisite period, as the court was without jurisdiction to grant her relief under the provisions of section 473 of the Code of Civil Procedure (as amended by St. 1933, p. 1851, § 34); she having been in default for more than six months prior to the making of the earliest order. *Buis v. Lindauer Corporation*, 116 Cal.App. 558, 561, 3 P.(2d) 18; section 473, Code Civ. Proc. The principle of law in the instant case is identical with that in *Buis v. Lindauer Corporation*, supra.

Respondent's motion is granted. The appeal is dismissed, and the judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

☞For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 59 P.2d 108.

10 Cal.App.2d 413

PEOPLE v. WALTON et al.

Cr. 2798.

District Court of Appeal, Second District,
Division 1, California.

Nov. 29, 1935.

Hearing Denied by Supreme Court

Dec. 26, 1935.

1. Criminal law §997

Petition for writ of error coram nobis on ground that petitioner was insane at time of felony prosecution against him *held* properly denied, where question of petitioner's sanity had been raised at trial and petitioner had at that time withdrawn plea of not guilty by reason of insanity.

2. Criminal law §997

Where petition for writ of error coram nobis was filed after denial of previous petition for such writ, second petition *held* properly denied where no new fact for issuance of writ appeared therein.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Proceeding by the People of the State of California against John Wesley Walton and others. From an order denying defendant Atwell Curtis' petition for a writ of error coram nobis, he appeals.

Affirmed.

Atwell Curtis, in pro. per.

U. S. Webb, Atty. Gen. and Walter L. Bowers, Deputy Atty. Gen., for the People.

YORK, Justice.

On January 24, 1928, an indictment was filed against appellant and two codefendants charging them with the crime of robbery on one count and with the crime of grand theft on another count. In January, 1930, appellant was arraigned, at which time he entered his plea of not guilty and not guilty by reason of insanity, and his trial was set for January 30, 1930. The court at that time appointed two doctors to examine appellant, both of whom reported that appellant had been confined in an asylum for the insane in Texas. Thereafter, to wit, on April 1, 1930, defendant went to trial and the jury returned a verdict of guilty on the robbery count and not guilty on the grand theft count of the indictment. His trial on the plea of not guilty by reason of insanity was set for April 4, 1930,

at which time appellant in open court and represented by counsel withdrew his plea of not guilty by reason of insanity and waived time for sentence.

April 3, 1935, a petition for a writ of error coram nobis on behalf of appellant was presented to the superior court and the same denied. On August 22, 1935, appellant again filed a petition for writ of error coram nobis in the superior court, which said petition was denied. He prosecutes this appeal from the order of said superior court denying his application for such writ.

[1] The sole point urged on this appeal by appellant is that the judgment of conviction of the crime of robbery entered against him by the superior court on April 3, 1935, was predicated upon an error of fact, which if known to the court would have prevented the rendition of said judgment, in that petitioner was insane at the time said proceedings were had against him and he was incapable of comprehending the same and unable to protect his interests.

As already stated, at the time of appellant's arraignment, he pleaded not guilty by reason of insanity, and the court at that time appointed physicians, both of whom reported upon appellant's commitment to a hospital for the insane in Texas, and the court considered said reports at the hearing of the case at the time of the original trial, at which time appellant withdrew his plea of not guilty by reason of insanity.

"The office of the writ of coram nobis is to bring the attention of the court to, and obtain relief from, errors of fact, such as the death of either party pending the suit and before judgment therein; or infancy, where the party was not properly represented by guardian, or coverture, where the common-law disability still exists, or insanity, it seems, at the time of the trial; or a valid defense existing in the facts of the case, but which, without negligence on the part of the defendant, was not made, either through duress or fraud or excusable mistake; these facts not appearing on the face of the record, and being such as, if known in season, would have prevented the rendition and entry of the judgment questioned." *People v. Reid*, 195 Cal. 249, 255, 232 P. 457, 459, 36 A.L.R. 1435, quoting from 5 Encyclopedia of Pleading and Practice, at page 27.

It is also held in the cited case of *People v. Reid*, supra, 195 Cal. 249, at page 258,

232 P. 457, 461, 36 A.L.R. 1435: "The uniform conclusion of the decisions is that the function of a writ of error coram nobis is to correct an error of fact. * * * The cases wherein the writ has issued, or relief equivalent thereto has been afforded, all seem to fall within one of the following classes: Where the defendant was insane at the time of trial and this fact was unknown to court and counsel." (Citing cases.)

[2] In the case before us, the question of the sanity of defendant was raised at the time of his trial on the felony charge and was known to and considered by the court at that time. Further, the second petition for the writ was properly denied for the reason—if there were no other—that the first petition having theretofore been denied, no new fact for the issuance of the writ appeared in the second petition. See *People v. Vernon* (Cal.App.) 49 P.(2d) 326.

The order denying petition for writ of error coram nobis is affirmed.

We concur: HOUSER, P. J.; DORAN, J.



10 Cal.App.2d 336

In re OLIVER'S ESTATE.

CALIFORNIA FIRST NAT. BANK OF LONG BEACH v. CARR.

Civ. 10653.

District Court of Appeal, Second District,
Division 2, California.

Nov. 22, 1935.

Hearing Denied by Supreme Court
Jan. 20, 1936.

1. Wills ⇐729

Under will bequeathing to testator's friend \$1,800 per year during her life payable in monthly installments, if possible, at rate of \$150 per month, and bequeathing balance of income of trust fund to testator's brother, annuity in favor of friend held not limited to income (Probate Code, § 104).

2. Wills ⇐684(5)

While, generally, expenses of administration of testamentary trust should be paid from trust income, action of court in directing that expenses of administration should be paid from corpus of trust held proper

where periodic payments of annuity from income as directed by will rendered income insufficient to pay expenses (Probate Code, § 161 (3).

Appeal from Superior Court, Los Angeles County; Thos. P. White, Judge.

Proceeding in the matter of the estate of Charles Henry Oliver, also known as Charles H. Oliver, also known as C. H. Oliver, deceased, wherein the California First National Bank of Long Beach, as trustee, filed annual report, which was objected to by Mrs. Julia A. Carr. From the order, the trustee appeals.

Affirmed.

W. Ward Johnson, of Long Beach, for appellant.

W. D. McAlister, and Harmel L. Pratt, both of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is an appeal by the trustee from an order of the trial court upon the hearing of its third annual report. The estate, totaling \$85,782.67, was distributed to the trustee under the terms of a will, the relevant parts of which are set up in the trustee's brief, and which, after boiling down, we set out herein: "6th. I direct my trustees to convert all of my property into cash and reinvest the same in first mortgage liens or other securities that will net at least 6 per cent. The trustees are to collect and receive the income of said trust fund and pay the same over as it occurs and is collected to the beneficiaries for whom it is set apart during their natural lives. 9th. I bequeath to my friend, Mrs. Julia A. Carr, \$1,800 per year during her life, the same to be paid in monthly installments, if possible, at the rate of \$150 per month. 10th. The balance of the income of said trust fund I bequeath to my brother, George W. Oliver, the same to be paid as it occurs and is collected. 11th. The trust fund must be kept intact during the life of my brother and my friend, Mrs. Carr, and the survivor is to receive the full income of said fund during his or her life. 12th. At the death of my brother and Mrs. Carr the estate is to be distributed as follows," etc.

The third annual account of the trustee reported payments out of the income of \$535.66 to the trustee as trustee's fees; \$75.83 as attorney's fees, and to Mrs. Carr

\$19.99 which was the balance of the income remaining after payment of the above items and other items. Mrs. Carr filed objections to this account. The court found and ordered that Mrs. Carr was entitled to be paid all of the income from the trust estate up to \$150 per month, and that the costs and expenses of managing the trust should be paid out of the corpus of the estate. The trustee appeals from that part of the order of the court requiring the trustee to pay the expenses of administering the trust estate out of the corpus thereof. Mrs. Carr does not appeal, and her rights, if any, to an additional order are not before us for review.

[1] The trustee contends that the will shows that it was the intention of the testator to make all payments from income only and to keep the trust estate intact until the death of Mrs. Carr and his brother.

The will uses the phrase, "the survivor is to receive the full income of said trust fund during his or her life." Paragraph nine of the will creates an annuity in favor of Mrs. Carr. There is no provision or statement of any kind in the will to the effect that this annuity shall be limited to income. The bequest to Mrs. Carr is positive and certain, clear and distinct, and there is no condition attached as to how it shall be paid. The Probate Code provides the rule of construction which is applicable. Section 104 thereof provides: "A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital of or reference to its contents in another part of the will."

[2] While it is the general rule that the expenses of administration should be paid from the income of the trust, this rule is not an universal one; there are exceptions to it. Annuities are favored under the probate law of California. For instance, section 161 of the Probate Code provides: "(3) Annuity. An annuity is a bequest of certain specified sums periodically; if the fund or property out of which * * * an annuity is payable fails, in whole or in part, resort may be had to the general assets, as in case of a general legacy." This is not cited as controlling, but as persuasive on the right and wisdom

of the trial judge to order a payment of the costs of administration of the trust out of the corpus. The trustee cites no authority which holds that expenses of administration of a trust may not be paid from the corpus of a trust where the decree of distribution creates an annuity; and we know of none. We are not referring, of course, to cases where the will expressly provides that periodical payments shall be made from the income.

The order is affirmed.

We concur: WOOD, J.; McCOMB, Justice pro tem.



10 Cal.App.2d 455

RISINGER v. ANDERSON.

Civ. 10579.

District Court of Appeal, Second District,
Division 2, California.

Dec. 4, 1935.

Hearing Denied by Supreme Court
Jan. 30, 1936.

1. Evidence  378(1)

Letter identified by plaintiff as having been received through mail and as bearing signature of defendant, from whom plaintiff testified she had received more than one hundred letters, which had been admitted without objection, held properly admitted.

2. Appeal and error  717

Findings of fact signed by trial judge, and not remarks made when judge indicated what the judgment would be, control as to facts on which the judgment rests.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action by Marjorie L. Risinger against Sherwood M. Anderson. From a judgment for plaintiff, defendant appeals.

Affirmed.

Alfred Jay Luke, of Los Angeles, for appellant.

R. A. McKay and Allan Brant, both of San Diego, for respondent.

CRAIL, Presiding Justice.

[1] The primary contention of defendant (appellant) is that the trial court erred

in admitting in evidence Plaintiff's Exhibit No. 12 which purported to be a letter from defendant to plaintiff. Before the court admitted the exhibit, plaintiff testified that she had received the letter in question through the mail, that she recognized the signature thereon to be the signature of defendant, and that, indeed, she was positive of it, having received over one hundred letters from him. The letters referred to were before the court, having been admitted in evidence without objection. Under the circumstances, the exhibit was properly admitted.

[2] Defendant also contends that the judgment was founded upon facts which were not supported by and were contrary to the evidence. For this statement, he relies solely upon certain oral remarks made by the judge when indicating what the judgment would be, and not at all upon the facts which were set forth in the findings of fact signed by the judge. It is to these we must look on this appeal to find the facts.

Defendant contends also that the award of damages was excessive, but we find no merit in this contention.

The judgment is affirmed.

We concur; WOOD, J.; GOULD, Justice pro tem.



10 Cal.App.2d 457

PEOPLE v. PHILLIPS.

Cr. 2795.

District Court of Appeal, Second District,
Division 2, California.

Dec. 4, 1935.

Rehearing Denied Dec. 14, 1935.

Hearing Denied by Supreme Court
Jan. 2, 1936.

1. Criminal law ☞1144(13)

Where it is contended that evidence is insufficient to justify conviction, Court of Appeals must consider evidence in light most favorable to successful party in trial court.

2. Threats ☞1

Evidence held to justify conviction of bond broker for extortion, who, after being informed that prosecuting witness who was

under arrest but against whom there was no charge, was about to be released, obtained money from such witness after witness' release, although no bond was furnished, by telling witness prior to release that he could procure release, but that witness would remain in jail if he did not consent to do business with broker (Pen.Code, §§ 518, 519).

3. Threats ☞1(1)

Threat to imprison another, or to detain another in prison without any ground, constitutes offense of extortion as threat to do unlawful injury to his person (Pen.Code, §§ 518, 519).

WOOD, J., dissenting.

Appeal from Superior Court, Los Angeles County; Raglan Tuttle, Judge.

Joseph Phillips was convicted of extortion, and he appeals.

Affirmed.

Hearing denied by Supreme Court; SEAWELL and LANGDON, JJ., dissent.

M. G. Phillips and John S. Cooper, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Buron Fitts, Dist. Atty.; and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for the People.

CRAIL, Presiding Justice.

This is an appeal from a conviction of extortion and from an order denying a motion for a new trial.

[1,2] Taking the evidence in the light most favorable to the successful party in the trial court, which it is our duty to do, it appears that defendant was a bond broker with his office "right here next door" to the Central Police Station. The prosecuting witness, a Mexican named Hernandez, had been arrested and detained in custody by two police officers, but he had not been charged with any crime; no warrant for his arrest had been issued and no complaint of any kind had been filed against him. Defendant was informed by one of his solicitors about the above Hernandez, including the fact that the officers had nothing on him and that he was to be released, or, as it was termed, "a kick-out." Defendant thereupon rounded up the wife and daughter of Hernandez and took them over to the jail to see him, and did not convey to him the information that he was to be released, but, on the contrary, told him that he was in a "mess"

and that defendant could get him out of jail that very day for \$250. While, of course, the term "mess" was a vague way in which to convey the idea that Hernandez had committed a crime, yet the more vague and general the language used, the better it would subserve the purposes of defendant in magnifying the fears of Hernandez. But defendant did not stop at this point; he told the prosecuting witness that he knew he could make the right contacts and he could set Hernandez free in no time, and that Hernandez had better consent to do business with him if he did not want to stay in jail until the following Monday or Tuesday. This was not said with respect to furnishing a bond, and, taken in connection with the facts above set forth, constituted an implied threat to hold Hernandez in jail if he did not. Finally Hernandez consented to defendant's terms, and after a while Hernandez was released from jail and directed to defendant's office. As he was entering the office of defendant, he saw the officers, who had arrested him, leaving the office. Hernandez gave defendant \$50 cash and the pink slip for his Buick automobile. No bond was furnished, for there was no charge against Hernandez. He consented to deliver his property to defendant because of his fear of defendant's threat to hold him in jail if he did not.

The first contention of defendant is that the evidence is insufficient to justify a conviction. We find that there is substantial evidence in the record to sustain the implied findings of the jury. We do not set out the evidence herein upon which we rely for this conclusion for the reasons stated in *Koeberle v. Hotchkiss* (Cal. App.) 48 P.(2d) 104.

[3] Defendant further contends that the verdict and decision were contrary to law and to the evidence. He states the same contention more intelligibly as follows: "As a matter of law the facts do not constitute the crime of extortion * * *." For the purposes of this case, extortion is the obtaining of property from another with his consent, induced by a wrongful use of fear (Pen.Code, § 518), and such fear may be induced by a threat to do an unlawful injury to the person of the individual threatened (Pen.Code, § 519). A threat to imprison another is a threat to do an injury to his person (*People v. Sanders*, 188 Cal. 744, 207 P. 380), and a

threat to detain him in prison without any ground is a threat to do an unlawful injury to his person. We are satisfied that there is substantial evidence, when taken in the light most favorable to the successful party at the trial, to sustain the implied findings of the jury as to every essential element of extortion.

The judgment and order are affirmed.

I concur: GOULD, Justice pro tem.

I dissent: WOOD, J.



10 Cal.App.2d 499

LOEGERING v. BOSSEN et al.

Civ. 5247.

District Court of Appeal, Third District,
California.

Dec. 5, 1935.

1. Fraud ☞58(4)

Evidence held to sustain finding that purchase of land was not induced by fraudulent representations and concealment regarding quality and quantity of land.

2. Fraud ☞35

Purchaser who worked and farmed and lived on land for five years could not, after vendors had ejected him for failure to comply with contract of purchase, claim damages for alleged fraudulent representations and concealment.

Appeal from Superior Court, Yuba County; Warren Steel, Judge.

Action by W. C. Loegering against Albert E. Bossen and others. Judgment for defendant, and plaintiff appeals.

Affirmed.

W. E. Davies, of Marysville, for appellant.

Rich, Weis & Carlin, of Marysville, for respondents.

MAXEY, Justice pro tem, delivered the opinion of the court.

Plaintiff was engaged in the hog business near Sacramento, Cal., and in May,

1927, purchased a contract from Robert Barberro (sometimes known as "Smokey" Barberro), to the garbage or swill business in Marysville, Cal. Shortly thereafter, and in June, 1927, plaintiff entered into negotiations with Arthur Gorwood, a real estate broker in the city of Marysville, for the purchase of certain real property owned by defendants in Yuba county, Cal. Gorwood was admittedly the agent of defendants in the transaction.

Gorwood showed plaintiff several parcels of land, including the 35-acre tract which is the subject of this action. This land was somewhat peculiarly situated, and the physical characteristics thereof suited plaintiff's purpose as a hog ranch. The agent informed the plaintiff that the price per acre of said tract was \$250. Plaintiff then requested a reduction in price as to a portion of the land, and this request was acceded to by the defendants. An agreement of sale and purchase was entered into between the parties on June 20, 1927. The plaintiff moved onto the premises and improved them by the erection of a house, outbuildings, sheds, and corrals. He further improved the land by leveling a portion thereof and planting crops thereon.

On July 17, 1927, plaintiff returned to Gorwood's office and entered into a contract to purchase ten additional acres adjoining the 35-acre tract originally purchased by him. Plaintiff paid the interest due upon both contracts and also paid the taxes on both pieces of property until on or about July 1, 1935. On or about the latter date, plaintiff offered to return the 10-acre tract to defendants in consideration of the release of liability under the contract of purchase and sale of said 10-acre tract. This proposal was accepted by defendants.

Plaintiff had made some payments on the principal due under the terms of the original contract, but was in arrears in such payment in October, 1932. Plaintiff at that time requested defendants to modify the said original contract and release him from liability thereunder by excluding all the land excepting 12 acres thereof upon which his buildings were located, and further requested the defendants to accept the sum of \$1,000 as the entire purchase price of said 12 acres. This proposal was rejected by defendants, and upon plaintiff's failure to pay

the amount due under the contract, defendants commenced a suit in ejectment against plaintiff, which resulted in his being removed from the premises.

Thereafter plaintiff sought to enter into another contract with defendants for the purchase of said land, or that defendants lease said land to plaintiff, and, upon defendants' refusal so to do, plaintiff commenced this action for damages for alleged fraud and misrepresentation made by Gorwood as the agent of defendants in the sale of the land in June, 1927. The cause was tried by the court without a jury, and, from a judgment in favor of defendants, plaintiff has appealed.

Defendants have affirmatively pleaded laches and the statute of limitations, in addition to a general and categorical denial of the allegations of the complaint. Plaintiff relied upon certain statements of the agent made on or immediately prior to the making of the contract which are alleged to be fraudulent, and certain alleged fraudulent concealments with reference to the quality and quantity of the land. The learned trial court found that no fraudulent representations nor concealments were made by defendants' agents at the time of, or immediately prior to, the execution of the contract of sale and purchase.

Appellant contends by this appeal that the evidence is insufficient to support the findings of the trial court.

[1] There is a direct conflict in the testimony relative to the statements, representations, and actions of the agent Gorwood, at or immediately prior to making the contract between plaintiff and defendants. Where such a question is raised, it is our duty to examine the record to see if there is any substantial evidence to support the findings of the trial court. In the instant case, the trial court was justified in reaching its conclusion; there is ample evidence in the record to support its findings and decision. *Martha E. Melvin et al. v. Mortgage Guarantee Co.* (Cal.App.) 51 P.(2d) 167.

[2] The plaintiff entered upon this property in 1927; lived on the land for five years; worked and farmed the land for that period of time; was in contact with defendants and their agent constantly during all these years, and had ample time to ascertain the truth or fal-

sity of any statement made concerning the land, yet he sat idly by and did absolutely nothing with reference to his alleged claim for damages until defendants had ejected him for failure to comply with his contract. No complaint, either verbal or written, was ever made to defendants; no demand was ever made upon them; no suggestion of any dissatisfaction until after plaintiff had been dispossessed of the land and premises. One cannot be permitted under such circumstances to come into court, and, after such a delay, maintain an action for damages for fraud that could have been and would have been discovered previously had any such a fraud existed. Plaintiff has slept on any rights he might have had in not raising his present objection at an earlier date. One who resides upon land, cultivates and improves the same land for a period of five years, cannot then, upon failure to comply with his contract of purchase, claim damages for alleged fraudulent representations and concealment.

The judgment is affirmed.

We concur: PULLEN, P. J.;
THOMPSON, J.



10 Cal.App.2d 416

TITLE INSURANCE & TRUST CO. v. TORRANCE et al.
Civ. 9935.

District Court of Appeal, Second District,
Division 1, California.
Nov. 29, 1935.

1. Corporations ⇨235

Stockholders of corporation are liable for entire amount of secured indebtedness, and not merely for deficiency remaining after security is exhausted.

2. Corporations ⇨235

In action on stockholders' liability, appealing stockholders held not entitled to benefit of amount paid to creditor by other stockholders.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by the Title Insurance & Trust Company against L. C. Torrance, Jr., Clyde R. Burr, Robert L. Chambers, Richard St. John, and others. From an adverse judgment, the named defendants appeal.

Affirmed.

Woodruff, Burr & Smith and Philip Grey Smith, all of Los Angeles, for appellants.

H. Sidney Laughlin, of Los Angeles, for respondent.

EDMONDS, Justice pro tem.

[1] This action is upon stockholders' liability. Recovery is sought upon an indebtedness incurred by Calangeles Corporation for money borrowed by it and evidenced by a promissory note secured by a deed of trust on real estate. The defense set up by the stockholders is that at the time this action was filed the real estate had not been sold under the provisions of the deed of trust. In other words, the defendants insist that the stockholders of a corporation are only liable upon a secured indebtedness for any deficiency remaining after the security is exhausted. The defendants also alleged a payment of \$4,500 on the indebtedness.

Judgment of the trial court was entered in favor of plaintiff against each defendant for one-eighth of the original principal sum of the note and interest thereon. The appeal therefrom is upon the judgment roll alone.

The case was tried upon a stipulation of facts. It appears that plaintiff loaned \$30,000 to Calangeles Corporation, in consideration of which the latter gave its promissory note secured by a deed of trust. At the time of this transaction the debtor corporation had eight stockholders, each of whom owned ten shares of its capital stock. When this action was commenced all of the principal of the note and interest thereon for almost two years was unpaid and in default. Before the suit was filed plaintiff had executed its notice of default and election to sell the real property under the provisions of the deed of trust and had placed this notice of record. However, no sale of the property had been made by the trustee.

The payment of \$4,500 was made by three of the stockholders to the plaintiff after the complaint was filed and in full satisfaction of their liability as stockholders upon the note in question.

District Court of Appeal, Second District,
Division 1, California.

Nov. 29, 1935.

Hearing Denied by Supreme Court
Jan. 27, 1936.

In *Knowles v. Sandercock*, 107 Cal. 629, 40 P. 1047, 1050, it was held that the fact that a note given by a corporation is secured by a mortgage which has not been foreclosed is no defense in an action against a stockholder for his proportionate part of the debt of the corporation. The court said: "He is not injured, nor is he benefited, by the fact that the corporation has given security."

This case and many other authorities were reviewed in *Aronson & Co. v. Pearson*, 199 Cal. 286, 249 P. 188, 191, 51 A.L.R. 1380, which presented the question of whether or not a creditor of a corporation may secure a writ of attachment in an action brought upon a stockholder's liability for a debt of the corporation, secured by a mortgage on real property, without showing that the security has become valueless. The court held: "The obligations of the defendant and the corporation being primary and independent, the mere fact that the latter gave a mortgage to secure its contract is not a ground for discharging the writ of attachment."

The reasons for the conclusions reached in each of these cases are stated at length in the opinions of the court. Applying the principles reviewed in those cases, there can be no question of the right of respondent to maintain this action.

[2] The *Knowles* Case is also authority for the proposition that appellants are not entitled to the benefit of the \$4,500 paid by their associates. The reason therefor is succinctly stated in the opinion as follows: "The money was not paid to the corporation, and was not in its possession. It was not intended to be used to pay the debts of the corporation, but to discharge the proportionate liability of the stockholders who paid it. It was held as the money of the stockholders who paid it, and was not the money of the corporation. If applied to the payment of the debt, to the extent of the proportionate shares of the stockholders who paid, that would not help appellants, for their shares of the indebtedness would be unaffected by such an application of it." See, also, *Sacramento Bank v. Pacific Bank*, 124 Cal. 147, 56 P. 787, 45 L.R.A. 863, 71 Am.St.Rep. 36.

The judgment is, therefore, affirmed.

We concur: HOUSER, P. J.; DORAN, J.

1. Guaranty Ⓒ54

Amendment of deed of trust by providing for loan from beneficiaries to trustor for payment of delinquent taxes to be secured by lien on trust property prior to trust deed held "material alteration" exonerating guarantor on deed of trust note, notwithstanding clause which authorized trustee to take prior lien for loan of its funds to trust, where deed of trust required that subordination lien be given for other indebtedness subsequently incurred (Civ.Code, § 2819).

[Ed. Note.—For other definitions of "Material Alteration," see Words & Phrases.]

2. Guaranty Ⓒ54

Parties to obligation cannot materially alter its terms without guarantor's consent, irrespective of good faith belief that guarantor would benefit thereby, and courts cannot speculate whether alteration benefits or injures guarantor (Civ.Code, § 2819).

3. Mortgages Ⓒ209

Provision in declaration of trust authorizing trustee to borrow money as trustor's agent might deem advisable or for best interest of corporation held not to authorize trustee to give lien on trust property prior to that of declaration of trust.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action by Adele McMannus against the Temple Estate Company and others. Judgment for plaintiff, and defendant S. Dupuy appeals.

Reversed with directions.

Charles A. Thomasset, of Los Angeles, for appellant.

R. Dechter and B. L. Hoyt, both of Los Angeles, for respondent.

ROTH, Justice pro tem.

Respondent, as assignee of Baash-Ross Tool Company and as plaintiff, brought suit on a promissory note in the principal sum of \$12,000 and a guaranty thereof. The note was executed by defendant Temple Estate Company, a corporation,

hereinafter referred to as estate, and recited on its face that it "is secured by a declaration of trust covering real and personal property." The declaration of trust in question named a number of beneficiaries, all of whom were creditors of the estate, respondent's assignor being one of them. The other three defendants, of whom appellant Dupuy is one, executed a guaranty of the note. Appellant Dupuy alone was served. The action, the judgment rendered in favor of respondent herein, and the appeal therefrom has to do, therefore, with appellant alone.

[1,2] It is shown without dispute that after the execution of the note, and of the trust deed given as security therefor, as well as the guaranty in which appellant participated, that an alteration was made in the trust deed by the written agreement of the trustor, trustee, and beneficiaries of the declaration of trust, without the knowledge or consent of appellant. The alterations were made in the form of a written agreement to the declaration of trust which recited that because of unpaid, delinquent, and accruing taxes, assessments, and interest and trustor's inability to provide funds for the payment of the same, it would be necessary to raise approximately \$6,000 to maintain in good standing the property covered by the declaration of trust. The amendment then provides for a loan of the amount required by the beneficiaries to the trustor in certain proportions, such several amounts to be evidenced by several notes executed by trustor in favor of the several beneficiaries, and secured by liens on the various parcels of property already in the trust. It was further stipulated in the amendment that such several liens were to be prior and senior to the lien which had theretofore been created by the trust as security for the \$12,000 note first mentioned.

The original deed of trust provided that "the Trustor, Temple Estate Company, shall have the right and power to borrow money and to secure the payment of any such loan together with interest thereon by a lien upon the trust property *subject and subordinate, however, to the indebtedness evidenced by the promissory notes described and mentioned herein, and any prior loans or advances made by or to the Trustee for the Trust Estate, pursuant to the last preceding paragraph.*" {Italics ours.}

There can be no question that the amendment to the deed of trust, which gave priority to the new loans made over the \$12,000 note guaranteed by appellant, was a material alteration. Such an alteration exonerates the guarantor. Civ.Code, § 2819; Parke & Lacy Co. v. White River L. Co., 110 Cal. 658, 43 P. 202.

Respondent contends, however, that the clause in the declaration of trust which authorized the trustee "to loan or advance its own funds to the trust for any purpose connected with the operation, management, * * * or the administration of this trust not exceeding \$10,000 * * *" and which permits the trustee a prior lien for such advance, is of such scope that had the trustee advanced the money to the trust instead of the creditor beneficiaries, as was the case, appellant would be in no worse position, and that, therefore, the amendment was not a material alteration.

The fact is that the trustee did not make such advances, and respondent's contention that the appellant was not prejudiced because the money was borrowed from the creditor beneficiaries instead of being advanced by the trustee is not tenable. It is clear that the purpose of the creditor beneficiaries in executing the amendment was to preserve the property in trust until it could be marketed to more advantage. It is settled, however, that the parties to an obligation cannot materially alter its definite terms without a guarantor's consent, even though such parties in good faith believe it is to the guarantor's advantage to make the alteration. We are not required and under the law are not permitted to speculate whether the alteration benefits or injures the guarantor. It is enough that it is a material alteration of the terms of the guaranty. Driscoll v. Winters, 122 Cal. 65, 54 P. 387; Lasky v. Bew, 22 Cal.App. 393, 134 P. 358; First Congregational Church of Christ, etc., v. Lowrey, 175 Cal. 124, 165 P. 440; Parke & Lacy Co. v. White River L. Co., 110 Cal. 658, 43 P. 202.

[3] The only other power in the declaration of trust urged by respondent as a possible source of authority for the execution of the amendment in question is that which intrusts the trustee with the "power to convey, bargain, sell, lease, * * * mortgage, pledge and borrow money by note, deed of trust, trust indenture, * * * in such manner, amount and cost

as the Trustee and George H. Woodruff the agent of the Trustor * * * may deem advisable or for the best interests of this corporation. * * *

This clause has no application for several reasons. The money was not loaned to the trustee with or without the consent of Woodruff. The agreement in the amendment is "to advance and loan to the Temple Estate Company." There is nothing which authorizes the trustee in the foregoing clause, assuming the money was loaned to the trustee, to make the money borrowed pursuant to said clause a prior lien to the debts originally listed in the declaration of trust.

The judgment is reversed with directions to the trial court to modify its findings in accordance with the views herein expressed, and to enter judgment in favor of appellant against respondent.

We concur: HOUSER, P. J.; DORAN, J.



10 Cal.App.2d 178

HILL v. INDUSTRIAL ACCIDENT COMMISSION et al.
Civ. 1744.

District Court of Appeal, Fourth District,
California.
Nov. 13, 1935.

1. Master and servant ⇨417(7)

Finding of Industrial Accident Commission which is supported by evidence cannot be disturbed.

2. Insurance ⇨136(2)

Insurance policy takes effect on delivery which, in absence of evidence to contrary, is presumed to have been on date of policy after which policy becomes property of insured (Civ.Code, §§ 1054, 1626, 1627).

3. Insurance ⇨136(3)

Delivery of insurance policy is absolute and thereupon policy becomes effective, discharged of any condition on which delivery was made (Civ.Code, §§ 1054, 1626, 1627).

4. Insurance ⇨136(2)

"Constructive delivery" of insurance policy is matter of intention and policy is constructively delivered when, by agreement of

parties at time of execution, it is understood to be delivered and under such circumstances that insured is entitled to immediate delivery regardless of whether policy actually reaches hands of insured (Civ.Code, §§ 1054, 1626, 1627).

[Ed. Note.—For other definitions of "Constructive Delivery," see Words & Phrases.]

5. Insurance ⇨136(2)

Delivery of insurance policy is complete when policy is sent to local agent to be unconditionally delivered after which policy is property of insured (Civ.Code, §§ 1054, 1626, 1627).

6. Insurance ⇨136(2)

Effort of insurer to collect premium on employer's liability policy after policy had been issued and received by agent, after injury to employee and after insurer had been fully advised of all facts *held* admission by insurer that policy had been delivered, and that policy was in full force and effect through such period, since without delivery of policy no part of premium could have been earned.

7. Insurance ⇨146(1)

Practical interpretation of parties to employer's liability insurance contract on questions of delivery and extension of credit is binding on Industrial Accident Commission and Court of Appeal.

8. Insurance ⇨665(2)

Evidence that insurer's agent had authority to extend credit and that bill for advance premium was mailed to insured after policy had been issued and received by agent and that insurer attempted thereafter to collect earned premium and parties considered policy in force during such time *held* to establish constructive delivery of employer's liability policy and extension of credit to employer so that policy was in effect from date of constructive delivery until cancellation.

9. Insurance ⇨229(2)

Under employer's liability policy providing that to effect cancellation thereof either party was required to give written notice to other party stating when cancellation should be effective, employer's receipt of request for wage statement on which only reference to cancellation were words "cancellation audit" in lower left portion of page *held* insufficient as notice of cancellation of policy.

10. Insurance ⇨229(2)

Insurer *held* not entitled to cancel employer's liability policy by any notice short of that which it had bound itself to give by provision of policy.

11. Insurance ⇨146(3)

Terms of employer's liability policy which had been prepared by insurer must be construed against insurer and insurer must be held to be bound by such terms.

12. Insurance ⇨235

In compensation proceeding, evidence held insufficient to support order discharging insurance carrier from liability based on finding that employer's liability policy was canceled prior to employee's injury.

Proceeding under the Workmen's Compensation Act by Mrs. Lulu Vickers, claimant, opposed by T. L. Hill, employer, and the National Automobile Insurance Company, insurance carrier, to review an order of the Industrial Accident Commission granting an award of compensation to the claimant and discharging from liability the insurance carrier.

Order annulled and remanded.

Clafin & Dorsey, of Bakersfield, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

MARKS, Justice.

This is a proceeding to review an order of the Industrial Accident Commission awarding Lulu Vickers compensation against T. L. Hill for injuries sustained in the course of and arising out of her employment by Hill, and discharging from liability the National Automobile Insurance Company, the purported insurance carrier for Hill. For brevity, we will refer to the Industrial Accident Commission as the commission, and the National Automobile Insurance Company as the company.

It is admitted that Mrs. Vickers was the employee of Hill; that she was injured in the course of her employment; and that her injury followed from a risk of employment. The sole questions presented are whether the company insured Hill, and, if so, whether the policy was canceled prior to the date of the injury of Mrs. Vickers on April 8, 1934. In other words, is the finding of the commission that Hill was uninsured at the time of the accident supported by any evidence? A determination of these issues requires a careful consideration of the evidence which we believe necessary for the guidance of the commis-

sion in further proceedings before it in this cause.

Collins & Mortensen, a copartnership of Bakersfield, Cal., to whom we will refer as the agent, was appointed by the company as "its agent for the purpose of securing for the company acceptable applications for policies and the collection of premiums therefor," as appears from the agency contract. That document contains the following provisions:

"Fifth: The Company shall render monthly statements of all business written and premiums due from the Agent and the Agent shall remit in full therefor for all moneys collected, or for all premiums included in Conditional Sales Contract, Title Retaining Note or subject to Chattel Mortgage, on or before the 15th day of the month following the date of the collection of such moneys or the issuance of such documents, and within forty-five days after the last day of the month, in which the insurance becomes effective, except when any policy provides payment as a condition precedent to effectiveness of such policy, the premium must be paid as therein provided.

"Sixth: If the original or subsequent premiums written on policies under this contract are not paid to the Company within sixty (60) days from the date of the issuance of the policies or renewals thereof, on which such premiums apply, the Company reserves the right to collect such outstanding premiums and if collected by the Company, the Agent shall receive no commission thereon, and Agent agrees to promptly remit to insureds any and all return premiums under policies or declaration certificates of this Company, and all return commissions, as per above commission schedule, on such return premiums are to be paid to the Company upon demand." The policy in question contained no provisions requiring the payment of the premium as a condition precedent to its effectiveness.

About the middle of February, 1934, Hill applied to the agent for a policy of employer's liability insurance. The application was forwarded to the office of the company in San Francisco and a policy was written. This policy and some of its indorsements bore the date of February 19, 1934. Other indorsements bore date of February 16, 1934. The completed policy was sent by mail to the agent in Bakers-

field. It called for an advance premium payment of \$40.

Hill testified that he met Mortensen away from the agent's office and had a conversation with him in which Mortensen informed him that the policy had been received. Hill further testified that he asked Mortensen to hold the policy in his office until he called for it and that Mortensen replied, "Okey." Mortensen admitted meeting Hill at the place specified, but did not remember the conversation detailed by Hill.

An employee of the agent testified that on March 1, 1934, she mailed Hill a bill for the advance premium of \$40. Hill denied receiving this bill. The same employee testified that at some time prior to March 14, 1934, she had a telephone conversation with Hill during which he stated that the advance premium on the policy was too high and that he could secure a policy from the state compensation insurance fund at less cost. While there is a conflict in the evidence as to this conversation, there is no evidence suggesting any express direction from Hill that the agent have the policy canceled.

The policy was returned to the San Francisco office of the company where the following indorsement was placed on its back: "Canceled Non-payment E. P. (Earned premium) 11.62 R. P. (Returned Premium) 28.38 Date 3-14-34 May 3 1934 Northern Agents." The words in parentheses are the explanations given by witnesses for the company of the preceding abbreviations.

Under date of March 20, 1934, a document entitled "Request for wage statement" was mailed to Hill from the San Francisco office of the company. This requested a statement from Hill of "the total compensation of all employees from February 16th 1934 to March 14th 1934, covered by Workmen's Compensation Policy No. C 41218," which is the one we have been discussing. Above the last printed paragraph on the request for wage statement the words "cancellation audit" are typed. Hill denied ever receiving this document.

On April 13, 1934, the company wrote Hill as follows:

"Kindly refer to our request on March 20th for Wage Statement covering the period of February 16th, 1934 to March 14th, 1934.

"It is imperative that we have this Wage Statement in order to complete our adjustment of this Policy."

It should be noted that this letter was dated six days after Mrs. Vickers had been injured.

On May 3, 1934, and after the company had been notified of the injury of Mrs. Vickers and of her claim for compensation, the company inclosed its bill of \$11.62 against Hill in the following letter to him: "We are inclosing a statement showing an earned premium due us on the above policy covering the period of February 16, 1934 to March 14, 1934. Inasmuch as the deposit premium was not paid to us we were forced to cancel the Policy for Non-Payment of Premium. We must ask that you let us have your check covering the amount as shown on our statement not later than May 14th 1934." At a hearing before the commission on December 3, 1934, the manager of the San Francisco office of the company testified that it was his understanding that the bill for \$11.62 against Hill had been handed to the company's attorney for action. It is admitted that no part of the premium has been paid, but Hill testified that he was willing and able to pay it when its amount was determined.

The manager of the San Francisco office of the company testified as follows concerning credit extended to the assured:

"Q. Mr. Burton, what is the custom in the business of extending credit? It is always customary to extend thirty to sixty days time, isn't it? A. Well, as far as extension of credit is concerned, you understand that the companies operate in a manner whereby the so-called agent is virtually representing the employer. Now, we extend, under ordinary circumstances, credit to the agent. Now, what extension of credit he may extend to the employer within that time that we allow him, why that is something that we do not know about.

"Q. What do you allow him, fifteen days after the month succeeding the date of the policy? A. Well, ordinarily, unless it is designated to the contrary, we allow them until the 10th of the month following in which the business is written, and that is paid by the 28th, then it is subject to cancellation.

"Q. In the ordinary course of business this policy issued in March would be subject to cancellation April 28th, or would

it be May 28th? A. No, it was dated February.

"Q. So the normal cancellation would be April 28th, primary notice on April 10th, thirty days following the month in which it was issued? A. Yes, that is correct.

"Q. That would be the normal way? A. Yes."

The policy contains the following provisions concerning cancellation: "This Policy may be canceled at any time by either of the parties upon written notice to the other party stating when, not less than ten days, thereafter, cancellation shall be effective. The effective date of such cancellation shall then be the end of the Policy Period. * * * Notice of cancellation shall be served upon this Employer as the law requires, but if no different requirement, notice mailed to the address of this Employer herein given shall be a sufficient notice, and the check of the Company, similarly mailed, a sufficient tender of any unearned premium."

[1] In approaching the problem of the questioned finding of the commission being supported by any evidence, we will entirely disregard all of Hill's evidence tending to deny conversations with the agent, the members of the partnership, and its employees. If there is any evidence supporting the finding, we cannot disturb it here.

The findings of the commission that the company was not the insurance carrier of Hill at the time of Mrs. Vickers' injury and that he was willfully uninsured seem to have been based on three conclusions: (1) That the policy was never delivered; (2) that no extension of credit was given him; (3) that the policy was canceled. The evidence on the first two conclusions is interlocking and we will consider them together.

[2-5] The rules governing delivery of a policy of insurance are clearly set forth in 14 California Jurisprudence 425, as follows:

"The rule as to the delivery of insurance policies and other written instruments is the same, under the code, as the rule in regard to grants. Hence, the policy takes effect upon delivery, which is presumed to have been on its date, in the absence of evidence to the contrary. The policy becomes the property of the insured after delivery.

"Delivery is absolute, and thereupon the policy becomes effective, discharged of any condition on which delivery was made. Thus it is settled that when a contract of insurance is executed with a full knowledge of an existing fact which would render it void under a condition precedent embodied therein, the condition will be considered as waived, since otherwise it would be an unmeaning form, the only effect of which would be to deceive and defraud. It has been held, accordingly, that an express provision in a policy that the company shall not be liable until the premium is actually paid, is waived by the unconditional delivery of the policy as a completed and executed contract, under an express or implied agreement that a credit shall be given for the premium; and the company is liable for a loss which may occur during the period of credit.

"A policy is constructively delivered when, by agreement of the parties at the time of execution, it is understood to be delivered, and under such circumstances that the insured is entitled to immediate delivery. Constructive delivery is a matter of intention. If it was intended that the policy should be in force before it actually reached the hands of the insured, it will be deemed constructively delivered. Moreover, it seems that if the insurer so far accepts the application as to prepare and forward a policy to its agent for delivery, and if payment of the premium has been made or waived or is not a condition of the policy's taking effect, the contract is then complete, and the insurer cannot revoke acceptance, though the policy has not been delivered. Delivery is complete, therefore, when the policy is sent to the local agent to be unconditionally delivered, and though lost on the way, it is nevertheless the property of the insured."

The policy in question, being a written instrument, did not take effect until its delivery. Sections 1626, 1627, 1054, Civ. Code. It follows that in the absence of its delivery, either actual or constructive, the policy could not have been in force and no mutual rights or obligations between the insurer and the insured could have arisen under it. The company would not have been obligated to protect Hill against the claim of an injured employee and the insured would have had no obligation to pay any portion of the premium.

In the case of *Harrigan v. Home Life Insurance Co.*, 128 Cal. 531, at page 547,

58 P. 180, 61 P. 99, the Supreme Court quoted with approval from the case of *Hallock v. Commercial Insurance Co.*, 26 N.J. Law, 268. In that case a policy of insurance was delivered by the insurer to its agent, Breck, but was not manually delivered to the insured. The New Jersey court said: "Breck, the agent, and the mail were only the vehicles to carry it to him. It was the same thing as if mailed or sent directly to the plaintiff. The defendants suggest, in answer, that Breck was their agent, and that, by sending it to him, they did not part with the possession of the policy, and that they only gave authority to Breck to deliver, which they could and did revoke before actual delivery. But when they mailed the policy to Breck to deliver, they did not constitute him their agent, to receive it and keep it for them, nor to retain it as their agent. * * * It was a delivery to Breck to deliver to the plaintiff, which was a good delivery to the plaintiff."

[6] There is no direct evidence of any express agreement to extend Hill credit or time within which to pay the advance premium. It is admitted that the agents had authority to extend him credit. On March 1, 1934, the agent mailed a bill to Hill for the amount of the advance premium. This was at least ten days after the policy had been issued and received by the agent and was the first demand made upon Hill for payment of the advance premium. This rather conclusively shows that credit had been extended to him for at least that time.

The most conclusive evidence that the policy had been delivered, that credit had been extended Hill, and that the policy was in full force and effect up to March 14, 1934, is the determined effort of the company to collect the earned premium up to that date and after the injury of Mrs. Vickers and after it had been fully advised of all of the facts of the case. This is an admission on its part that the policy had been delivered, for without its delivery no part of the premium could have been earned. It is also an admission that credit had been extended to Hill at least to March 14, 1934. It is also an admission that the policy was in full force and effect up to that date.

[7] It seems too clear for argument that Hill believed he was insured and that the company believed that it was his insurance carrier up to at least March 14, 1934.

It seems to us that the parties to the insurance contract by their conduct have placed a practical interpretation on the questions of delivery and extension of credit that must be construed as binding on the commission and on this court. In *Mitau v. Roddan*, 149 Cal. 1, at page 14, 84 P. 145, 150, 6 L.R.A.(N.S.) 275, the Supreme Court said: "Parties to a contract have a right to place such an interpretation upon its terms as they see fit, even when such an interpretation is apparently contrary to the ordinary meaning of its provisions. And in all cases where the terms of their contract, or the language they employ, raises a question of doubtful construction, and it appears that the parties themselves have practically interpreted their contract, the courts will follow that practical construction. It is to be assumed that parties to a contract best know what was meant by its terms, and are the least liable to be mistaken as to its intention; that each party is alert to his own interests, and to insistence on his rights, and that whatever is done by the parties contemporaneously with the execution of the contract is done under its terms as they understood and intended it should be. Parties are far less liable to have been mistaken as to the intention of their contract during the period while harmonious and practical construction reflects that intention, than they are when subsequent differences have impelled them to resort to law, and one of them then seeks a construction at variance with the practical construction they have placed upon it. The law, however, recognizes the practical construction of a contract as the best evidence of what was intended by its provisions. In its execution, every executory contract requires more or less of a practical construction to be given it by the parties, and when this has been given, the law, in any subsequent litigation which involves the construction of the contract, adopts the practical construction of the parties as the true construction, and as the safest rule to be applied in the solution of the difficulty. *Mayberry v. Alhambra, etc., Co.*, 125 Cal. 446, 54 P. 530, 58 P. 68; *Keith v. Electrical Engineering Co.*, 136 Cal. [178] 181, 68 P. 598." See, also, *Kales v. Houghton*, 190 Cal. 294, 212 P. 21; *Rosenberg v. George A. Moore & Co.*, 194 Cal. 392, 229 P. 34; *Katz v. People's Finance, etc., Co.*, 101 Cal.App. 552, 281 P. 1097; *Work v. Associated Almond Growers*, 102 Cal.App. 232, 282 P. 965; *Skousen v. Herz*, 135 Cal.App. 116, 26 P.(2d) 498.

[8] We therefore conclude that the evidence establishes beyond question that there was a constructive delivery of the policy to Hill and an extension of credit to him. It follows that the policy was in full force and effect from the date of its constructive delivery in February, 1934, until its cancellation, if it was ever lawfully canceled.

[9-11] It is admitted that no formal notice of cancellation of the policy was mailed or otherwise sent or delivered to Hill before the time of the injury of Mrs. Vickers. The company relied upon the "request for wage statement" mailed to Hill on March 20, 1934, as being a notice of cancellation. Hill denied receiving this instrument, but we will disregard his testimony and assume that it was delivered to him through the United States mail. The only reference to a cancellation of the policy were the words "cancellation audit" typed on the lower left portion of the page. These words cannot be construed into a notice that the policy was being canceled or was going to be canceled at a future date. The maximum information which they might convey on the subject was that the company might be preparing to take steps to cancel the policy. The words fell far short of the information concerning cancellation which the company bound itself to give Hill in the policy issued to him. In that instrument it was provided that to effect a cancellation it must give "written notice to the other party stating, when, not less than ten days thereafter, cancellation shall be effective." It could not cancel its policy by any notice short of the one it had bound itself to give. It did not give such a notice of cancellation. The policy having been prepared by the insurance company, its terms must be construed against it and it must be held bound by them. *Witherow v. United American Ins. Co.*, 101 Cal.App. 334, 281 P. 668.

[12] In the instant case we conclude that the policy was issued and delivered by the company and not canceled by it prior to the injury of Mrs. Vickers. The challenged findings of the commission are not only without evidentiary support but contrary to all of the undisputed evidence in the case. The commission urges that as there were conflicts in the evidence its findings must be sustained. This contention is without merit. There are no conflicts in that evidence upon which we must rely

to support the conclusion that the policy was delivered, credit extended and no cancellation effected. The only conflicts in the testimony are upon matters immaterial to a decision of the three questions of importance here.

The award of the commission against T. L. Hill, and dismissing the National Automobile Insurance Company and relieving it from all liability upon the claim of Lulu Vickers is annulled and the cause is remanded to the commission for further proceedings.

We concur: BARNARD, P. J.; JENNINGS, J.



10 Cal.App.2d 332

PEOPLE v. HOOPER.

Cr. 2793.

District Court of Appeal, Second District,
Division 2, California.

Nov. 22, 1935.

Hearing Denied by Supreme Court
Dec. 19, 1935.

1. Forgery $\hookrightarrow$ 26

Information charging that defendant willfully and fraudulently forged indorsement of draft and order and setting out in full check upon which indorsement was alleged to have been forged with indorsement thereon held to charge forgery of indorsement.

2. Obstructing justice $\hookrightarrow$ 5

Production of check in municipal court by defendant's attorney, testimony of defendant as to check and disputed indorsement thereon, marking of check for identification and examination by court, and expert testimony and legal argument with reference thereto held "offering in evidence" within statute denouncing offering in evidence as genuine any instrument known to be forged, notwithstanding that record failed to disclose that check was marked as exhibit, or that check was ever formally introduced in evidence (Pen.Code, § 132).

3. Forgery $\hookrightarrow$ 44(1/2)

Obstructing justice $\hookrightarrow$ 16

Evidence supported conviction of forgery and offering in evidence forged instrument as genuine (Pen.Code, § 132).

4. Criminal law Ⓒ489

In prosecution for forgery and offering in evidence forged instrument as genuine, cross-examination of defendant's handwriting expert as to his familiarity with certain printed work on subject concerning which he was testifying *held* not error, where witness had testified that he relied upon certain works.

5. Criminal law Ⓒ489

Contents of printed books may be brought before jury upon cross-examination of expert witness where witness has testified that he relies upon certain works or to test competency of expert, although generally such evidence is inadmissible as hearsay.

6. Forgery Ⓒ43

In prosecution for forgery of check upon back of which it was written that check was for rent, by addition of words "all previous rent paid," testimony of defendant that he had in fact paid back rent bill by services performed for landlord *held* properly excluded as irrelevant.

Appeal from Superior Court, Los Angeles County; J. J. Trabucco, Judge.

James Hooper was convicted of forgery, and of offering in evidence as genuine instrument known to be forged or fraudulently altered, and he appeals.

Affirmed.

L. V. Peterman and Wm. J. Clark, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

GOULD, Justice pro tem.

Defendant appeals from an order denying his motion for a new trial after he was convicted by a jury on two counts, one for forgery, the other for a violation of section 132 of the Penal Code.

The case has to do with a check for \$50 dated April 28, 1932, drawn by defendant's wife as payer, made payable to defendant, indorsed by him and delivered through the mail to his landlord upon his rent account. It is conceded that the check at the time of delivery to the landlord bore upon its back the words, "This check is for rent at 4145 Tracy Street from May 1, 1932." When the landlord later brought suit for a claimed balance of \$599.04 on the rent account, the \$50 check was produced at the civil action in the Los Angeles municipal court, and in addition to the above-quoted words, it had this indorsement on

the back: "All previous rent paid." The writing of these words constitutes the forgery charged, it being the claim of the prosecution that after the check was indorsed and cashed by the landlord, and after it was returned to Mr. and Mrs. Hooper, defendant wrote across it the words which, if true, would have wiped out the rent bill.

[1] Appellant claims that inasmuch as the alleged forgery is of the indorsement on the back of the check the information as to count one is fatally defective because it charged forgery generally, without specifically charging forgery of the indorsement, relying in this contention upon *People v. Thornburgh*, 4 Cal.App. 38, 87 P. 234. But that case presents an entirely different state of facts. Here the information charged in terms that we deem amply sufficient that defendant did "wilfully, unlawfully and fraudulently and feloniously make, alter and forge a certain contract and receipt for money, acquittance, release, acceptance and indorsement of a draft and order in writing," etc., and then set out in full the check with the indorsements thereon. In our opinion the charge was sufficiently explicit, and appellant was thereby fully apprised of the accusation against him.

[2] Section 132 of the Penal Code denounces as a crime the offering in evidence at any trial as genuine or true any instrument known to be forged or fraudulently altered. At the municipal court trial, appellant contends, the check in question was never "offered in evidence," and therefore conviction as to that offense is not supported by the evidence. It is true that the record does not disclose that the check was ever marked as an exhibit in the civil case, and the court reporter at that trial could not discover from his notes that it was ever formally introduced in evidence. But the check was produced in the municipal court by appellant's attorney, appellant there testified as to the check and the disputed indorsement, it was marked for identification, was examined by the court, and was the subject of expert testimony and legal argument. We are of the opinion that such use of the document constitutes an offering in evidence within the meaning of the section.

[3] Appellant's point as to insufficiency of the evidence is answered by the ob-

servation that there was ample substantial evidence to justify the jury's verdict.

[4, 5] Error of law is asserted because a handwriting expert introduced in behalf of appellant was asked questions on cross-examination touching his familiarity with a certain printed work on the subject concerning which he was testifying. While it is the general rule that the contents of printed books may not be brought before the jury upon examination of an expert witness, upon the theory that such action violates the hearsay rule and permits a person not under oath and not subject to cross-examination to place his opinions before the jury (*Baily v. Kreutzmann*, 141 Cal. 519, 75 P. 104), the rule is otherwise upon cross-examination where, as here, the witness has testified that he relies upon certain works, or where the purpose is to test the competency of the expert. *Fisher v. Southern Pacific Co.*, 89 Cal. 399, 26 P. 894.

[6] Nor do we think the court erred in excluding proffered testimony of appellant that he had in fact paid his back rent bill by services performed for the landlord. The only question involved here was whether the forgery of the four words was committed by appellant, and the line of testimony sought to be introduced was extraneous to the issue and not material.

Order affirmed.

We concur: CRAIL, P. J.; WOOD, J.



LOEB v. CHRISTIE. *

Civ. 10555.

District Court of Appeal, Second District,
Division 2, California.

Nov. 19, 1935.

1. Guaranty §77(3)

Creditor could enforce liability of guarantor of promissory note secured by trust deed without first exhausting security.

2. Guaranty §78(1)

Economic depression does not constitute equitable defense to action to enforce liability of guarantor of promissory note.

3. Action §91/2

Moratorium statute held not applicable to obligations incurred prior to effective date of statute (St. 1934, Ex.Sess., p. 3, § 7).

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Action by Edwin J. Loeb against H. H. Christie. From a judgment for plaintiff, defendant appeals.

Affirmed.

Sparling & Teel, of Los Angeles, for appellant.

Loeb, Walker & Loeb, of Los Angeles (Milton H. Schwartz and Herman F. Selvin, both of Los Angeles, of counsel), for respondent.

McCOMB, Justice pro tem.

This is an appeal by defendant from a judgment in favor of plaintiff after trial by the court without a jury.

The complaint alleges an unconditional guarantee by defendant, executed May 19, 1930, of a promissory note payable to plaintiff. It is conceded that the note was secured by a trust deed and that plaintiff had not resorted to the power of sale given therein.

Defendant relies for reversal of the judgment on the following propositions:

First. An action will not lie against a guarantor of a secured obligation until the security has been exhausted.

Second. The economic depression constituted an equitable defense to the action.

Third. Section 7 of chapter I of an act of the extra session of the 1934 California Legislature, effective September 15, 1934, commonly known as the Moratorium Act of 1934, is a bar to the present action.

[1] Defendant's first contention is untenable, in view of the holding in *Withers v. Bousfield*, 42 Cal.App. 304, at page 319, 183 P. 855, 862, where in a suit upon a contract guaranteeing the payment of a promissory note secured by a trust deed, the court said:

"This case presents no different aspect from the foregoing, and numerous other cases, decided by the courts of last resort of this state, in which it has been held that, regardless of the necessity for exhausting the security given, before resorting to the personal liability of the maker of a note,

nevertheless an indorser, or guarantor, may be sued upon his personal liability before, and without, such action having been taken."

[2] Turning to the second question, the economic depression does not constitute an equitable defense to a suit to enforce an obligation. *California Securities Company v. Grosse* (Cal.Sup.) 46 P.(2d) 170.

[3] Appellant's final contention may not be sustained for the reason that the Moratorium Act of 1934 (St. 1934, Ex.Sess., p. 1) does not apply to obligations incurred prior to the effective date of the act. To hold otherwise would impair the obligation of a contract and render this act unconstitutional. *Bankers Life Company v. Canterbury* (Cal.App.) 50 P.(2d) 83; *Brown v. Ferdon* (Cal.App.) 46 P.(2d) 218. In the instant case the guarantee, which is the basis of the act, was executed May 19, 1930, while the act relied upon as a defense did not become effective until September 15, 1934.

The judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.



10 Cal.App.2d 348

HILLIARD et al. v. FABRICIUS et al.

Civ. 5379.

District Court of Appeal, Third District,
California.

Nov. 22, 1935.

Rehearing Denied Dec. 21, 1935.

Hearing Denied by Supreme Court
Jan. 20, 1936.

1. Automobiles ⇨244(27)

In action for death of road roller operator struck by truck being used in highway construction work under arrangement whereby highway contractor paid hourly amount for use of truck and, in addition, paid for oil, gas, and truck driver's wages, but whereby truck owners had control over truck drivers, evidence held to sustain verdict that driver of truck was servant of truck owners.

2. Appeal and error ⇨1001(1)

Verdict which ample evidence supports will not be disturbed on appeal.

3. Automobiles ⇨193(2)

Statute regarding liability of owners of motor vehicles held inapplicable where relation of servant and master existed between driver and owner (Civ.Code, § 1714¼).

Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

Action by Myrtle Hilliard and another against Alexander Fabricius and others. From an adverse judgment, defendants appeal.

Affirmed.

Len. H. Honey, of Stockton, for appellants.

Daniel W. Burbank and C. F. Lau-meister, both of San Francisco, and L. T. Milburn, of Mariposa, for respondents.

Mr. Justice pro tem. MAXEY delivered the opinion of the court.

This action was brought by the surviving wife and son of Lester Hilliard, seeking damages for injuries sustained by Lester Hilliard on December 11, 1933, that resulted in his death.

The defendant Fabricius was a truck driver, and on the 11th day of December, 1933, was driving and operating an International motortruck belonging to the defendants Biasotti, Willard & Biasotti. It is alleged in the complaint, and admitted by appellants, that the accident resulting in the death of Lester Hilliard was occasioned by the careless and negligent operation of the truck by Fabricius. The defendants Biasotti, Willard & Biasotti are a copartnership consisting of Louis Biasotti, Frank Willard, and Allie Biasotti. The copartnership was originally alleged to consist of Louis Biasotti, Frank Willard, and Louis Lovotti. During the course of the trial it was developed by the evidence that this firm had been succeeded by the present firm of Biasotti, Willard & Biasotti; that Allie Biasotti had succeeded to the interests of Louis Lovotti; and that Louis Lovotti was not concerned with said action. Thereupon, the court permitted the plaintiff to file an amended complaint to conform to the proof, which amended complaint prayed for damages against Biasotti, Willard & Biasotti instead of the former firm or copartnership of Biasotti, Willard & Lovotti. The copartnership of Biasotti, Wil-

lard & Biasotti, was engaged in the general contracting business at Stockton, Cal., and in connection with its business owned several motortrucks used in transporting highway materials.

The jury returned its verdict against all of said defendants for the sum of \$15,000. Upon defendant's motion for a new trial, this amount was reduced to \$12,000, and judgment entered for the latter amount. Defendants have appealed from the judgment so entered.

The points raised by appellants are: (1) Insufficiency of evidence to support implied finding of jury that Fabricius was a servant, agent, or employee of Biasotti, Willard & Biasotti at the time of the accident; (2) insufficiency of evidence to support verdict of liability against Biasotti, Willard & Biasotti, as general employers where Frederickson & Watson Company, as special employers, had the right of control over Fabricius at the time and place of the accident; and (3) error by trial court in failing to instruct upon material issues.

Early in December, 1933, the defendant Fabricius applied to the defendants Biasotti, Willard & Biasotti for work as a truck driver, and was, at that time, informed that said defendants had no work for him, but they suggested that he communicate with Frederickson & Watson Construction Company in Mariposa county, and stated that the latter company might have need for men to drive trucks.

Frederickson & Watson Construction Company was engaged in surfacing the state highway in Mariposa county, at a point on the Carson cut-off of the all-year highway near Cathay. Frederickson Bros. were also interested in this contract with Frederickson & Watson Construction Company. Charles O. Frederickson was a member of the firm of Frederickson Bros., but was not of the firm of Frederickson & Watson Construction Company; however, he was in charge of the particular work involved in this action for both firms. Mr. Frederickson visited the offices of Biasotti, Willard & Biasotti in Stockton, and there entered into negotiations for the rental of three motortrucks to be used in Mariposa county. He testified that the rental of these trucks agreed upon between himself and Louis Biasotti, one of the copartners, was \$1.65 per hour, and, in addition thereto, to supply the oil and gas used, and to pay the wages of the drivers of the trucks.

He further testified that Mr. Biasotti stated to him that the copartnership would furnish its own drivers for the trucks.

Biasotti, Willard & Biasotti conditioned their trucks preparatory to sending them to the Frederickson & Watson job; they selected six men, two for each truck, to drive and operate the three trucks while engaged in this work. Mr. Willard called the drivers together, with the exception of Fabricius, and instructed them how to operate the trucks, giving them the strict injunction that they should not "dynamite" them, in other words, that they should not misuse nor abuse the trucks in their operation. The five drivers had been in the employ of Biasotti, Willard & Biasotti previously, and Mr. Scott was the oldest employee of the five in point of service. Fabricius had never been in the employ of the copartnership.

Scott was instructed by the copartnership to have Fabricius accompany him on his truck to Mariposa, and the copartnership ordered Fabricius to accompany Scott; Fabricius joined Scott at Livingston and drove the truck to the plant of the Frederickson & Watson Company. Upon arriving at the plant of Frederickson & Watson Company, Mr. Frederickson inquired of Scott as to who was in charge of the trucks, and was informed that he (Scott) was in charge of the trucks and men. Scott then told Frederickson that Fabricius would drive the afternoon shift, and that he (Scott) would drive the morning shift. Frederickson then stated to Scott that it would be necessary to make some changes in the truck by removing the fenders and to increase the height of the sideboards. Mr. Frederickson testified that he had previously explained these changes to Mr. Louis Biasotti and that he had consented to the changes being made. Scott assisted in making these changes.

Frederickson showed Fabricius where the loading-hopper was located, and where the materials were to be taken, which point of unloading was a distance of approximately five or six miles from the loading plant. Fabricius then secured a load of road material and started for the point designated, lost control of the truck, collided with a road roller being operated by Lester Hilliard, and, as a result of the collision, Lester Hilliard received injuries that caused his immediate death.

Allie Biasotti, one of the defendants testified that no contract of employment

was ever made between Fabricius and the copartnership to his knowledge. He did say, however, that he had told Fabricius to accompany Scott to the Frederickson & Watson job. The other members of the copartnership testified similarly. None of them had ever made any agreement concerning his employment with Fabricius. The testimony of Jensen was to the effect that the drivers for Biasotti, Willard & Biasotti took care of their trucks, and that the driver's time was conditioned upon the time the particular truck was in use; that no agreement concerning employment was ever made with Fabricius to the witness' knowledge. Fabricius, one of the defendants, testified that he had no agreement of employment with Biasotti, Willard & Biasotti, nor did he have any agreement of employment with Frederickson & Watson Company, that he had no agreement of employment with any one, but that he accompanied Scott at the direction or order of Biasotti, Willard & Biasotti, and at the request of Scott. On December 13, 1933, and again on December 20, 1933, Fabricius made statements to the effect that he was under the employ of and working for Biasotti, Willard & Biasotti. His testimony was indefinite and his statements were conflicting, and would support either contention herein advanced. During the time Fabricius was confined to the hospital, and during his convalescence, the compensation insurance carrier for Frederickson & Watson Company paid his wages and incidental expenses.

[1,2] We have briefly summarized the testimony pertinent to the question of the employment of Fabricius. It shows such a conflict that the jury could with propriety resolve the conflicting statements in favor of the plaintiff; it shows conclusively that Fabricius was employed by Biasotti, Willard & Biasotti, if Frederickson's testimony is to be believed. The fact that Frederickson & Watson Company, either directly or indirectly, paid the wages and expenses of Fabricius while he was incapacitated does not detract from this view, because Frederickson & Watson Company had agreed with the copartnership to pay these wages as a part of the consideration for the rental of the trucks. The copartnership had retained a control over the drivers of the various

trucks by instructing them as to the use thereof—not to "dynamite" them.

The verdict of a jury will not be disturbed on appeal if there is any evidence to support its conclusion. There was ample evidence in this case to support the verdict as rendered.

Upon the conclusion herein reached, it is unnecessary to further consider the second question raised by appellants.

[3] Appellants' third point is that the court erred in failing to instruct the jury upon material issues raised by the pleadings and evidence. Appellants' contention is based upon section 1714 $\frac{1}{4}$ of the Civil Code as it then existed. That section, however, was inapplicable where the relation of servant, agent, or employee existed, and having concluded that the evidence would support such an implied finding by the jury, it is unnecessary to further consider this point. Nor is this instruction contained in appellants' brief nor any similar instruction, called to our attention.

The judgment appealed from is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



10 Cal.App.2d 383

HRABAK et al. v. CITY OF LOS ANGELES
et al.
Civ. 9374.

District Court of Appeal, Second District,
Division 1, California.
Nov. 25, 1935.

Rehearing Denied Dec. 19, 1935.

1. Municipal corporations Ⓒ218(2)

Removal of employees in classified civil service of city because of lack of funds without hearing before board of civil service commissioners *held* proper under city charter dispensing with right to hearing in case of suspension because of lack of funds.

2. Municipal corporations Ⓒ218(2)

Removal of employees in classified civil service of city by notice that they were "laid off" for lack of funds *held* proper under pro-

vision of city charter which gave only right to "suspend" employee because of lack of funds.

3. Municipal corporations ☞206

Employees in city department of water and power who after promotion from positions as linemen to that of line foremen had been laid off because of lack of funds held not entitled to restoration of their previous status with right to employment on basis of their seniority ranking as of date of their original employment.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Petition for writ of mandate by Frank B. Hrabak and others against the City of Los Angeles and others. Judgment for defendant, and plaintiffs appeal.

Affirmed.

William E. Reiley, of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and G. Ellsworth Meyer, Deputy City Atty., all of Los Angeles, for respondents.

ROTH, Justice pro tem.

This is an appeal from a judgment entered upon an order sustaining without leave to amend a demurrer to an amended petition for a writ of mandate to compel respondents to reinstate petitioners in the employ of the department of water and power of the city of Los Angeles as linemen.

We ignore defects of pleading which were not cured in the amended petition, and because of which the order sustaining the demurrer without leave to amend might be technically justified as a proper exercise of discretion, inasmuch as a previous demurrer had already been sustained, and proceed to the merits. It appears from a reading of the amended petition that petitioners (seven in number) were first employed as linemen by the department of water and power at various dates, but commencing approximately in the year 1922. They continued in the employ of that department in such capacity until at or about 1925, when said petitioners, of their own volition and upon their own initiative, took and passed examinations for line foremen. They were promoted and certified to the position of line foremen in the year 1925, and continued in the latter capacity

until September 6, 1932, when they were "laid off" for lack of funds and lack of work. The initial point made by petitioners is that they were "laid off" contrary to the provisions of the city charter, specifically section 112(a) thereof. Petitioners also contend that, since they were linemen before they were line foremen, they retained their civil service seniority as linemen, and, therefore, that if there was no work for them as foremen, they automatically reverted to their classification as linemen; that the department of water and power must recognize their seniority ranking as linemen as of the date of their original employment in the capacity of linemen; and that if it becomes necessary to discharge or lay off other linemen in order to make room for petitioners, that the department should do so, since petitioners have seniority over such linemen who took up that kind of work subsequent to the date that petitioners commenced to work for the department as linemen.

[1,2] On the first point petitioners contend that they were not "laid off" in accordance with law for the reason that they were not given a written notice and opportunity for hearing, as required by section 112(a) of the charter of the city of Los Angeles. That section does provide that no person in the classified civil service of the city "shall be removed * * * except for cause, which shall be stated in writing by the board or officer having the power to make such removal, * * * and filed with the Board of Civil Service Commissioners, with certification that a copy of such statement has been served upon the person so removed. * * *" The section then provides for an investigation and hearing of the causes stated in the notice and for reinstatement if not supported by evidence. The section concludes, however, with the following language: "** * * Provided, that the order of any appointing board or officer suspending any person because of lack of funds in such department shall be final and shall not be subject to review by said Board of Civil Service Commissioners. * * **" (Italics ours.)

The petition in the instant matter does not affirmatively allege or even suggest that the cause for the removal was not "because of lack of funds," but, on the contrary, inferentially alleged that the reason was "because of lack of funds." On such facts it has been decided that the not-

ice and hearing required by section 112(a) is dispensed with by the final proviso of the section itself. *Kabisius v. Board of Play-ground, etc., of Los Angeles* (Cal.Sup.) 50 P.(2d) 1040.

It is true that section 112(a) of the city charter of the city of Los Angeles gives to the board only the right to "suspend" an employee from the service because of lack of funds. It is not necessary, however, to determine whether a "lay-off" is synonymous with suspension, because in the *Kabisius Case*, supra, the notice to the employee used the word "terminate," which is undoubtedly stronger than the phrase "laid-off," used in the notice in the instant case, and the Supreme Court said, 50 P.(2d) 1040: "However, it is contended, inasmuch as the written notice to appellant said his employment was terminated, instead of using the word of the section, to wit, 'suspended,' that appellant was not effectively removed from the service. Aside from the two oral notices we think the letter clearly expresses the intention of the department to remove appellant from the service as an economy measure. In view of the state of the law hereinbefore set forth, we are constrained to hold that no such narrow interpretation of the section can be indulged. The proviso was intended to declare the right of the city to reduce its forces when such was necessary or advisable as a matter of economy."

[3] It is also clear that there is nothing in the provisions of the city charter which compels the restoration of petitioners to their previous status of linemen. The only pertinent portions of the city charter to which we have been cited are:

"Sec. 107. The board shall by its rules provide for the promotion in such classified civil service on the basis of ascertained merit and seniority in service and examination, * * * in fixing said rating an allowance of credits, to be stated at the time of the announcement of said examination, shall be made for past service. * * *

"Sec. 115. The board shall by its rules provide for the establishment of and govern the keeping of service records of all employees in the classified civil service. Said records may be used as one of the bases for: (a) Promotion; * * * (b) lay offs, through stoppage or lack of work. * * *

There is nothing in said sections, and our attention has been directed to no

others, and we find none, which compels or even authorizes the civil service commission or department of water and power to reinstate a civil service employee to a capacity or to a status which he had occupied prior to taking and successfully passing an examination for a new classification. As a matter of common sense, if the rule were otherwise, a civil service employee commencing in the lowest grade and by successive examinations attaining one of the highest, could not be discharged if there were work in any of the grades which he had previously occupied that was being done by civil service employees who came into the service after the date he had started in a lower grade.

The judgment is affirmed.

We concur: HOUSER, P. J.; DORAN, J.



10 Cal.App.2d 147
SOUTHWEST SULPHUR CO. v. SUPERIOR
COURT IN AND FOR LOS ANGELES
COUNTY et al.
 Civ. 10391.

District Court of Appeal, Second District,
 Division 1, California.

Nov. 13, 1935.

New trial ☞10

Where on June 28, 1934, trial judge vacated judgment and findings and on April 9, 1935, made ex parte order vacating order of June 28, 1934, and ordered judgment and findings for plaintiff, and plaintiff's counsel on April 10, 1935, filed and served notice thereof, plaintiff could not, after it became apparent that court would grant defendant's subsequently filed motion for new trial, question order of June 28, 1934.

Prohibition proceeding by the Southwest Sulphur Company against the Superior Court of the State of California, in and for the County of Los Angeles, and Carl A. Stutsman, judge thereof.

Alternative writ discharged.

Geo. L. Hampton, of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, Douglas De Coster, Chief Deputy Co. Counsel, and Henry Ramey, all of Los Angeles, for respondents.

YORK, Justice.

This matter comes before us on a petition for a writ prohibiting the trial court from proceeding to try a case anew after a motion for a new trial had been granted.

The record in this case was in a very chaotic state until the hearing before this court on October 8, 1935, at which time the attorney for petitioner stipulated that the facts set forth in the answer to the petition for the writ of prohibition were true.

The original action herein was one to quiet title, and after trial thereon was had, respondent judge announced his decision and ordered judgment for the plaintiff (petitioner here); proposed findings were prepared and presented by plaintiff, objections thereto were presented by defendant Ramey and hearings were had thereon, at which time respondent judge directed that specified changes be made in said findings and at which time he also directed plaintiff's attorney Hampton and the defendant Ramey to agree upon as many findings as possible, and then present the matter to him for settlement as to any findings upon which they were unable to agree, said respondent judge agreeing that he would not settle or sign said findings unless the objections of defendant to the proposed findings had been removed, or until a hearing was had thereon. In his objections and proposed amendments, said Ramey had asked for findings diametrically opposed to the findings contained in a certain paragraph of the findings as proposed by plaintiff, and respondent judge directed that a finding be substituted for that particular paragraph as would be in substantial accord with the findings proposed by Ramey in his objections.

On or about June 18, 1934, findings were presented to respondent judge, and believing and having been given to understand that the paragraph in controversy had been changed, as directed, he signed said findings and the judgment *ex parte* and thereafter, on June 21, 1934, the said judgment was entered. Upon being advised that the findings had not been changed as he had directed, the respondent judge ordered a hearing, and on June 28, 1934, said Hampton and said Ramey appeared before him, and he thereupon, after hearing, made a minute order vacating and setting aside the

judgment and findings theretofore entered on the 21st day of June, 1934. On April 9, 1935, an order was made vacating said minute order of June 28, 1934, and "findings are ordered for the plaintiff in this action as of this date."

Thereafter, to wit, on the 20th day of April, 1935, defendant Ramey served upon plaintiff in said action and filed with the clerk of the court a notice of motion to move for new trial, and on the same date, the defendant served upon plaintiff and filed with the clerk of the court a notice of motion to vacate the judgment and enter a new judgment on behalf of said defendant. These notices were presented to the court on the 9th day of May, 1935, over the objection of plaintiff that the court was without jurisdiction to hear said motions because said notices of motion had not been filed within the time required by law. Respondent court proceeded to hear said motions and granted defendant Ramey's motion for a new trial, denied his motion to vacate the judgment, and set said cause for trial. The minute order of said day, to wit, May 9, 1935, is in words and figures as follows: "Motion to vacate judgment and motion for new trial comes on regularly at 3 p. m. for hearing. The Court being of the opinion that the findings and judgment entered June 18, 1934 were inadvertently signed and that the court's action in setting aside said findings and judgment on June 24, 1934 were proper. The court now denies challenge of the court's jurisdiction to hear the motion of defendant Ramey to vacate judgment under section 663, Code Civ.Proc., and said defendant's motion for a new trial, and the motion of the defendant J. D. Bauer for a new trial. Defendant Ramey's motion for a new trial granted, and motion to vacate judgment is denied. Defendant J. D. Bauer's motion for a new trial denied. Date of the new trial is set for May 31, 1935 at 3 p. m."

The question presented is as to the jurisdiction of respondent court and the power of respondent judge to make the order vacating and setting aside said findings and judgment.

Petitioner's attorney, Hampton, was an officer of the plaintiff corporation, and it appears from the record that as such he was directly responsible for the court's action in signing the findings and judgment which were presented to the trial judge on June 18, 1934, which findings were drawn contrary to the directions which had been given by the trial judge. Both parties were pres-

ent at the hearing of June 28, 1934, at which time the findings and judgment theretofore entered were vacated and set aside, and we therefore will assume that that order was valid, in the absence of any showing that petitioner made any objection during that proceeding.

At the hearing before this court on October 8, 1935, petitioner stipulated that "the facts set forth in the answer to the petition for writ of prohibition are true."

There is an allegation in said answer to the following effect: "At plaintiff's instance said cause was reopened and set for trial and the taking of further evidence, and for settlement of findings, on December 6, 1934, at which time no additional evidence was received but said findings were discussed and argued by counsel; and thereafter said matter was set for settlement of findings on January 8, 1935; that various continuances were had and various conferences held and attempts made to agree upon said findings, and said Hampton, on the 23rd day of March, 1935, had the matter of the settlement of the findings in said matter set down for hearing on the first day of April, 1935, and notified said Ramey thereof by letter; that said Ramey had theretofore presented to respondent judge his objections and proposed amendments, to said findings, together with said defendant's proposed pages * * * which he asked be substituted for pages * * * proposed by plaintiff; * * *

The answer further alleged that "during said hearings aforesaid and at such of said conferences as were held in the presence of respondent judge, he had expressed to counsel his belief that the entire matter might better be disposed of upon motion for a new trial, and had indicated his preference for such disposition of the matter; that on, to-wit, April 1, 1935, respondent judge directed that pages * * * prepared and proposed by said Hampton, be substituted for page * * * of said findings as contained in the files, and sent counsel into his chambers to make the substitution. Counsel decided that the Clerk of the Court should make the substitution because said findings and other papers were permanently fastened into the judgment roll in said action, and upon entering the court room said Ramey stated he thought respondent judge did not fully understand the contents of the pages prepared by said Hampton, and again called attention thereto, and particularly to the inclusion in said proposed findings of

the finding concerning the clouding of plaintiff's title, which * * * respondent judge had directed should be excluded. Whereupon respondent judge * * * stated in substance 'if you gentlemen will not agree, I will re-sign these findings as they are and will hear you further on a motion for new trial', and thereupon said Respondent re-dated said findings and judgment April 1, 1935, and handed the file to the Clerk. Thereafter and on, to-wit, April 9, 1935, to evidence the action of respondent judge and accomplish his purpose to settle and sign new and modified findings and a new judgment, on, to-wit, April 9, 1935, he made an order ex parte vacating said minute order of June 28, 1934, and ordered judgment and findings for plaintiff as of said April 9, 1935. Said procedure by said respondent was intended to and did require service of notice of entry of judgment, and on, to-wit, April 10, 1935, notice thereof was filed by said Hampton and a copy of said notice was mailed to said defendant Ramey on, to-wit, April 10, 1935, and was received by said Ramey thereafter * * * April 11, 1935; that thereafter on * * * 20th day of April, 1935, notice of intention to move for a new trial and notice of intention to move to vacate the judgment, and the affidavit of defendant Ramey in support of his said motion for a new trial, were served upon said Hampton and filed with the clerk of the court. * * *

"Some of the proceedings and many of the occurrences and statements at said conferences and upon said hearings for settlements of said findings not being ascertainable from the records and files in said action, and upon said hearing respondent judge and said Hampton and said Ramey each stated his recollection of the facts and circumstances and occurrences at said hearings and during said conferences, and the circumstances under which said findings and judgment had been signed on the 18th day of June, 1934, and the circumstances and occurrences under which the judgment and findings had been set aside on June 28, 1934, and respondent judge, finding his recollection and statement of facts and circumstances substantially in accord with the recollection and statement of the defendant Ramey, directed said Ramey to prepare and file for the record an affidavit setting forth said facts and circumstances; that said Ramey thereafter and on, to-wit, the 13th day of May, 1935, made and filed his affidavit in said action setting forth said facts and circumstances, and stating also that

said Ramey's daybook and docket contain entries made at the time which are in exact accord with said Ramey's recollection of said facts, as stated in said affidavit; that the minute order of May 9, 1935, * * * correctly shows the order of respondent judge refusing to sustain the challenge of said Hampton to said respondent's rulings upon said motions."

The notice of entry of judgment was served and filed by Hampton and notice of intention to move for a new trial was served and filed by Ramey, and thereafter, to wit, on May 9, 1935, after time for proceedings by motion or appeal by Ramey had expired, and when it became apparent that a new trial would be granted, Hampton for the first time raised the question as to the court's action of June 28, 1934.

In view of the various facts and circumstances hereinbefore outlined, especially of the stipulation made by petitioner in this court, we are of the opinion that the order of the court of May 9, 1935, refusing to vacate the judgment and granting a new trial was fully justified.

The alternative writ hereinbefore granted is discharged.

We concur: HOUSER, P. J.; DORAN, J.



10 Cal.App.2d 401

GUBERMAN v. WEINER et al.
Civ. 9736.

District Court of Appeal, Second District,
Division 1, California.
Nov. 26, 1935.

Rehearing Denied Dec. 19, 1935.

1. Automobiles ⇨244(26)

Evidence that driver of automobile which struck pedestrian was employee of hotel company and at time of accident was proceeding to see debtor of hotel which driver operated for hotel company, for purpose of collecting debt, *held* to sustain finding that driver was acting within scope of employment at time of accident.

2. Evidence ⇨123(11)

In action by pedestrian for injuries sustained when struck by automobile, *state-*

ments of driver to employer's insurer, made at employer's direction, in which driver detailed facts of accident and admitted he was engaged upon business of collecting bill owed hotel which driver operated for employer, *held* competent irrespective of any question of agency.

3. Automobiles ⇨200 Judgment ⇨241

That verdict against registered owner of automobile involved in accident was for \$100 and that against employer of driver was for \$5,000 *held* not to render judgment against employer invalid, since liability of registered owner of automobile is direct and several as well as joint, and is not dependent upon a judgment against operator.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by Samuel Guberman against Morris Weiner, Consolidated Hotels, Incorporated, and others. From a judgment for plaintiff as against the second named defendant, such defendant appeals.

Affirmed.

Harold Larson, of Los Angeles, for appellant.

Paul Barksdale D'Orr, Thomas A. Reynolds, and Ira J. McDonald, all of Los Angeles, for respondent.

ROTH, Justice pro tem.

This is an action brought by respondent to recover damages for injuries claimed to have been sustained by him, as a consequence of an automobile accident which occurred at Seventh and Hill streets, in the city of Los Angeles, on the 17th day of March, 1933. Plaintiff and respondent was struck by the automobile as he was moving from the curb to a safety zone in the street. The automobile involved was driven by one Weiner and belonged to his wife, although one Ulrey was the registered owner thereof at the time of the accident. Appellant Consolidated Hotels, Inc., was sued as Weiner's employer, on the theory that at the time of the alleged accident Weiner was an employee of the Consolidated Hotels, Inc., acting within the scope of his employment. Trial was had before a jury and this appeal is from the judgment rendered in plaintiff's favor as against the Consolidated Hotels, Inc., and Weiner for the sum of \$5,000. There was also a verdict in favor of plaintiff and against Ulrey, the registered owner

of the automobile involved in the accident, for the sum of \$100. This appeal is solely by Consolidated Hotels, Inc., hereinafter called appellant. The effect of the discrepancy in the verdicts against Weiner and Ulrey is of no moment, unless such discrepancy vitiates the verdict and the judgment entered thereon against appellant.

It appears to be conceded by appellant that Weiner was negligent, and that the injuries sustained by plaintiff and respondent were a direct consequence of the accident caused by such negligence. Perfunctory argument is made that appellant was guilty of contributory negligence as a matter of law, and that the court erred in refusing certain instructions. It is sufficient to say that the instructions as given by the court were substantially correct and fully protected appellant on all material matters upon which instructions were requested.

As to the contributory negligence of the plaintiff, the written statement of Weiner, of which more will be said hereafter, demonstrates that respondent was not guilty of negligence as a matter of law, and that the admissions made by Weiner in connection with other evidence fully justified the jury in its finding of negligence against Weiner, and in concluding that there was no contributory negligence on the part of respondent. *Wilbur v. Wilbur*, 197 Cal. 1, 239 P. 332; *Wing v. Kishi*, 92 Cal.App. 495, 268 P. 483.

[1] Appellant concentrates its fire on the point that Weiner at the time of the accident was not acting within the scope of his employment and that it, therefore, was not responsible for the consequences of such accident. The evidence on this point is conflicting. The testimony of the defendant Weiner, when considered in the light of written statements made to the insurance adjuster of appellant at appellant's direction on the day after the accident and before filing of the suit, is replete with glaring contradictions. An analysis of this evidence without giving to respondent the benefit of the presumptions to which he is entitled on appeal, shows that defendant Weiner was the employee of appellant, and that at the time of the accident, he was on the way to see one Feldman, who owed money to the hotel which Weiner operated for appellant. There is no question that this was appel-

lant's business, and there is no credible evidence that Weiner was not charged with the responsibility of making an effort to collect the bill, or that there was anything improper or unauthorized in the method adopted by Weiner in making the collection.

[2] Appellant urges that the written statement made and signed by Weiner to appellant's insurance carrier the day after the accident at appellant's direction, in which Weiner detailed the facts of the accident and admitted he was engaged upon the business of collecting the bill mentioned, was improperly admitted against appellant, and that appellant was not bound thereby because such statements were no part of the *res gestae*. *Willard v. Valley Gas & Fuel Co.*, 171 Cal. 9, 151 P. 286; *Burgesser v. Bullock's*, 190 Cal. 673, 214 P. 649; *Barton v. McDermott*, 108 Cal.App. 372, 291 P. 591. The principles enunciated in the foregoing cases have no application here. Weiner's report to appellant's insurance carrier (which became insolvent prior to the trial of this action) was made by direction of appellant. There is no doubt of this, because shortly thereafter appellant, addressing a letter to its insurance carrier, referred to Weiner as "one of our employees" and asked for a copy of the report made by him. Furthermore, Weiner's written report comprising three pages, each of which was separately signed by Weiner, recites the facts of the accident and states, "before the accident I was going to 746 South Broadway to see a Mr. Feldman, who owed a back bill at the Victor Hotel," all of which was competent evidence, irrespective of any question of agency. *Roche v. Llewellyn Iron Works*, 140 Cal. 563, 74 P. 147.

[3] As already stated, defendants Ulrey and Weiner have not appealed. The fact that the verdict against Ulrey was for \$100, and against Weiner was for \$5,000 is of no moment, in so far as the validity of the judgment against appellant is concerned. The liability of a registered owner is "direct and several, as well as joint, and is not dependent upon a judgment against the operator." See *Milburn v. Foster* (Cal. App.) 47 P.(2d) 1106, 1107.

The judgment is affirmed.

We concur: HOUSER, P. J.; YORK, J.

10 Cal.App.2d 294

PEOPLE v. PAHNER.
Cr. 319.

District Court of Appeal, Fourth District,
California.

Nov. 21, 1935.

1. Automobiles ⇨336

Knowledge of automobile driver at time of accident that he has injured another person is necessary element of offense of failing to stop and render aid after automobile accident (Pen.Code, § 1096).

2. Automobiles ⇨355(8)

Evidence supported conviction of failure to stop and render aid after automobile accident (Pen.Code, § 1096).

3. Criminal law ⇨829(9)

In prosecution for failing to stop and render aid after automobile accident, refusal of instruction that prosecution was required to prove that defendant had knowledge that he had struck person on highway *held* not error, where court read statute under which prosecution was brought, which provided that no further instruction on subject of presumption of innocence or defining reasonable doubt need be given, and repeatedly instructed as to presumption of innocence (Pen.Code, §§ 1096, 1096a).

4. Criminal law ⇨823(4)

In prosecution for failure to stop and render aid after automobile accident, instruction purporting to set out essential elements of offense requiring jury to find that it was apparent at time of accident that aid was necessary *held* erroneous in omission of definite requirement of finding that it was apparent to defendant that aid was necessary, but not to require reversal in view of instruction that prosecution was required to establish every element constituting offense, including defendant's knowledge of injury at time of accident (Pen.Code, § 1096; Const. art. 6, § 4½).

5. Criminal law ⇨755½

In prosecution for failure to stop and render aid after automobile accident, reference of court to portions of evidence in comment to jury *held* not error, where reference to evidence was fair and clearly informed jury that they were exclusive judges of evidence, and that court was in no way urging conviction or acquittal (Pen.Code, § 1096).

6. Automobiles ⇨354

In prosecution for failure to stop and render aid after automobile accident, evidence that defendant was intoxicated on evening of day in which accident had occurred *held* admissible (Pen.Code, § 1096).

7. Criminal law ⇨1170½(1)

In prosecution for failure to stop and render aid after automobile accident, exclusion of evidence which was offered for impeachment *held* not error, where evidence could not have had such effect, and any possible impeachment would have been upon immaterial matter (Pen.Code, § 1096).

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

E. M. Pahner was convicted of failing to stop and render aid after an accident, and he appeals.

Affirmed.

C. O. Thompson, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

This is an appeal from a judgment of conviction on a charge of failing to stop and render aid after an accident and from an order denying a motion for a new trial.

About 5:45 p. m. on June 17, 1935, one Fred Miller, who was 77 years of age, was walking east on Valley boulevard toward the city of Bloomington and carrying a roll of blankets, a coat, and some newspapers. This road was paved to a width of 20 feet with an oiled shoulder 7 or 8 feet wide on either side of the pavement. While so walking on the south edge of the oiled shoulder on the south side of the highway, Miller was struck and thrown to the ground by an automobile which was also traveling toward the east. For convenience, this car will be referred to as the first car.

Another automobile, which will be referred to as the second car, was proceeding east a short distance behind the first car. From testimony given by three occupants of the second car, it appears that the first car entered the Valley boulevard, from the south, about 75 feet in front of them and about a mile west of the point where Miller was struck; that as it entered the highway the first car went clear to the north side of the highway and nearly overturned in making the turn to the east; that it then proceeded east at a higher rate of speed than the second car, being from an eighth to a quarter of a mile ahead at the time Miller was struck; that as it proceeded the first car zigzagged from one

side of the road to the other several times and was not driven straight at any time; that one of the men in the second car observed Miller walking on the south edge of the road when his view was not obscured by the first car as it went from one side of the road to the other; that immediately before the accident the first car swerved clear to the south side of the road and off the pavement; that the occupants of the second car then observed papers or something flying in the air; that the first car proceeded on its way at a rapid rate of speed; that the occupants of the second car came up and found Miller lying on the ground with his left elbow broken and a small hole in the fleshy part of his left arm; that they picked him up and delivered him to a constable at Bloomington, who took him to a hospital; that they also picked up his bundle, coat, and papers; and that under his bedroll and coat they found an automobile door handle, the long end of which was covered with blood.

Between 9:30 and 10 o'clock that night the constable and another officer were called to the home of the appellant on an errand not connected with this accident and while there found that the appellant's automobile fitted the description of the automobile which had struck Miller, being of the same make, model, and color. On examining the appellant's car the constable found that the handle on the door on the right side had been broken off and was missing, and that the post in the lock, which had held the handle, was bent backward. The handle which had been found corresponded exactly with the handle on the other side of appellant's car, and its broken metal looked like that on the post in the lock on the right side of the car; both indicating a fresh break. The long end of the handle on the left side of appellant's car pointed forward.

[1,2] The first car was well described by the occupants of the second car, two of whom gave a general description of its driver. One of these witnesses pointed out the appellant in the courtroom as the driver of the first car, and it cannot be seriously questioned that he was the driver of the car which injured Miller, and that he immediately left the scene of the accident without stopping or rendering any aid. The appellant earnestly contends, however, that the evidence is not sufficient to establish the fact that he knew that a human being had been struck and injured. He admitted that he had passed along this road

in his car, going east, at approximately the time of the accident, but he testified that he had no knowledge of having hit or injured any one. Both the appellant and his wife testified that they had discovered that the handle was missing from the right door of their car on the morning of the day before this accident, and that they did not know what had caused its absence. A significant fact appears in the constable's testimony that on the evening after the accident he discovered that the handle was missing from the right door of appellant's car, that he then stated to the appellant and his wife that he had the missing handle, that the appellant's wife then broke down and cried, and that neither of them then informed him that the handle had been missing on the day before. Two or three days after the accident the constable asked the appellant if he had hit this old man, and the appellant refused to talk. It also appears that the accident happened in broad daylight, on a clear day, and that the handle of the door, which must have struck Miller's arm, was directly opposite the driver of that car as he sat at the wheel. It is hardly to be expected that direct testimony could be obtained in such a case as this to the effect that a defendant knew that he had injured another person. From the nature of the case, such knowledge on the part of a driver, although a necessary element of the offense, must usually be proved by showing the surrounding facts and circumstances which indicate such a knowledge. We think the established facts here justify an inference that the appellant knew he had struck Miller, and that the evidence is sufficient, in this respect, to support the verdict. *People v. Libhart*, 79 Cal.App. 291, 249 P. 211; *People v. Leutholtz*, 102 Cal.App. 493, 283 P. 292.

[3] The appellant argues that the court erred in refusing to give an instruction offered by him. The material part of this instruction, which it is claimed was not covered in any other instruction, reads as follows: "And in this connection you are instructed that there is no presumption that the defendant had knowledge, but on the contrary the presumption is that the defendant did not know that he had struck and injured said Miller. You are further instructed in this connection that the defendant is not required to prove that he did not know he had struck and injured said Miller, but the prosecution is required to prove beyond a reasonable doubt that he

had knowledge at the time that he had so struck and injured said Miller." The court read to the jury section 1096 of the Penal Code. Section 1096a of that Code provides that no further instruction on the subject of presumption of innocence or defining reasonable doubt need be given. In addition, the court instructed the jury that the defendant is presumed to be innocent and not guilty of the offense charged until his guilt is proven to the satisfaction of each and every juror beyond a reasonable doubt, that this presumption is a matter of evidence to the benefit of which the defendant is entitled, that this presumption is not a mere form but is a substantial part of the law, that no suspicion or probability, however strong, and no mere preponderance of the evidence is sufficient to overcome the presumption of innocence, and that this presumption continues as long as there is a reasonable doubt of any material fact necessary to convict the defendant of the crime charged against him. The jury was then repeatedly instructed that the law raises no presumption against a defendant, that he is presumed to be innocent, that this presumption overcomes all other presumptions, and that every fact and circumstance in the case is to be construed and explained by them as consistent with the innocence of the defendant if the same can be done by any reasonable construction or explanation. Everything contained in the proffered instruction was sufficiently covered in other instructions given, and we find no error in the refusal of the instruction here in question.

[4] It is next urged that the court erred in giving an instruction which reads as follows:

"The driver of any vehicle involved in any accident resulting in injury or death to any person or damage to property shall also give his name, address and the registration number of his vehicle and exhibit his operator's or chauffeur's license to the person struck or the driver or occupants of any vehicle collided with and shall render to any person injured in such accident reasonable assistance, including the carrying of such person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent that such treatment is necessary or such carrying is requested by the injured person."

"Therefore, if you are satisfied beyond a reasonable doubt that the defendant in this case, E. M. Painer, was on or about the

date charged, in the County of San Bernardino, State of California, involved in an accident resulting in the injury of one Fred Miller, and that said defendant was the driver of the automobile which was at that time involved in said accident, and that said defendant did fail to stop at the scene of said accident or give his name, address and the registration number of his vehicle, or exhibit his operator's or chauffeur's license to the person injured in such accident, and it was then and there apparent that such aid or treatment was necessary, then you should find the defendant guilty as charged in the Information."

It is argued that this instruction purports to set out all of the essential elements of the offense charged, but that it erroneously omits one of those elements, namely, that the defendant had knowledge at the time that he had caused an injury to Miller. The appellant relies upon *People v. Wallace*, 2 Cal.App. (2d) 238, 37 P.(2d) 1053, and *People v. Rallo*, 119 Cal.App. 393, 6 P.(2d) 516. These cases hold that a defendant in such a case is entitled to a specific instruction to the effect that he had knowledge of the fact that he had injured a person. We think the instruction here in question is erroneous in that it does not definitely state that it must be apparent to the defendant that the rendering of aid was necessary. We are not convinced, however, that this error would justify a reversal in view of section 4½ of article 6 of the Constitution. After reading all of the instructions, it is not possible to believe that the jury could have been misled by this omission in this instruction into applying an incorrect rule of law. *Ward v. Read*, 219 Cal. 65, 25 P.(2d) 821. In the instruction in question the court had been referring to the appellant and to what he did or failed to do. While the concluding language thereof could be taken as referring to whether or not the necessity of aid was apparent to the injured party, the only other person present at the time, it would naturally be taken as referring to whether the necessity for aid was apparent to the appellant, about whom the court had been speaking, and it would require a rather strained construction of the language used to conclude that the jury could have taken it the other way. This is especially true since the court thereafter gave another instruction in which the jury was told that the prosecution must prove by competent evidence to a moral certainty and beyond a reasonable doubt each and

every material element constituting the offense charged in the information. The elements constituting the offense are then carefully enumerated, including the following:

"(e) That the defendant, at the time of the accident knew of the accident and knew that said Miller had been injured thereby.

"(f) That the defendant, with knowledge that said Miller had sustained injuries resulting from the accident, wilfully failed to immediately stop said vehicle at the scene of the accident, and failed to give his name, address and registration number of said vehicle and failed to exhibit his operator's license to said Miller, and did wilfully fail to render reasonable assistance to said Miller, and wilfully failed to carry the said Miller to a physician, surgeon, or hospital for medical or surgical treatment."

In the same instruction the jurors were then told that if they had any reasonable doubt as to whether any one of these material elements of the offense had been proved beyond all reasonable doubt they must acquit the defendant even though they might believe that other elements of the offense had been so proven. The matter of knowledge on the part of the appellant was thoroughly and completely covered in the instructions, and a reading of the entire record leaves us far from convinced that a miscarriage of justice has occurred. Under these circumstances, the error referred to, which is more apparent than real, comes within the spirit and meaning of the constitutional provision referred to.

[5] It is next claimed that the court erred in certain oral comments made to the jury after the instructions were given and just before the case was submitted. It would serve no useful purpose to set forth these comments here. While the court referred to portions of the evidence, he was fair in the extreme and in no way indicated his own views to the jury, but, on the other hand, clearly and plainly informed them that they were the exclusive judges of all of the evidence, of all of the facts, and of the credibility of the witnesses, and that he was in no way urging a conviction or an acquittal.

[6] Error is assigned in the admission of evidence to the effect that the appellant showed signs of intoxication at a service station in Bloomington a few minutes after the accident occurred, and that he was in-

toxicated when the officers went to his home between 9:30 and 10 o'clock that night. We think this evidence was competent as one of the facts surrounding the accident. *People v. Libhart*, supra.

[7] The last point raised is that the court erred in sustaining an objection to four questions asked of the appellant while on the stand. The first of these is said to have been asked for the purpose of impeaching another witness. No answer to the question could have had that effect and any possible impeachment would have been upon an immaterial matter. The second and third questions related to immaterial matters, the answers to which could not have had any such effect as that ascribed to them in the argument. The fourth called for a self-serving declaration which was plainly not admissible.

The judgment and order appealed from are affirmed.

We concur: MARKS, J.; JENNINGS, J.



10 Cal.App.2d 450

**BORGES v. PACIFIC GREYHOUND
LINES, Inc., et al.**

Civ. 9861.

District Court of Appeal, First District,
Division 2, California.

Dec. 4, 1935.

Rehearing Denied Jan. 3, 1936.

Hearing Denied by Supreme Court
Jan. 30, 1936.

1. Appeal and error ⇨867(2)

On appeal from order granting new trial on sole ground that court improperly instructed jury, sole question is propriety of instructions (Code Civ.Proc. § 657).

2. Appeal and error ⇨867(2)

On appeal from order granting new trial on sole ground that court improperly instructed jury, review could be limited to instructions attacked (Code Civ.Proc. § 657).

3. Automobiles ⇨246(60)

In automobile collision case, instruction that there is legal presumption that every man obeys law, and that such presumption is evidence, held not error (Code Civ.Proc. § 1963, subd. 1).

4. Appeal and error $\S$ 1064(1)

Incorrect instruction on evidence necessary to overcome presumptions *held* harmless, where there was no evidence contradicting sole presumption referred to.

5. New trial $\S$ 39

Instruction on unavoidable accident defining "accident" as an event happening without concurrence "or will" of person by whose agency it is caused, *held* not to authorize new trial as requiring plaintiff to show that defendant's acts were willful as well as negligent, where immediately followed by definition of "accident" as unforeseen and unexpected and unthought of occurrence, something that takes place without design "or neglect."

SPENCE, J., dissenting.

Appeal from Superior Court, Contra Costa County; Thomas D. Johnston, Judge.

Action by Joe Borges against the Pacific Greyhound Lines, Incorporated, and others. Judgment for defendants, plaintiff's motion for a new trial was granted, and defendants appeal.

Reversed, with directions.

Rehearing denied; SPENCE, J., dissenting.

James F. Hoey and Warren Cunningham, both of Martinez (F. G. Hamilton, of Oakland, of counsel), for appellants.

Elliott Johnson and Jesse E. Nichols, both of Oakland, and Thomas M. Carlson and Robert V. Collins, both of Richmond (D. W. Brobst, of Oakland, of counsel), for respondent.

NOURSE, Presiding Justice.

[1] Plaintiff sued for damages resulting from an automobile collision. The jury gave its verdict for the defendants, and judgment was thereupon entered. The plaintiff moved for a new trial on all the statutory grounds. The motion was granted on the sole ground that "the court had improperly instructed the jury." The defendants appealed from this order, and the only question before us is the propriety of the instructions. Section 657, Code Civ. Proc.; *Cochran v. O'Keefe*, 34 Cal. 554; *Dodds v. Gifford*, 127 Cal.App. 629, 632, 16 P.(2d) 279.

The plaintiff rested his charge of negligence on the excessive speed at which the defendant Holland operated the bus. The defendants denied such negligence and

relied on the contributory negligence of the plaintiff. The bus was running on San Pablo avenue, which was a through boulevard 84 feet wide and fully protected by the usual stop signs. The plaintiff stopped at one of these signs erected at the intersection of Bay View on the west side of the boulevard. He waited until some of the southbound traffic had passed, then drove into the boulevard at a speed of 25 miles an hour. He stopped when in the center of the boulevard and let some traffic pass, and, though he saw the bus approaching on his right, he "figured" that he could "beat him across." The evidence on the part of the defendants is that the bus was running at a reasonable speed; that when it struck plaintiff's car it shoved it about 2 feet on the pavement; that when the driver saw that plaintiff was trying to go ahead of the bus he applied his brakes, sounded the horn, and brought the car practically to a stop. After striking plaintiff's car, Holland pulled out of the traffic and stopped the bus at the curb about 200 feet beyond the point of impact. The plaintiff's car continued on all four wheels across the boulevard, and was brought to a stop about 50 feet away. The only semblance of a conflict offered by the plaintiff related to the speed of the respective cars and is too incredible to call for repetition because it is contrary to all the physical facts. The jury and the trial judge both held with the defendants on the evidence which demonstrates the contributory negligence of plaintiff as a matter of law.

[2,3] Though the order referred to errors in the instructions generally, we may limit our review to those which respondent attacks. *Ennulat v. Taylor*, 127 Cal.App. 420, 422, 15 P.(2d) 900. The first of these advised the jury that there is a legal presumption that every man obeys the law, and that such presumption is evidence. Respondent attacks this on the authority of *Rogers v. Interstate Transit Co.*, 212 Cal. 36, 297 P. 884. The case is not in point for two reasons: The instruction there condemned was on the presumption that a party takes ordinary care of his own concerns and was therefore free from negligence; second, the error of that instruction rested in the fact that the presumption of due care was dispelled by the evidence of the party relying on it. Here the instruction was a plain statement of the law as expressed by the Legislature in section 1963, Code of Civil Procedure (subdivision

1), "that a person is innocent of crime or wrong." There is a wide difference between an instruction that the law presumes that the car was operated "in a lawful manner" and one that the law presumes that the parties were exercising ordinary care and were free from negligence. So far as the evidence is concerned, all that offered by the appellants was in accord with this presumption, and the respondent offered no credible evidence to dispell it.

[4] Criticism is also made of the instruction defining the effect of presumptions and the evidence necessary to overcome them. The instruction as given was incorrect, but no possible prejudice could have followed because the instructions as a whole fully covered the subject of the weight of the evidence, and also because it could apply only to the presumption just mentioned, since no other presumption was referred to. There can be no quarrel with the general statement that a preponderance of the evidence is not necessary to overcome a presumption, and that a "balance" is sufficient. But where, as here, there is no evidence bearing a semblance of contradicting the presumption, then the presumption is itself evidence, and the question of what is necessary to overcome it is purely academic.

By a very patent error in the quotation of the record, the respondents have found ground for an attack on the instruction relative to the quantum of proof necessary on the issue of contributory negligence. The jury was told that to find for the plaintiff it must find that the evidence fails to show by a preponderance thereof that respondent was guilty of contributory negligence. By inserting the word "not" in the instruction it is made to read "the plaintiff was not guilty of" contributory negligence. The argument of respondent would be unanswerable if the record supported his premise.

[5] Finally, it is argued that the court erred in the instruction touching the element of unavoidable accident. The instruction reads in part: "Accident is an event happening without concurrence or will of the person by whose agency it is caused, * * * unforeseen and unexpected and unthought of occurrences * * * something that takes place * * * without design or neglect." The criticism is directed to the use of the words "or will."

It is argued that this compelled the respondent to show that the acts of the appellants were willful, and that a showing of negligence alone would have been insufficient. This cannot be so because the jury was expressly told that the act must be "without design or neglect." Though the instruction is inaptly phrased the words "or will" could not have confused the jury because of what immediately follows. The meaning which the trial court tried to convey to the jury was that the event must have occurred without the intention, design, or neglect of the appellants, but that it must also have been an event which could not reasonably have been anticipated or foreseen. It was merely an involved way of saying that the foundation of liability for negligence is knowledge, or the means of knowledge, of the peril which might cause injury.

We find no error in the instructions noted. An examination of the entire charge shows that the jury was fully and fairly instructed on all issues. The examination of the evidence discloses that the verdict of the jury was sound, and the record as a whole fails to show any miscarriage of justice.

The order is reversed that a judgment on the verdict may be entered.

I concur: STURTEVANT, J.

SPENCE, Justice.

I dissent. The appeal was taken from the order granting a new trial. Certain instructions given by the trial court were erroneous, while others were misleading. The question of whether the giving of said instructions was prejudicial was primarily a question to be determined by the trial court in ruling upon the motion for new trial, and its determination should not be disturbed, unless the trial court abused its discretion. *Nieves v. Vigolino*, 135 Cal. App. 763, 27 P.(2d) 916; *Pope v. Wenisch*, 109 Cal.App. 608, 293 P. 622; 20 Cal.Jur. 140. A review of the record leads me to the conclusion that a close case was presented upon the issues of negligence and contributory negligence, and that it cannot be said that the trial court abused its discretion in determining that the giving of said instructions was prejudicial. I am therefore of the opinion that the order granting a new trial should be affirmed.

**FOX-WOODSON LUMBER CO. v. BANK
OF AMERICA NAT. TRUST &
SAVINGS ASS'N et al. ***
Civ. 10639.

District Court of Appeal, Second District,
Division 2, California.

Nov. 13, 1935.

Hearing Granted by Supreme Court
Jan. 10, 1936.

1. Licenses ☞7(2)

Provision of Corporate Securities Act limiting exemption of state banks to cases of issuance of their own securities against their own assets held violative of constitutional provision prohibiting discrimination against domestic corporations, in view of complete exemption given national banks (St. 1925, p. 962, § 2, subd. 3 (a, c).

2. Licenses ☞18½

Under Corporate Securities Act as it existed from 1923 to 1929, national bank was not required to obtain permit from commissioner of corporations as condition to issuance of securities (St. 1917, p. 673, as amended; St. 1925, p. 962, § 2, subd. 3 (a, c).

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by the Fox-Woodson Lumber Company against the Bank of America National Trust & Savings Association and others. From a judgment for plaintiff, defendants appeal.

Reversed.

Freston & Files and Ralph E. Lewis, all of Los Angeles, Louis Ferrari, of San Francisco, and Edmund Nelson, O'Melveny, Tuller & Myers, and Louis W. Myers, all of Los Angeles, for appellant.

G. C. De Garmo and W. M. Crane, both of Los Angeles, for respondents.

CRAIL, Presiding Justice.

This is an appeal from a judgment in favor of the plaintiff in an action brought in two counts, the first for rescission, and the second for money had and received. The defendant bank is and was a national bank acting as the trustee under an express trust, the corpus of which consisted of a note and a trust deed executed by the Arcady Apartment Hotel Company, which lien was junior to a \$1,325,000 bond issue on the hotel property. In its capacity as trustee, and on order of Arcady, the bank between the years 1925 and 1929 executed

and delivered so-called participation certificates evidencing fractional interests in the basic note. The certificates so executed and delivered aggregated on their face approximately one-half million dollars.

The circumstances under which the bank executed the participation certificates were as follows: The Arcady owned real property situated on Wilshire boulevard in Los Angeles and desired to finance the construction of a twelve-story apartment hotel thereon. It first executed a deed of trust constituting a first lien on the property to secure a bond issue of \$1,325,000. This was in the nature of a construction loan and its validity is not in dispute, its existence as a first lien being the only point of importance. More money was necessary to complete the erection and equipment of the proposed hotel. To meet this situation Arcady negotiated with and obtained from each of the contractors and materialmen concerned with the erection of the building an agreement to accept in part payment of their compensation (usually 20 per cent. thereof) a second lien upon the property subject to the bond encumbrance. To effectuate this arrangement Arcady executed to the order of L. L. Adams its promissory note in the sum of \$600,000 and secured said note by a second trust deed upon the property and expressly stated that it was junior to the trust deed securing the bond issue. This note and trust deed was transferred to the bank. The bank thereupon executed a declaration of trust, which was approved by Arcady and which recited that the bank held the said note and trust deed in trust for the purpose of issuing participation certificates thereon, each of which would represent an interest in the basic note; the proportionate interest being disclosed on the face of the respective certificates. Originally all certificates were issued only to creditors of Arcady and they were all issued pursuant to contracts entered into before the particular certificates were issued. These contracts were all made with parties who were in a position to furnish labor, services, or materials in the construction of the hotel. The certificates were in this manner issued only to creditors of Arcady and the creditors were persons who had agreed to accept the certificates before they became creditors. Certain of the creditors, including the plaintiff's assignor, after receiving the certificates disposed of them to third persons

☞For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

who had no original connection with the transaction. These assignees surrendered their original certificates to the bank for cancellation and received new certificates in their own names. The hotel building was completed as agreed and was put into use. Early in 1931 the plaintiff discovered for the first time that no permit had been issued for the certificates held by it and served notice of rescission upon the bank and brought this action. It was stipulated by the parties and the trial court found it to be a fact that the bank had at all times acted in the utmost good faith and merely in the position of trustee under such express trust and as registrar of the certificates. It did not receive and did not handle any money or funds or other property at all in connection with the issuance of said certificates and at no time received or was paid anything other than the usual and reasonable compensation for its services in acting as trustee or registrar.

The basis for this action is the fact that no permit was obtained from the commissioner of corporations for the issuance or sale of these participation certificates. It was specifically found by the trial court that prior to the issuance of the certificates, representatives of the Arcady, the bank, and other interested parties discussed with the commissioner of corporations the question of the necessity of obtaining such a permit and were informed by such officer that no permit was required. The court also found that the bank did not at the time of the issuance of any such certificates make any express representations whatsoever with regard to the validity, genuineness or value of the certificates. The court likewise found that the trust indenture contained an express statement that the bank as trustee assumed no responsibility as to the validity of the trust or the participation certificates issued thereunder. The trial court concluded, however, that the bank by participating in the transaction did, *as a matter of law*, represent and warrant that each of the certificates was valid, legal and genuine. The court also concluded that a permit from the corporation commissioner was necessary to their validity and as none had been obtained they were void, and gave judgment against the bank for the face value of the certificates.

The complaint alleges that the certificates were void in consequence of the lack of a permit from the commissioner of corporations. It is obvious from reading the complaint and also from a perusal of the

record that there is no causal connection whatever between the failure to obtain a permit from the commissioner of corporations and whatever loss was suffered by the plaintiff. The actual cause of the loss to the plaintiff was entirely extraneous to the lack of a permit, such as shrinkage in value of the mortgaged property incident to the depression rendering a second lien of little value. If a permit had been obtained, the shrinkage and loss would have occurred in precisely the same manner and to the same extent that it did occur, and the presence of the permit would not have obviated the loss. Under the allegations of the complaint then, the complaint states a cause of action if it was necessary to obtain a permit from the commissioner of corporations for the issuance of the certificates; if it was not necessary to obtain such permit, the complaint fails to state a cause of action.

It is the contention of the defendant on this appeal that as a national banking association it was not required to obtain a permit under the terms of the law as it existed at the time in question; that the certificates were not in any event offered and sold to the public within the purview of the act; that the bank had never received any money or other thing of value from any person to whom certificates were issued or from the plaintiff and hence could not be held on the basis of money had and received; that since the bank never received anything of value whatsoever, the bank cannot be held liable to the plaintiff in money in an action for rescission, and that an action for rescission will not lie against a defendant who was never a party to the contract sought to be rescinded; that the bank cannot be held liable on any theory of fraud in the face of the finding that the bank had used the utmost good faith throughout and had in the trust indenture itself made no warranties or representations whatsoever concerning the validity of the certificates; that the plaintiff was not one of those who could raise the question of the constitutionality of the subsection exempting national banks at it was not one of the class of corporations discriminated against.

It is contended by the plaintiff, however, that national banks acting in their proprietary capacity as trustees were subject to the Corporate Securities Act during the period involved even though the statute purportedly excepted them from its operation; that if, during the period involved,

the Corporate Securities Act (St. 1917, p. 673, as amended) exempted national banks acting as trustees from its operation but applied to state banks and trust companies so acting, an unconstitutional discrimination resulted which left both groups subject to the statute; that the form of the complaint permits money judgments against the defendant as one of the participants in the violation of the Corporate Securities Act; that all who participate in a violation of the Corporate Securities Act, regardless of their receipt of any benefit, are joint tort-feasors and liable to reimburse the purchaser of the void security; that the good faith of the defendant is no defense, and that the provisions of the trust declaration cannot exempt the defendant from liability; and that the securities involved required a permit for their lawful issuance and sale, and, likewise, for their reissuance; that an offering to the public of the securities was not required and that the defendant sold the securities within the statutory definition of sale.

The facts in this case are set forth very fully and the contentions of both parties upon appeal are set forth, for the reason that this case went originally by direct appeal to the Supreme Court and was transferred, along with several others, for decision to this court and for the further reason that the question involved is a matter of great importance at this time in the state of California, having arisen in many cases which are now on appeal in this and other courts of the state, involving as it does the very existence of many of the banks of California, both state and national.

In 1925 the Legislature amended the Corporate Securities Act in certain particulars so that section 2 of that act read in part as follows (St. 1925, p. 962):

"The following words have in this act the signification attached to them in this section, unless otherwise apparent from the context: * * *

"3. The word 'company' includes all domestic and foreign private corporations, associations, joint stock companies, and partnerships, of every kind, trustees, as hereinafter defined, and also individuals as hereinafter defined; *excepting therefrom*:

"(a) All national banking associations and other corporations organized and existing under and by virtue of the acts of the congress of the United States;

"(b) All public utilities subject to the jurisdiction, control, and regulation of the railroad commission of this state;

"(c) All corporations now or hereafter organized under the laws of this state for the purpose of conducting the business of banking within this state and all corporations transacting insurance business within this state, when such corporations are issuing securities of their own issue against their own assets." (The final clause of this subsection was added in 1923.)

(d) (All corporations under building and loan supervision); and

(e) (Certain corporations otherwise regulated by law.)

Subsection (a) of subdivision 3 of section 2, which exempts national banks from the operations of the act, remained the same from 1917 to 1929. This precise portion of the act was recently considered by the Supreme Court in the case of *Young v. Three For One Oil Royalties*, 1 Cal. (2d) 639, 36 P.(2d) 1065, 1067. In that case counsel for the respective parties together with a large number of other attorneys as amici curiæ appeared and filed briefs, and a comprehensive discussion and analysis of the question was presented to the court. That case is controlling herein for it is on all fours in every essential respect except as to the dates of the transactions involved. The *Young Case* considered the Corporate Securities Act as it stood prior to 1923, but subsection (a), which was there construed by the court, was and remained exactly the same and absolutely unchanged throughout the period involved in the instant case. A national bank acting as a trustee is the defendant party in each instance. The essential fact that no permit had been obtained from the corporation commissioner is the basis of the controversy both in the *Young Case* and in the instant case. The decision is most definite that under the language of said subsection (a), national banks were exempt from the requirement of obtaining a permit from the commissioner of corporations prior to the issuance of such certificates. We quote from the opinion in that case as follows: "Appellant * * * contends that when a national bank issues securities other than its own, that is, as in the present instance, when it acts in the capacity of a trustee in issuing securities of other corporations or individuals, the exception above noted does not apply. On the other hand, the respondents contend that the section of the act is

clear and unambiguous, and means just what its plain language imports—that is, that a national bank as such is excepted from the definition of ‘company’ and that while acting as such, either in issuing its own securities or as a trustee in issuing those of other persons or corporations, it is not required to secure a permit before taking such action. It was held in the case of *In re Flesher*, 81 Cal.App. 128, 252 P. 1057, 1059, in construing the Corporate Securities Act, that it was ‘the legislative intent to exclude from the definitive words of the section all corporations subject to some other supervisory power of the state.’ Under this construction of the act, national banks were assumed to belong to those classes of corporations excepted from the operation of the act.”

It is the contention of the plaintiff that during the period from 1923 to 1929 the Corporate Securities Act purported to wholly except national banks from its operation, but especially subjected state banks to its provisions whenever they were not issuing certificates of their own issue against their own assets (Stats. 1923, § 2, subd. 3, [a] and [c], p. 87); that the Legislature manifestly intended to regulate national banks and that the exemption clause operated to remove them from the application of the statute only while they were discharging their functions as federal instrumentalities, for otherwise during that period the national banks were left completely unsupervised; and that a construction of the statute in opposition to this contention would result in an unconstitutional discrimination in favor of national banks against state banks. (See article by Judge Emmet H. Wilson in *American Bar Journal*, July, 1934, at page 399.) The plaintiff also contends that “a complete exemption of national banks from the statute would defeat the very purpose for which it was enacted by permitting the state to be flooded with worthless or questionable securities issued and sold through national banks * * *.” In making these contentions the plaintiff admits, “We are not unmindful of the recent ruling of this court in said cause of *Young v. Three For One Oil Royalties*, supra, which as far as it goes is adverse to respondents’ contentions.”

We do not agree with the plaintiff’s contention that such a construction would permit the state to be flooded with worthless or questionable securities. It is common knowledge that the state was not during

the years in question flooded by worthless or questionable securities issued by national banks, although it was assumed by all, including the commissioner of corporations (as admitted in the briefs) that said banks were not required to obtain permits during that period. Neither would the state have been flooded with worthless or questionable securities if state banks had the same privilege under the operation of the said statute. In any event, the Corporate Securities Act is no longer needed to protect the public against the issue of worthless or questionable securities during the years 1923 to 1929. Those years are now washed up on the sands of time. In 1929 the Legislature changed the entire scheme of exemptions (St. 1929, p. 1253, § 2(b)). By amendment the act was made applicable to all private corporations for profit and the exemptions were made to apply instead to various classes of securities.

Neither do we agree with the contention of the plaintiff that state banks were subject to the operation of the law during the period from 1923 to 1929 and that therefore the exemption of national banks resulted in a discrimination against state banks which made unconstitutional the clause exempting national banks. In the first place it would be as reasonable, much more so indeed, to contend that the clause with respect to state banks would be the one made unconstitutional rather than the one with regard to national banks. Assuming that the provisions of the act as above quoted required state banks to obtain a permit to issue securities while at the same time exempting national banks from this requirement, the reasoning would be as follows: That the act permits national banks to do business in this state on more favorable terms than state banks; that such favoritism is contrary to section 15 of article 12 of the Constitution of California, which reads as follows: “No corporation organized outside the limits of this state, shall be allowed to transact business within this state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state.” That this fundamental safeguard of the Constitution is attempted to be subverted by placing a burden upon domestic corporations to which foreign corporations are not subject, the latter thus being given negatively a privilege denied the former (*Young v. Three For One Oil Royalties*, supra) and one or the other of

the provisions is unconstitutional; that the provision of the act with regard to national banks is clear and unequivocal while the provision of the act with regard to state banks is subject to two reasonable interpretations; that the amendment with reference to state banks was passed last in respect of time and is the one which caused the unfair discrimination, and that if either must be held to be unconstitutional it is the latter; and, finally, that this discrimination against state banks being void and unconstitutional such banks continued to enjoy the same exemption as national banks before the enactment of said unconstitutional provision.

This reasoning is very persuasive and we would adopt it as controlling in this case if it were not that by doing so we would overlook one of the fundamental rules of statutory construction, which is that unconstitutional effect should not be given to a statute if another construction is reasonably discoverable from its language. *In re Estate of Potter*, 188 Cal. 55, 204 P. 826. "A presumption of constitutionality protects every legislative act. * * * It will be given a construction consistent with validity if at all possible." *People v. Globe, etc., Co.*, 211 Cal. 121, 294 P. 3, 5.

Let us examine more carefully the language of the Corporate Securities Act above quoted in order to see if there is not a reasonable interpretation which will save its constitutionality. It will be observed that if the final clause of said paragraph (c) is confined in its application to corporations transacting insurance business within this state, then there is no discrimination against state banks in the provisions of said act, for by its very terms as so construed the act exempts "all corporations now or hereafter organized under the laws of this state for the purpose of conducting the business of banking within this state." Prior to the enactment of the final clause of said paragraph (c) certain corporations transacting insurance business within this state had commenced on a large scale the issuing of so-called mortgage insurance certificates of their own issue against their own assets. This construction of the statute is much more reasonable than a construction which forces a discrimination so violent that certain acts if committed by officers of state banks are criminal while the identical acts if committed

by officers of national banks are lawful, and which would construe the act to apply to state banks, a class of corporations which was already under the strict supervision of the state, whereas our Supreme Court has already held in construing the act that "it was 'the legislative intent to exclude from the definitive words of the section all corporations subject to some other supervisory power of the state.'" *Young v. Three For One Royalties*, supra, and *In re Flesher*, 81 Cal.App. 128, 252 P. 1057.

In construing statutes courts will sometimes consider other statutes, passed by the Legislature, to ascertain the legislative intent, especially in support of the presumption of constitutionality. *People v. Globe, etc., Milling Co.*, 211 Cal. 121, 127, 294 P. 3; *In re Washer*, 200 Cal. 598, 254 P. 951. This should be especially true as to acts passed at the same session. In this connection we should remember that at the same session of the Legislature at which said subsection (c) was enacted, an amendment to the California Bank Act (St. 1909, p. 87, as amended) extending to national banking associations the privilege of doing a trust business in the state of California was enacted. Section 49a, St. 1923, p. 57. In doing so the Legislature conditioned the privilege with the words, "provided that the particular conditions and restrictions prescribed for banks of this state for the exercise of like privilege are imposed upon and complied with by such national banking associations." This provision denying to national banks any favoritism over state banks became effective on the same day said provisions of the Corporate Securities Act became effective, and this weighs heavily in favor of the contention that the Legislature had no intention of granting discriminations in favor of national banks against state banks.

The intention of the Legislature as above construed possibly would have been clearer if the comma (,) had been placed in said paragraph (c) after the first use of the phrase "within this state," rather than after the second use of the same phrase. But a comma is not necessary. And, in any event, a failure to punctuate may be and sometimes must be disregarded. *In re Sekuguchi*, 123 Cal.App. 537, 11 P.(2d) 655, citing 23 Cal.Jur. 733. The omission of a comma should not be allowed to thwart this just and reasonable construc

tion of the statute. The construction which confines the application of the final clause of paragraph (c) to corporations transacting insurance business within the state will save the legislation within constitutional limitations.

During the conferences of this court upon this case the question has arisen: Has not the Supreme Court in *Young v. Three For One Royalties*, supra, already construed the provisions of the amendment of 1923 to the Corporate Securities Act at variance with the one which is found in this opinion? And attention is called to the following language: "In 1923, but after the sale of the certificates now owned by appellant, the Legislature amended said act so as to except state banks from the terms of said act only 'when such corporations are issuing securities of their own issue against their own assets.'" It is sufficient to say that the amendment of 1923 was not before the court for interpretation and that said language is pure dictum. Fortunately this very statement is made in a later part of the opinion: "But with the provisions of the act in force after such amendment we are not concerned as the rights of the parties herein are governed by the terms of the act before such amendment." And later, "Nevertheless, we are urged by the respondents and a number of amici curiæ appearing herein to decide this question as a large number of cases involving state trust companies are now pending in the courts awaiting a decision of this question. Notwithstanding this request, we have decided to leave this question for future action. We have reached this conclusion for the reason that any decision that we might render herein, if adverse to the respondents, would be dictum pure and simple."

Finally it is contended that if the Corporate Securities Act during the period in question were so construed that national banks were exempt and that state banks were not exempt, still the provisions would be constitutional for the reason that the classification of banks in the Corporate Securities Act into state banks and national banks is based on a rational ground of differentiation, and that unless a classification is manifestly without support in reason, the conclusion of the Legislature with reference thereto will be sustained (*Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 151 P. 398, and *In re Stephan*, 170 Cal. 48,

148 P. 196, Ann.Cas. 1916E, 617), and that there is a sufficient distinction between state and national banks so that the legislative classification in this statute is not palpably arbitrary. Yes, and so what! The provisions of section 15 of article 12 of the Constitution, above quoted, contemplate such classification, and then declare that the one class shall not be allowed to transact business within this state on more favorable conditions than are prescribed by law to the other.

Under our construction of the law it was not necessary for the bank to have obtained a permit in order to issue the securities, and the securities were not void. The second cause of action is merely a repetition of the cause of action set forth in the first count. Since it was essential to plaintiff's recovery that the certificates be void, the judgment should be for the defendant.

Judgment reversed.

WOOD, Justice, and McCOMB, Justice pro tem. (concurring).

[1,2] We concur in the judgment on the one ground stated in the opinion that the statute is unconstitutional for the reason that it permits corporations organized outside of California to transact business in the state on more favorable conditions than California corporations.



SECURITY-FIRST NAT. BANK OF LOS ANGELES v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al. *

Civ. 10257.

District Court of Appeal, Second District,
Division 2, California.

Nov. 13, 1935.

Hearing Granted by Supreme Court
Jan. 10, 1936.

Licenses $\text{C}\text{--}18\frac{1}{2}$

Under Corporate Securities Act as it existed from 1923 to 1929, national bank was not required to obtain permit from commissioner of corporations as condition to issuance of securities (St. 1917, p. 673, as amended; St. 1925, p. 962, § 2, subd. 3 (a, c).

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by the Security-First National Bank of Los Angeles, as executor of the estate of Christ Thoren, deceased, against the Bank of America National Trust & Savings Association and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

J. Marion Wright, of Los Angeles, for appellant.

Freston & Files, of Los Angeles, for respondents.

CRAIL, Presiding Justice.

This is an appeal from a judgment in favor of the defendants after an order sustaining a demurrer to the plaintiff's complaint without leave to amend. Plaintiff, as holder of so-called participation certificates under a trust, brought the action to recover the face value of such certificates on the ground that the certificates were void as having been issued in violation of the Corporate Securities Act (St. 1917, p. 673, as amended). The defendant bank is and was a national bank, acting as the trustee under an express trust, the corpus of which consisted of a note secured by a second trust deed executed by the Arcady Apartment Hotel Company, which lien was junior to a \$1,325,000 bond issue on the hotel property. In its capacity as trustee and on order of Arcady or its nominees, the bank between the years 1925 and 1929 executed and delivered so-called participation certificates evidencing fractional interests in the note. These certificates were delivered to materialmen, contractors, architects, and superintendents, including the plaintiff's decedent, to apply on labor and material furnished by them in the construction of the Arcady Hotel, under contracts entered into by them prior to its construction and before the respective certificates were issued, whereby they were to accept said certificates in payment as a part of the program to finance the construction of said building. The certificates so executed and delivered aggregated on their face approximately one-half million dollars, and the plaintiff as executor was the holder of one or more of these certificates. It is alleged in the complaint that no permit from the commissioner of corporations was obtained by the

bank for the issuance of these certificates and that the certificates are void for this reason. The lack of such permit is the basis of the suit and if the issuing of a permit by the commissioner of corporations were a necessary requisite to the validity of the certificate, the complaint stated a cause of action; if such permit were not necessary the complaint did not state a cause of action.

The suit is similar in all respects to the case of Fox-Woodson Lumber Co. v. Bank of America, 51 P.(2d) 1149, which was decided by this court on this date, except that judgment went for the defendant instead of the plaintiff, and the reasons for our decision in this case are fully set forth in the opinion filed in that case.

Under our construction of the law it was not necessary for the bank to have obtained a permit in order to issue the securities, and therefore the securities were not void. The plaintiff's complaint fails to state a cause of action and the judgment should be for the defendant.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, Justice pro tem.



HOLMES et al. v. BANK OF AMERICA NAT.
TRUST & SAVINGS ASS'N et al. *

Civ. 10641.

District Court of Appeal, Second District,
Division 2, California.

Nov. 13, 1935.

Hearing Granted by Supreme Court
Jan. 10, 1936.

Licenses 18½

Under Corporate Securities Act as it existed from 1923 to 1929, national bank was not required to obtain permit from commissioner of corporations for issuance of participation certificates in trust deed, and circumstance that plaintiff was materialman to whom certificate was originally issued for materials furnished gave him no right to relief against bank.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Verne L. Holmes, etc., and others, against the Bank of America National Trust & Savings Association and others. Judgment for plaintiffs and defendants appeal.

Reversed.

Freston & Files and Ralph E. Lewis, all of Los Angeles, Louis Ferrari, of San Francisco, and Edmund Nelson, O'Melveny, Tuller & Myers, and Louis W. Myers, all of Los Angeles, for appellants.

G. C. De Garmo and W. M. Crane, both of Los Angeles, for respondents.

CRAIL, Presiding Justice.

The facts in this case are similar to those set forth in Fox-Woodson Lumber Co. v. Bank of America, 51 P.(2d) 1149, our decision in which was filed on this date, except that in this case the participation certificate was issued directly to the plaintiff who furnished Holmes disappearing beds for the apartment hotel. In other words, the plaintiff Holmes was the holder of an original certificate, whereas the plaintiffs in the other cases were assignees of the original holders of certificates; the bank having upon surrender to it of the original certificates issued and delivered to such plaintiffs equivalent certificates in exchange. Both the plaintiff and the defendant claim advantages in their favor arising out of this circumstance, but under the view of the law which we have expressed in the Fox-Woodson Lumber Co. Case, supra, the circumstance is immaterial. The reasons for our decision are fully stated in the case last named.

Judgment reversed.

We concur: WOOD, J.; McCOMB, Justice pro tem.

Earle M. DANIELS, Plaintiff and Respondent,
v. BANK OF AMERICA NATIONAL
TRUST & SAVINGS ASSOCIATION (a Na-
tional Banking Association) et al., Defend-
ants and Appellants. *

Lillian B. CROTSLEY, Plaintiff and Respond-
ent, v. SAME.

George E. ALLISON, Plaintiff and Respond-
ent, v. SAME.

Civ. 10640, 10643, 10642.

District Court of Appeal, Second District,
Division 2, California.

Nov. 13, 1935.

Hearing Granted by Supreme Court
Jan. 10, 1936.

Appeals from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Freston & Files and Ralph E. Lewis, all of Los Angeles, Louis Ferrari, of San Francisco, and Edmund Nelson, O'Melveny, Tuller & Myers, and Louis W. Myers, all of Los Angeles, for appellants.

G. C. De Garmo and W. M. Crane, both of Los Angeles, for respondents.

CRAIL, Presiding Justice.

These three cases are similar in many respects to the case of Fox-Woodson Lumber Co. v. Bank of America (Cal.App.) 51 P.(2d) 1149, this day decided. The participating certificates issued to the plaintiffs in these cases were the same as those issued in the Fox-Woodson Lumber Company Case except as to names, dates and amounts, and all were issued during the period from 1925 to 1929. We reach the same decision in these cases as in that and our reasons are fully stated in the opinion filed in that case.

Judgments reversed.

We concur: WOOD, J.; McCOMB, Justice pro tem.

*For subsequent opinion see 59 P.2d 1029.

**MILLER v. UNION BANK & TRUST CO. OF
LOS ANGELES et al. ***

Civ. 10385.

District Court of Appeal, Second District,
Division 2, California.

Nov. 13, 1935.

Hearing Granted by Supreme Court

Jan. 10, 1936.

1. Constitutional law $\Rightarrow$ 48

Unconstitutional effect should not be given statute if another construction is reasonably discoverable from its language.

2. Licenses $\Rightarrow$ 18½

Under Corporate Securities Act as it existed from 1923 to 1929, neither national banks nor state banks were required to obtain permits from commissioner of corporations before issuing securities (St. 1917, p. 673, as amended; St. 1923, p. 87; Const. art. 12, § 15).

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Charles A. Miller against the Union Bank & Trust Company of Los Angeles and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

McGee & Robnett, John J. Wilson, and Robert Lee Collins, all of Los Angeles, for appellant.

Loeb, Walker & Loeb, of Los Angeles, for respondent Union Bank & Trust Co. of Los Angeles.

O'Melveny, Tuller & Myers, Louis W. Myers, Swanwick, Donnelly & Proud-fit and Finlayson, Bennett & Morrow, all of Los Angeles, amici curiæ.

CRAIL, Presiding Justice.

This is an appeal from a judgment entered pursuant to an order sustaining defendants' general demurrer to the plaintiff's complaint without leave to amend. It is alleged in the complaint that on the 5th day of January, 1926, the defendant bank, a California corporation, issued a certain declaration of trust known as the "Whittier Triangle Syndicate" involving a tract of real estate in Los Angeles county as the trust res; that the declaration of trust was issued for the purpose of selling assignments of beneficial interests to the public; that on May 14, 1929, the bank issued and sold to the plaintiff 60/200 interests in the net proceeds

arising out of said trust; that at no time did the bank have a permit from the commissioner of corporations to issue or sell the said securities; and that they were therefore void.

It is asserted both by the plaintiff and the defendants that the question involved may be stated as follows: "Was the Corporate Securities Act, St. 1917, p. 673, as amended in 1923 [Stats. of 1923, p. 87] and as it read until 1929, constitutional in requiring state banks to secure a permit before issuing securities and in exempting national banks from the necessity of obtaining a permit before issuing securities?" The demurrer was sustained on the theory that the Corporate Securities Act in the respect stated was unconstitutional and that therefore it was not necessary for the bank to have obtained a permit to issue the securities; but the demurrer should have been sustained as well if for any reason it was unnecessary for the bank to obtain such permit.

The defendants, assuming that the provisions of the Corporate Securities Act as then in effect required state banks to obtain a permit to issue securities while at the same time exempting national banks from this requirement, contended in the trial court and contend here that the provision requiring state banks to obtain a permit before issuing securities was unconstitutional for the reason that the act permitted national banks to do business in the state on more favorable terms than state banks; that said favoritism is contrary to section 15 of article 12 of the Constitution of California, which reads as follows: "No corporation organized outside the limits of this state shall be allowed to transact business within this state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state." That this fundamental safeguard of the Constitution was attempted to be subverted by placing a burden on domestic corporations to which foreign corporations were not subjected, the latter thus being given negatively a privilege denied the former [Young v. Three For One Oil Royalties, 1 Cal.(2d) 639, 36 P.(2d) 1065]; and finally that this unauthorized discrimination in favor of national banks extended to state banks the exemption granted to national banks.

[1,2] The respondents' contention as above stated is very persuasive. Nevertheless, we should not overlook one of the fundamental rules of statutory construction which is that unconstitutional effect should not be given to a statute if another construction is reasonably discoverable from its language. We have reached the conclusion that the Corporate Securities Act as it existed during the years from 1923 to 1929 may be reasonably construed, and therefore should be so construed, as not to require either national banks or state banks to obtain permits from the commissioner of corporations before issuing securities. Our reasons for this conclusion are fully set forth in the case of *Fox-Woodson Lumber Co. v. Bank of America* (Cal.App.) 51 P.(2d) 1149, the opinion in which was filed on this date. For brevity's sake we do not again set them forth herein.

Under our construction of the law it was not necessary for the bank to have obtained a permit in order to issue the securities and the securities were not void with respect to the only ground set up by plaintiff as his cause of action, and therefore the plaintiff's complaint failed to state a cause of action.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, Justice pro tem.



HAMMOND LUMBER CO. v. ADAMS et al.*

Civ. 10611.

District Court of Appeal, Second District,
Division 2, California.

Nov. 14, 1935.

Rehearing Denied Dec. 10, 1935.
Hearing Granted by Supreme Court
Jan. 13, 1936.

Corporations 471

So-called beneficial certificates evidencing undivided interests in corporation's note and trust deed, which certificates were issued to contractors, subcontractors, and materialmen for services and material, held not "bonded indebtedness," within provision requiring consent of two-thirds in amount of stockholders before increasing corporation's bonded indebtedness (Civ.Code, § 359, as

amended by St. 1923, p. 1015; Const. art. 12, § 11, as amended in 1920).

[Ed. Note.—For other definitions of "Bonded Debt or Indebtedness," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by the Hammond Lumber Company against L. L. Adams and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Horton & Horton, Joseph K. Horton and Holbrook, Taylor, Tarr & Horton, all of Los Angeles, for appellant.

Louis Ferrari, of San Francisco, and Edmund Nelson, Freston & Files, Ralph E. Lewis, O'Melveny, Tuller & Myers, and Louis W. Myers, all of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is an appeal from a judgment in favor of the defendants after an order sustaining a general demurrer without leave to amend. In so far as the first count of the complaint is concerned, the allegations are similar to those set forth in the case of *Fox-Woodson Lumber Co. v. Bank of America* (Cal.App.) 51 P.(2d) 1149, the opinion in which was filed by this court yesterday. We refer to that opinion for a full statement of the facts in this case. Our decision as to the first count is the same and our reasons for the decision are stated in the opinion in that case.

The original complaint in this case was filed in the year 1931. Thereafter and on October 11, 1934, the decision of the Supreme Court in the case of *Young v. Three for One Oil Royalties*, 1 Cal.(2d) 639, 36 P.(2d) 1065, was rendered. Thereafter and on May 13, 1935, the plaintiff filed an amended complaint containing a second count in which it was alleged that the so-called participation certificates, i. e., the certificates issued for the construction of the Arcady Apartment Hotel, were void as having been issued in contravention of section 11 of article 12 of the Constitution of this state and of section 359 of the Civil Code as these laws existed in 1927 and 1928, which provide in effect that the bonded indebtedness of a corporation shall not be increased without the consent of the persons holding at least two-thirds of the amount in value of the stock. The second

*For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 59 P.2d 1030.

count alleges that no such consent was obtained and that no meeting of the stockholders was held as required by said section 359. Defendants, on the other hand, contend the certificates do not constitute "bonded indebtedness" within the purview of the Constitution, and that even if the certificates did represent bonded indebtedness they would not be either void or voidable.

The law is meager in California as to what constitutes "bonded indebtedness." In an otherwise splendid opening brief plaintiff takes it for granted, largely, that the certificates before us constitute bonded indebtedness and contents itself with the following assertion in that behalf: "The rules of law, as to what constitutes a bonded indebtedness of a corporation, are so generally known and settled that we feel justified in referring to, as authority in this respect, 14a C.J., Corporations, p. 610, § 2563." Turning to this authority, which as we have said is the only one cited by plaintiff in support of this contention, we find it reads as follows: "In the ordinary meaning of the term, a corporate bond is a written promise by a corporation under seal to pay a fixed sum of money at some future time named, with stated interest payable at some fixed time or intervals, given in return for money, or its equivalent, received by the corporation, sometimes secured, and sometimes not." It is obvious that this is a very general definition, so broad in its terms as to include ordinary promissory notes and a wide variety of other contracts which plainly and unmistakably are not corporate bonds. It must be remembered that the question which now confronts us is not whether the certificates constitute a "security" under the Corporate Securities Act (St. 1917, p. 673, as amended), but whether they constitute a "bonded indebtedness" within the meaning of the Constitution and Code provisions.

In the case of *Underhill v. Santa Barbara, etc., Co.*, 93 Cal. 300, 28 P. 1049, 1050, the contention was made that certain notes issued by a corporation and secured by mortgages in consideration of labor and material furnished to the corporation constituted a bonded indebtedness within the meaning of said constitutional provision. The court said: "If the constitution does not prohibit a corporation from securing every kind of indebtedness by mortgage, it follows that the mere fact that a corporation debt is secured by mortgage does not show that it is of the kind prohibited, and

that the prohibited kind must be distinguished by some other attribute than that of mortgaged security. It will hardly be contended that section 11 of article 12 of the constitution was intended to prohibit all increase of indebtedness not authorized by a general law and consent of a majority of the stockholders; much less, that it was intended to prohibit mortgage security for any kind of indebtedness which a corporation may lawfully incur. Conceding that, to constitute 'bonded indebtedness,' in the constitutional sense, it must be secured by mortgage, it does not follow, as contended by counsel, that all indebtedness secured by mortgage is 'bonded indebtedness' in that sense."

In the case of *Bank of Newman v. Monterey County, etc., Co.*, 48 Cal.App. 263, 191 P. 970, the defendant corporation had placed a written guaranty upon the bonds of another corporation and the contention was made that this guaranty constituted a bonded indebtedness. The court said: "We are unable to agree with the position taken by the appellant in this regard. The guaranty in question appears upon its face to have been issued for value received, and there is nothing in this record to indicate that it was not issued in good faith and in the regular course of the business of the corporation issuing the same. It does not purport to have any relation to any past bonded indebtedness of the appellant, or to have been issued in the form or with the intent of creating or increasing any bonded indebtedness of the corporation; but, on the other hand, it appears as to both its form and substance to belong to that class of written instruments which include promissory notes, checks, bills of exchange, and like obligations of corporations or of individuals issued in the ordinary course of business. The term 'bonded indebtedness' has never been held to apply to or include this class of obligations, but as used in the Constitution and statutes has had reference to those more formal transactions of both municipal and private corporations which require such prerequisites as elections, or the express approval of stockholders, in order to their creation, and which when thus permitted take the *express form of bonds*." (Italics ours.)

While it would be difficult and perhaps unwise to attempt to accurately define the term "bonded indebtedness," it is apparent that some regard must be had to the questions: Was the paper which is in contro-

versy formally issued as a bond? And, was it of such nature as to be recognized and accepted as such by the business and financial world?

The so-called "beneficial certificates" which we have under consideration were issued in the first instance only to contractors, subcontractors, and materialmen who had furnished labor and material to Arcady in its regular course of business and had agreed with Arcady to accept a portion of their compensation in the form of an undivided interest in a \$600,000 note and trust deed. When such contractor or materialman performed his services or furnished the material agreed upon he became entitled to an undivided interest in that promissory note and trust deed. His certificate when issued merely provided him a convenient evidence of his ownership of such an undivided interest. This case was submitted in part upon the briefs which were filed in the Fox-Woodson Lumber Company Case and this court has had the benefit of all the briefs in this group of cases. The so-called beneficial certificates were never referred to in any of them, so far as we recall, as constituting a bonded indebtedness. They were not designated as such even by the plaintiff herein until four years after the commencement of the action. It is admitted in the briefs that defendant throughout the entire transaction acted in the utmost good faith and without profit to itself other than the usual fee for acting as trustee or registrar, and to hold at this late date that these participation certificates constitute the creation of a bonded indebtedness would be to impose in effect a penalty or forfeiture upon the defendant. Our conclusion is that the certificates do not constitute the creation of a bonded indebtedness within the meaning of the constitutional provision. Holding as we do, it is unnecessary for us to consider the other contentions of the parties.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, Justice pro tem.

LOS ANGELES LIME COMPANY (a Corporation), Plaintiff and Appellant, v. **L. L. ADAMS et al.**, Defendants and Respondents.*

LLEWELLYN IRON WORKS (a Corporation), Plaintiff and Appellant, v. **SAME.**

PACIFIC COAST STEEL CORPORATION, (a Corporation), Plaintiff and Appellant, v. **SAME.**

SUNSET ROCK PRODUCTS COMPANY (a Corporation), Plaintiff and Appellant, v. **SAME.**

Civ. 10612-10615.

District Court of Appeal, Second District,
Division 2, California.

Nov. 14, 1935.

Hearing Granted by Supreme Court
Jan. 13, 1936.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Horton & Horton, Joseph K. Horton, and Holbrook, Taylor, Tarr & Horton, all of Los Angeles, for appellants.

Louis Ferrari, of San Francisco, and Edmund Nelson, Freston & Files, Ralph E. Lewis, O'Melveny, Tuller & Myers, and Louis W. Myers, all of Los Angeles, for respondents.

CRAIL, Presiding Justice.

These four cases are similar to the case of Hammond Lumber Company v. Adams (Cal.App.) 51 P.(2d) 1158, this day decided, except as to plaintiffs, dates, and amounts of the certificates. We hold for the defendant in these cases also and for the reasons stated in the opinion in the case of Hammond Lumber Company.

Judgments affirmed.

We concur: WOOD, J.; McCOMB, Justice pro tem.

*For subsequent opinion see 59 P.2d 1032.

VANDERVORT v. FARMERS & MERCHANTS NAT. BANK OF LOS ANGELES.

Civ. 8909.

District Court of Appeal, Second District,
Division 2, California.

Nov. 13, 1935.

Hearing Granted by Supreme Court
Jan. 10, 1936.

1. Licenses ⇐18½

Under Corporate Securities Act as it existed from 1923 to 1929, national bank was not required to obtain permit from commissioner of corporations as condition to issuance of securities (St. 1925, p. 962, § 2, subd. 3 (a, c)).

2. Fraud ⇐46

Person relying on fraud as element of cause of action must allege facts, and that false representations were made with intent to deceive or to induce plaintiff to enter into transaction.

3. Fraud ⇐45

Complaint by holder of participating certificate against trustee under trust deed, for fraud, held insufficient, where plaintiff alleged that trustee had knowledge of facts, unknown to plaintiff, which it failed to disclose, but failed to allege that plaintiff's ignorance was known to trustee or that it was trustee's duty to inform her of matters contained in her agreement.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Lucy B. Vandervort against the Farmers & Merchants National Bank of Los Angeles. Judgment for defendant, and plaintiff appeals.

Affirmed.

Young & Young and Wilbur D. Finch, all of Los Angeles, for appellant.

Overton, Lyman & Plumb, Irving H. Prince, and Cecil A. Borden, all of Los Angeles, for respondent.

Swanwick, Donnelly & Proudfit and Finlayson, Bennett & Morrow, all of Los Angeles, amici curiæ for respondent.

CRAIL, Presiding Justice.

Appellant brought this action to recover the sum of \$15,000 paid by her in June,

1929, as the purchase price of a beneficial interest in a real estate trust of which the bank was trustee. The appeal is from a judgment for the defendant after an order sustaining a general demurrer to the complaint without leave to amend. The first cause of action of the complaint alleges that the interest which the bank conveyed to her was void and hence valueless for the reason that the bank had not obtained any permit from the commissioner of corporations authorizing its sale and that such a permit was necessary. A second cause of action sounds in tort and alleges certain facts upon which the plaintiff seeks to recover on the ground of fraud.

[1] So far as the first cause of action is concerned, this case is similar to the case of Fox-Woodson Lumber Co. v. Bank of America (Cal.App.) 51 P.(2d) 1149, which was decided by this court on this date, except that judgment went in the trial court for the defendant instead of the plaintiff. For the reasons stated by us in that case the order sustaining a general demurrer was proper. It was not necessary for the bank to have obtained a permit and the plaintiff's contention in this regard is without merit.

In the second cause of action the plaintiff does not allege any overt act of fraud upon the part of the defendant. The allegations of her complaint may be sufficient to state a cause of action against the parties who with her were engaged in the real estate transaction, to take care of which the trust was created, but under the allegations of the complaint the bank was merely the escrow holder and the trustee of said trust and it was not otherwise interested in the transaction.

In her opening brief the plaintiff confined herself to other matters, abandoning at that time so far as the appeal was concerned her cause of action for fraud. Thereafter the case of Young v. Three For One Oil Royalties, 1 Cal.(2d) 639, 36 P.(2d) 1065, was decided by the Supreme Court adversely (at least inferentially) to the contention of the plaintiff on her cause of action based on the Corporate Securities Act, and thereupon by stipulation of the parties and authorization of the court the plaintiff filed a supplemental and additional opening brief in which she urged for the first time on appeal that her sec-

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

51 P.(2d)—73½

*For subsequent opinion see 59 P.2d 1028.

ond cause of action sufficiently alleged fraud against the defendant.

[2,3] As alleged in the complaint and the exhibits thereto, the transaction with the bank was a simple one for the creation of a trust in real property between the several owners thereof by which they vested their respective interests therein in the defendant bank as trustee. It is not alleged that the bank received any benefit whatever from the transaction other than the agreement on the part of the trustors to pay it the usual charge for acting in the capacity as trustee. There is a wealth of allegations alleging fraud against the other parties to the transaction who are not parties to this suit, having been sued in a prior action, but nowhere is there sufficient allegation of fraudulent conduct on the part of the bank or its trust officer in connection with the matter. Whenever fraud constitutes an element of a cause of action the facts must be alleged. 12 Cal. Jur. 800. There must be an allegation among others that the false representations were made with intent to deceive the plaintiff or with intent to induce her to enter into the transaction. 12 Cal. Jur. 808, § 65, and cases cited. There is no allegation in the complaint either of intent upon the part of the defendant to deceive the plaintiff or of an intent to induce plaintiff to act in the matter, and there are no allegations of facts and circumstances from which such intent must necessarily be implied. Indeed, there are no allegations of false representations made by the bank. There are allegations that the plaintiff did not know certain facts connected with the transaction and that the bank did know said facts and failed to inform the plaintiff, but there is no allegation that the bank knew that plaintiff did not know, and there is no allegation directly or indirectly that it was the duty of the bank to inform the plaintiff of matters contained in her own agreements of which she and her confidential agent presumptively had full knowledge. The general demurrer should have been sustained to the second count. Neither is there any merit in the contention of the plaintiff that the contract is void for uncertainty.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, Justice pro tem.

**RICHARDSON v. BOARD OF EDUCATION
OF LOS ANGELES CITY SCHOOL**

DISTS. et al. *

Civ. 9887.

**District Court of Appeal, Second District,
Division 1, California.**

Nov. 8, 1935.

**Hearing Granted by Supreme Court
Jan. 1, 1936.**

1. Schools and school districts ☞147

Statutes giving boards of school trustees power to govern schools in their districts and duty to employ teachers and to fix and prescribe their duties, authorized district board to fix required minimum number of days attendance by teachers and schedule of excusable absences (Pol. Code, § 1607, subd. 1, as added by St. 1917, p. 736; § 1609, subds. 2, 5 (b), added by St. 1917, p. 738, and amended by St. 1921, pp. 1664, 1665).

2. Schools and school districts ☞136

Relation between teacher and school district is created by contract.

3. Schools and school districts ☞133

Under statute providing that teacher should be classified as permanent after being successfully employed by district for two or three complete consecutive school years, and contract specifying credit to be allowed for certain absences, and providing that teacher must teach 195 days if year was to count as full school year, teacher, who under contract was credited with 193 days of teaching for first year, held not entitled to classification as permanent teacher at end of third year's services (Pol. Code, § 1609, subd. 3 (e), as amended by St. 1927, p. 1913).

HOUSER, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Suit by Paul Eddy Richardson against the Board of Education of Los Angeles City School Districts and others. From an adverse judgment, plaintiff appeals.

Affirmed.

W. A. Alderson, of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, and Ernest Purdum, Deputy Co. Counsel, both of Los Angeles, for respondents.

SHINN, Justice pro tem.

Plaintiff seeks the mandate of the court requiring respondent school district to clas-

☞For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 58 P.2d 1285.

sify him as a permanent teacher. Plaintiff's rights are governed by his contract with the board and by section 1609, subd. 3 (e), Political Code (St. 1927, p. 1913), under which it was the duty of defendant board to classify plaintiff as a permanent teacher if he had been "successfully employed by the district for two or three complete consecutive school years," as a probationary teacher. The three-year period applies under the provision of the section that the classification shall be made at the end of either the second or third year of the employment, at the option of the governing board of the district, no classification having been made at the end of the second year. The complaint alleges and the answer denies that plaintiff was so employed.

Respondent admits that the second and third years' services were complete, but contends that the first year's service (1928-1929) was incomplete. The court found that plaintiff's contract contained, among other provisions, the following: "To all Probationary Teachers: According to the California School Law, a teacher who enters a School District must successfully serve as a probationary teacher on a probationary contract for two full, consecutive years. In order to count as a full school year, it is necessary to teach a minimum of one hundred ninety-five days. A teacher who serves less than one hundred ninety-five days in a school year cannot receive a permanent contract at the end of two years, but must continue to serve on a probationary contract until the requirements are met. However, the increase in salary can be earned by two years of service of not fewer than one hundred fifty school days each."

There is no statutory provision as to the number of days of teaching required to make up a complete school year as that term is used in said section 1609. In Los Angeles City High School District 200 days was adopted as the maximum number of teaching days in the school year and under rules of the board 195 was fixed as the minimum number of days of teaching with which the teacher must be credited to make up a complete year. In addition thereto, under the rules of the board, half pay was allowed for sick leave for not exceeding 10 days during the school year, and full pay for not exceeding 10 days when the teacher should be quarantined, not exceeding two such periods in a school year, and in certain other cases, not material here, full pay was allowed.

During the year 1928-1929, plaintiff was credited with 184 days' actual teaching and was absent 16 days, all on account of illness. He was credited with 4 days out of the 16 on account of being quarantined and he was given a further credit for 10 days' absence on account of illness, at half pay, or 5 full days. The remaining 2 days were charged against him as unexcused absences. This credit of 9 days brought his total of paid teaching days to 193, or 2 short of the required minimum. It was upon the ground that this year's service was incomplete that the board refused to give him a rating as a permanent teacher and judgment went against him in the trial court.

[1] Under its general powers to govern the schools in the district the board had power to make rules not inconsistent with the state law or the rules of the state board of education. Pol.Code, § 1607, subd. 1, St. 1917, p. 736. It was also the duty of the board to employ teachers, fix their compensation unless otherwise provided by law, and to fix and prescribe their duties. Pol. Code, § 1609, subd. 2, St. 1917, p. 738, § 1609, subd. 5(b), St. 1921, pp. 1664, 1665. The district board, therefore, was fully competent to make the rules here involved, fixing a required minimum number of days' attendance by teachers and a schedule of excusable absences. Such rules, indeed, would seem to be necessary for a proper definition of the teachers' duties of attendance and to provide as well for emergency absences for which the teachers should not be penalized as to compensation or credit for attendance.

[2,3] The relation between the teacher and the school district is one that is created by contract. *Leymel v. Johnson*, 105 Cal. App. 694, 288 P. 858; *Gould v. Santa Ana High School District*, 131 Cal.App. 345, 21 P.(2d) 623; *Wood v. Los Angeles City School District* (Cal.App.) 44 P.(2d) 644. Plaintiff's several contracts made specific reference to the rules and regulations of the board, the employment being subject thereto. It appears, therefore, that essential terms of the employment to which the parties agreed were that 195 days of teaching service should be rendered each year, computed under the rules of the board, and that if the days of service fell below the minimum requirement, the year in question would not be considered one during which plaintiff was successfully employed for a complete year.

Plaintiff's rights are governed by the contract in all matters in which the law leaves the parties free to contract. There is no conflict between the rules of the board here involved, which were incorporated into the contract, and the state law on the subject. The provisions of the contract, therefore, are controlling. Plaintiff's services having fallen short of a complete year's service were insufficient to meet the requirements of the contract and the rules of the school district and he has failed to comply with the conditions upon which his right to a rating as a permanent teacher depends. *Wood v. Los Angeles City High School District*, supra.

Plaintiff's further contention that he was successfully employed for three complete years because a contract subsisted throughout each year is untenable. It would be violative of the clear purpose of the law and of the terms of the contract of employment, as well, to allow one holding a contract as a probationary teacher for three successive years to acquire the status of a permanent teacher without having rendered the successful service which furnishes the reason for the probationary period. Neither can we agree that substantial as distinguished from full compliance with the terms of his contract is sufficient to bring plaintiff within the classification he seeks. The authorities cited by him to the effect that illness does not of itself terminate a contract are not in point. The board did not seek to terminate plaintiff's employment, nor does it appear that there existed any ground for such termination. The point is that the required services contracted for were not rendered. Respondent board acted properly in exacting performance upon plaintiff's part and in refusing to give him a classification he had not earned.

The judgment denying plaintiff classification as a permanent teacher is affirmed.

I concur: YORK, J.

HOUSER, Presiding Judge.

I dissent. I am unable to agree with the conclusion reached herein by my associates to the effect that although no statutory language either expressly or impliedly confers such power, a school board may conclusively, and, if need be, arbitrarily, determine as against the teacher, the question of law as to what constitutes a "complete" school year, as provided by the pertinent statute. It is obvious that, if throughout this state

school boards possess such authority, one board (as in the instant case) may prescribe 195 days as a "complete" school year; and that in the exercise of its asserted power in that regard, and for a like purpose, another school board, in perhaps an adjoining school district, may demand a service of only 175, 150, or any lesser number of days; or, going to an extreme in the opposite direction, may require a perfect score. To my mind, neither of such possible situations, dependent upon either whim or caprice on the one hand, or on the other, upon an arbitrary "efficiency requirement," was contemplated by the Legislature in its enactment of the statute. Manifestly, an operation of the statute such as is proposed to be sanctioned by the prevailing opinion herein will not only prevent uniformity in practice, but will work confusion and inequality as between or among teachers employed in respective school districts throughout the state. In other words, the point is that the statute, although possibly uncertain, nevertheless is the measure of the rights of the parties; that what constitutes a "complete" year necessarily is a question of law for exclusive determination by the courts; and that in consequence it is not competent for a school board to solve any uncertainty that may exist in the language of the statute, to the manifest detriment of a teacher.

Moreover, assuming that which to my mind, as hereinbefore has been indicated, is indefensible, to wit, that the school board possessed the authority to define what should constitute a "complete" school year, it should be apparent that in the instant case, in the exercise of such assumed power, the school board not only adopted an unreasonable rule, but as well arbitrarily enforced it; that is to say, any question of substantial performance by the teacher was entirely ignored. In that regard, may it properly be said that it is either reasonable or consistent that when "quarantined," up to a credit of 20 days, a teacher shall receive credit for the time that he may be absent from his duties, but that for time when he may be compelled to be absent (for whatever length of time) because of "illness," he shall be credited for one-half time only, and then only up to a limit of 5 days in the aggregate? If so, it is clear that if only "quarantined," because of exposure to the disease of smallpox, he might be credited to the extent of 20 days, although if he were actually ill with the disease of smallpox (even if contracted by him in the course of and arising out of his duties

as a teacher because of exposure to one of his pupils who was afflicted with the disease), and for that reason was absent for a period of three months, during all of which period of time he was completely, but involuntarily, incapacitated, according to the clause in the so-called "contract" between the school board and the teacher, the latter would be credited for 5 days only. In principle, such a situation forms the basis for the ruling by the school board in the instant case, by which the teacher is deprived of a "permanent" rating. To my mind, such a conclusion is neither just nor reasonable. It would seem fair to assume that in the use in the statute of the word "complete," the Legislature had no intention to authorize a school board to adopt a rule, or to so provide by "contract" with a teacher, that the latter might suffer an injustice; but rather that all that was contemplated was that the teacher should substantially perform a "complete" school year's work.



10 Cal.App.2d 481

In re COWDEN'S ESTATE.

COWDEN et al. v. FRENCH.

Civ. 10655.

District Court of Appeal, Second District,
Division 1, California.

Dec. 5, 1935.

Hearing Denied by Supreme Court

Feb. 3, 1936.

1. Wills Ⓒ439

Rules for interpretation of will may be applied to support, but not to defeat, testator's intention (Probate Code, §§ 101, 103, 106).

2. Wills Ⓒ565(1)

"Personal property," in bequest by testatrix to a brother of money, clothing, and personal property, *held* limited to personal effects including only jewelry and other articles of personal adornment, where construction of term in legal sense would defeat other specific bequests and gift to stepchildren of residue "both real and personal" (Probate Code, §§ 101, 103, 106).

[Ed. Note.—For other definitions of "Personal Property," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Proceedings in the estate of Nellie F. Cowden, deceased, by E. W. Cowden and others against Earl C. French, administrator with the will annexed. From an order construing the decedent's will, defendant appeals.

Affirmed.

Keyes & Erskine, of San Francisco, and Shirley Meserve and Meserve, Mumper, Hughes & Robertson, all of Los Angeles (J. Benton Tulley, of San Francisco, of counsel), for appellant.

Lamb & Lamb, for respondents.

SHINN, Justice pro tem.

Appeal from an order construing a will.

The provisions of the will in question read as follows: "To my brother E. C. French the sum of two hundred dollars & my clothing & personal property. To my stepchildren by my husband Forbes C. Cowden I bequeath the rest of my estate both real & personal & wherever situated share and share alike." In a proceeding initiated to obtain an interpretation of these conflicting provisions, the court held that the brother took the sum of \$200 and the clothing and personal effects of the decedent, including "only such items as jewelry and other articles of personal adornment," and that the residue of the estate, which included stocks and bonds of the value of some \$1,500 and household furnishing of the value of \$300, went to the stepchildren under the residuary provision.

[1,2] Upon this appeal, the brother contends that the will should be so construed as to give him all of the personal property. He relies upon certain well-established rules of construction, namely, that a specific bequest will control a general bequest where the two are in conflict (69 C.J. 115); a clear and distinct bequest cannot be affected by any other words not equally clear and distinct, or by inference or argument from other parts of the will (Probate Code, § 104); that the law presumes an intention that the property should go in the legal channels of descent (26 Cal.Jur. 209); and that the words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected (Probate Code, § 106). If these rules are controlling, the position of appellant is correct. Other rules de-

clare that effect must be given to every expression in a will when that can be done, and the entire will must be construed so as to form one consistent whole (Probate Code, §§ 102, 103). Under section 101, which was followed by the trial court, the will must be construed according to the intentions of the testatrix, and where such intention cannot be given effect to its full extent, it must have effect as far as possible. All of these rules of interpretation have as their ultimate object the ascertainment of the intentions of the maker of the will and they may be applied to support but not to defeat such intention. Estate of Layton, 217 Cal. 451, 19 P.(2d) 793, 91 A.L.R. 480. It is not to be doubted that the testatrix did not intend to give all of her personal property to either appellant or respondents. Having provided for her brother, she believed there was personal property left to give to the stepchildren. The second bequest was in just as clear terms as the first one. She, therefore, had in her mind some intended limitation of the first bequest. We think an interpretation is to be preferred which will give effect to both bequests rather than one which would disregard the residuary bequest to the defeat of testatrix' obvious wishes. There is direct authority for the determination of the trial court that the personal property given to the brother should be limited to the personal effects of the deceased. Estate of Norrish, 135 Cal.App. 166, 26 P.(2d) 530; Estate of Combs, 136 Cal.App. 286, 28 P.(2d) 711. In each of these cases the words "personal property" were so construed. In the latter case it was pointed out that the words "personal property" taken in the popular sense may mean only goods and chattels which are the subject of personal use, while in a legal sense they embrace all classes of property except real property, and it was held that the former definition should be accepted because the will as a whole showed that the words were not used in their more comprehensive sense. The interpretation contended for by appellant would not only defeat the bequest of the residue of the personal property to respondents, but it would also defeat certain other bequests, namely, one of \$200 to B. J. Cowden, one of \$350 to Dora A. Cowden, and a bequest of a diamond ring to Eva Price, a sister, for if appellant is to take all of the personal property the others mentioned would take nothing. Such a disposition of the

estate would be quite foreign to the wishes of the testatrix as expressed in the will.

The order interpreting the will is affirmed.

We concur: HOUSER, P. J.; YORK, J.



10 Cal.App.2d 423

VAN NOY v. FRANK.

Civ. 9899.

District Court of Appeal, Second District,
Division 1, California.

Dec. 2, 1935.

Hearing Denied by Supreme Court
Jan. 30, 1936.

Appeal and error ⇐ 1067
Negligence ⇐ 138 (4)

In guest's action against driver of automobile with which host collided, refusal to instruct that if guest neither drove nor exercised any control over host's automobile, negligence of host could not be imputed to guest held reversible error, where, under admitted facts, doctrine of imputed negligence was inapplicable.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Phil Van Noy, by Le Nore Van Noy, his guardian ad litem, against Henrietta Frank. Judgment for defendant, and plaintiff appeals.

Reversed.

W. W. Kaye and Homer Johnstone, both of Los Angeles, for appellant.

O'Melveny, Tuller & Myers, J. R. Girling, and L. M. Wright, all of Los Angeles, for respondent.

ROTH, Justice pro tem.

The record in this case shows that plaintiff and appellant, Phil Van Noy, a minor, was riding in a Ford roadster, which was being operated by his brother, the owner thereof, in a southerly direction on Norton avenue, in the city of Los Angeles. As the Ford crossed the intersection of Norton and Second street, it was struck at the right rear portion thereof by an Oldsmobile operated and driven in an easterly direction on Sec-

ond street by the respondent. The collision overturned the Ford, and appellant suffered various injuries as a direct consequence. An action was started by appellant through his guardian ad litem for damages, and trial was had before a jury, which resulted in a verdict for defendant. Judgment was duly entered thereon, and from that judgment this appeal is taken.

Appellant calls our attention to a number of errors. We do not feel that it is necessary to treat all of them, since one of the errors complained of is of such a nature that a reversal is mandatory. This error is the refusal of the trial court, despite request of the appellant submitted in due form, to instruct the jury on the doctrine of imputed negligence. Appellant requested and the court refused to give the following instruction: "If you find from the evidence in this case that the Ford automobile mentioned in this case was, at the time of said alleged collision, owned and operated by Dorris Van Noy, and that the plaintiff Phil Van Noy neither drove the said automobile nor exercised any control or management over it whatever, then you must also find that on said occasion said plaintiff was the guest of said Dorris Van Noy, and in that event, negligence of said Dorris Van Noy, if any there was, could not under the law of negligence be imputed to the said Phil Van Noy."

The context of the requested instruction is not criticized by the respondent, and we do not find in any of the instructions given by the court or in the instructions when read as a whole, anything said or suggested about the doctrine of imputed negligence, as requested by appellant, or otherwise. Indeed, some of the instructions of the court when considered in the light of the whole charge given to the jury, suggests that negligence, if any, of Dorris Van Noy was imputable to appellant. Thus, the court instructed the jury that, "if you find from the evidence that the plaintiff was himself negligent, and that such negligence contributed proximately, no matter how slightly, to the happening

of the accident, plaintiff cannot recover, and in such event your verdict will be in favor of defendant."

There is no issue of contributory negligence raised by the pleadings; it was not alleged as a separate defense, and there was no evidence which would tend to prove any contributory negligence on the part of the plaintiff. Plaintiff did not drive the car, had no responsibility for its operation, and did not participate in its operation. There is no evidence of any of these elements. The special defense of "common and joint enterprise" pleaded in the answer was withdrawn by respondent prior to the submission of the case to the jury, her attorneys admitting that there was no evidence to support the same. On the admitted facts, there can be no question about the nonapplication of the doctrine of imputed negligence to this case, and the propriety—indeed, necessity—of instructing the jury what the doctrine is and appropriately advising the jury that it has no application to the facts of the instant case. *Kelley v. Hodge Transportation System*, 197 Cal. 598, 242 P. 76.

It is undoubtedly true that a finding by a jury from conflicting evidence to the effect that one driver's negligence is the sole cause of collision, and its corollary that there is no contributory negligence on the part of the other driver, is binding upon this court. The fatal omission, however, of the trial court to charge the jury on the subject of imputed negligence is such that we cannot say that the jury did so find. It may very well be that the jury was under the impression that if there was negligence on the part of the appellant's brother that respondent was exonerated, irrespective of any negligence on the part of respondent contributing directly to the accident. It seems clear to us that the failure of the trial court to instruct on a legal question of such importance, as applied to the facts of the instant case, is prejudicial error.

The judgment is reversed.

We concur: HOUSER, P. J.; YORK, J.

10 Cal.App.2d 475

LANE v. CITY OF REDONDO BEACH et al.
Civ. 9769.District Court of Appeal, Second District,
Division 1, California.
Dec. 5, 1935.**Eminent domain** ⇨280

Property owner whose realty and easement were allegedly damaged by city in making improvement under Improvement Act after city gave notice of intention to make improvement only by posting and publication of resolution of city council *held* not to waive right to damages because he did not appear before council and protest proposed improvement as required by Improvement Act (St. 1929, p. 1652, § 3; Const. art. 1, § 14).

Appeal from Superior Court, Los Angeles; Thomas C. Gould, Judge.

Action by C. H. Lane against the City of Redondo Beach and others. From a judgment of dismissal, plaintiff appeals.

Judgment reversed, with directions.

Morin, Newell, Brown & Hamill, of Pasadena, for appellant.

Frank L. Perry, City Attorney, of Redondo Beach, for respondent City of Redondo Beach.

ROTH, Justice pro tem.

Appellant's first cause of action alleges that in the course of making a public improvement under the provisions of the Improvement Act of 1911 (St. 1911, p. 730, as amended) respondent city of Redondo Beach changed the grade of a public street in the said city so as to damage and destroy his easement of ingress and egress. The second cause of action alleges that as a direct result of the continuing encroachment or trespass of a portion of the work of public improvement, to wit, a retaining wall, that plaintiff's real property has been taken and damaged for a public use without just or any compensation. It is conceded that the complaint is sufficient in all of its material allegations, excepting that it is the contention of the respondent, which contention was adopted by the trial court, that since it appears on the face of the complaint that the public improvement was done under the provisions of the Improvement Act of 1911, it was incumbent upon appellant to allege affirmatively that he had appeared before the city council at the time fixed in the resolution of

intention and made objection to the proposed grade involved in the work of improvement, as provided by section 3, part 1, of said act, as amended by Statutes of 1929, p. 1652, and that his failure to make said affirmative allegation rendered the complaint insufficient. Appellant did not appear before the city council to make the objection referred to, and naturally could not make the allegation required. A demurrer to the complaint and each of its causes of action was sustained without leave to amend, and a judgment of dismissal was entered thereon. From said judgment this appeal is taken.

The question presented involves the construction of section 14, article 1, of the Constitution, and section 3, part 1, of the Improvement Act of 1911 (St. 1911, p. 733), as amended by the Statutes of 1929.

Said constitutional provision provides: "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner." Section 3 of the Improvement Act referred to provides: "Any property owner whose property is to be assessed to pay the costs and expenses of the proposed improvement may at the time fixed in the resolution of intention for hearing of objections to the proposed work and improvement, appear before the city council and make objection to the proposed grade or proposed modification of grade. A failure to make objection at such time shall be deemed to be a waiver of all objections to the proposed grade or proposed change or modification of grade and shall operate as a bar to any claim for damages or any subsequent action looking to the prevention of the work or the recovery of damages on account of the performance of the work to such grade or changed grade." St. 1929, p. 1652.

The only notice given by the city council of Redondo Beach of the resolution of intention to make the improvement prescribed in the complaint was the posting and publication of the resolution of intention. The resolution briefly described the prescribed work and referred to the plans and specifications on file with the city engineer. There is no contention that any notice was served by mail, personally, or otherwise, upon appellant, except by the posting and publication referred to. Respondent contends that appellant's failure to appear before the city council and protest, pursuant to the provisions of section 3, part 1, of the Improve-

ment Act of 1911, as amended, amounted to a waiver of his right to damages.

The precise question presented in this case is decided by a recent decision of this court, Ambassador Holding Corporation, Ltd., v. City of Los Angeles, 51 P.(2d) 899. After a full and thorough discussion of the cases, this court says in that case at page 902 of 51 P.(2d): "The inadequacy of part I on this subject is evident, consequently, the failure to comply with section 3 thereof does not operate to bar appellant from the right to an action for damages. The isolated reference to damages in section 3 is but an empty threat, a defiance of which cannot destroy a substantial right."

The judgment is reversed, with directions to the trial court to overrule the demurrer to the complaint and to both causes of action thereof, and to allow respondent time to answer.

We concur: HOUSER, P. J.; DORAN, J.



BRUTON v. TEARLE. *
Civ. 9661.

District Court of Appeal, First District,
Division 2, California.
Nov. 15, 1935.

Hearing Granted by Supreme Court
Jan. 13, 1936.

1. Appeal and error ⇨870(4)

Jurisdiction of trial court to issue restraining order and order granting injunction on application for appointment of receiver in aid of execution would not be considered where no appeal was taken from such orders (Code Civ.Proc. § 564, subd. 4; § 963).

2. Execution ⇨405

Appointment of receiver in aid of execution held proper where judgment debtor refused to apply earnings to satisfaction of judgment, had entered into conspiracy with employer to defeat collection of judgment, and execution had been returned only partially satisfied (Code Civ.Proc. § 564, subd. 4).

3. Execution ⇨405

Appointment of receiver in aid of execution held proper as against objection that judgment debtor was denied opportunity to be heard on claim for exemption of accrued earnings, where debtor's exemption claim was

made issue before trial court and he had full opportunity to be heard thereon, and earnings were not necessary for support of debtor's family (Code Civ.Proc. § 564, subd. 4; § 690, subd. 10).

4. Execution ⇨365

Nonexempt property acquired by judgment debtor between issuance of order of examination for order to show cause in proceeding for appointment of receiver in aid of execution and time of hearing thereon could be reached in such proceedings (Code Civ.Proc. § 564, subd. 4).

5. Execution ⇨365

Order properly directed receiver appointed in supplemental proceeding in aid of execution to collect money representing salary earned by judgment debtor up to time of appointment of receiver, which was not exempt from execution, but order improperly directed collection of salary earned after date of appointment of receiver (Code Civ.Proc. § 564, subd. 4).

6. Divorce ⇨331

Judgment obtained in California action at law for unpaid balance due on New York alimony judgment held ordinary money judgment, not enforceable by order directing receiver appointed in supplemental proceeding in aid of execution to collect entire future earnings of judgment debtor until full satisfaction (Code Civ.Proc. § 564, subd. 4).

7. Execution ⇨405

Appointment of receiver in aid of execution held proper, notwithstanding deed of trust furnished as security for agreement of forbearance had not been exhausted, since judgment was not merged in forbearance agreement, which expressly provided that judgment creditor would refrain from enforcing judgment only so long as judgment debtor performed his promise to pay judgment (Code Civ.Proc. § 564, subd. 4).

NOURSE, P. J., dissenting.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Martin P. Bruton, administrator of the estate of Josephine Park Tearle, deceased, against Conway Tearle. From an order appointing a receiver in aid of execution, defendant appeals.

Order affirmed as modified.

Prior opinion, 47 P.(2d) 285.

Gavin McNab and Schmulowitz, Wyman, Aikins & Brune, all of San Fran-

cisco, Milton M. Cohen, of Los Angeles, Albert A. Kidder, Jr., of Hollywood, and Edward E. McCullough, of Los Angeles, for appellant.

Marcel E. Cerf, Henry Robinson, Marcel E. Cerf, Robinson & Leland, and Herbert A. Leland, all of San Francisco, for respondent.

SPENCE, Justice.

This is an appeal by defendant from an "order appointing receiver in aid of execution."

The action was originally brought by Josephine Park Tearle to recover a judgment for unpaid alimony due her under the terms of a New York decree. She recovered judgment in excess of \$9,000 and defendant appealed. During the pendency of the appeal said Josephine Park Tearle died. Her administrator was substituted and the judgment was thereafter affirmed. *Bruton v. Tearle*, 117 Cal. App. 696, 4 P.(2d) 623. It is unnecessary to set forth the various efforts made to obtain satisfaction of said judgment. Suffice it to state that despite all of these efforts the judgment was only partially satisfied in the sum of approximately \$5,000. When defendant returned from an extended trip abroad, he was served with summons in an action brought by Josephine Park Tearle in her lifetime in Los Angeles county in which action judgment was sought for the alimony accruing under the New York decree after the period covered by the judgment in this action. It was also sought by said action to set aside certain alleged fraudulent conveyances. Thereafter a written agreement was entered into in 1932, whereby defendant and his present wife acknowledged that defendant was indebted upon the judgment herein and for alimony subsequently accrued in a total sum in excess of \$13,000. They agreed to pay said sum by the payment of 10 per cent. of the earnings of either or both of them and they further agreed that, if their earnings in any semi-annual period should exceed \$3,000, they would pay one-half of said earnings in excess of \$3,000. There were numerous provisions in said agreement, but only a few of them need be mentioned here. The defendant and his wife further agreed to procure the execution of a deed of trust by the record owner of certain real property in Los Angeles county to secure their promises.

It was also agreed that as long as said parties performed all of the covenants of said agreement, the Los Angeles action would not be brought to trial and that no steps would be taken in the present action to execute the judgment herein or to institute proceedings supplemental to execution.

Thereafter defendant Tearle engaged in theatrical work in New York and earned in excess of \$24,000 up to the end of 1933. He made the payments required only for a short time after the agreement was made, said payments totalling the sum of \$1,560. He ceased making payments in February, 1933. He was in default at the end of 1933 under the terms of the agreement in the sum of approximately \$8,500, and no payments were forthcoming. In February, 1934, defendant made a contract with RKO Studios to appear in a picture in which he worked for 27 days at \$250 per day or a total of \$6,750. He started work on February 14. On February 20, pursuant to a writ of execution issued in the present action, a notice of garnishment was served upon RKO Studios in response to which the garnishee answered that it was indebted to defendant in the sum of \$1,243.75. On February 23 defendant was examined in proceedings supplemental to execution and it appeared that he had made an arrangement with RKO Studios after the above-mentioned garnishment whereby he was to receive his salary each day in advance, thereby making it impossible for his earnings to be levied upon. It also appeared that defendant had withdrawn his money in the bank in order to prevent a levy thereon. While notice of garnishment had been served on RKO Studios each morning from February 20 to March 1, these services proved futile, as there was no money due. Defendant collected the sum of \$2,250 from RKO Studios during this period.

On February 28, 1934, application was made in the present action for the appointment of a receiver in aid of execution and also for a restraining order. An affidavit was filed with said application setting forth the facts and showing that execution had been returned only partially satisfied and that said defendant refused to apply his earnings to the satisfaction of said judgment. It was alleged therein that defendant, his manager, and RKO Studios had entered into a conspiracy to defeat the collection of said judgment and that defendant had stated

to counsel for respondent that he would not apply any of his earnings to the payment of said judgment. The trial court issued an order to show cause and a restraining order. The hearing was had on March 9, 1934, and other affidavits were filed by the parties. Testimony was taken and the transcript of the testimony on supplementary proceedings was admitted in evidence pursuant to stipulation. On said date, the trial court made an order granting injunction, but continued the hearing of the application for a receiver until March 12. On the last-named date the matter was submitted and on March 16 the trial court made its "order appointing receiver in aid of execution," from which order this appeal was taken.

[1] Appellant contends "that said court was without jurisdiction in making the orders of February 28, 1934, March 9, 1934, and March 16, 1934, and that the showing made by said plaintiff did not entitle him to any of said orders." We find no merit in this contention. The order of February 28 was the restraining order and order to show cause. The order of March 9 was the order granting injunction. Appellant argues that the trial court was without jurisdiction to issue either the restraining order on February 28 or the order granting injunction on March 9, but we are not called upon to pass upon these questions. These orders were appealable orders (Code Civ.Proc. § 963; 14 Cal.Jur. 294), and no appeal was taken therefrom. The only appeal before us is the appeal from the order of March 16, which was an "order appointing receiver in aid of execution," and we shall therefore confine our discussion to the points raised with respect to the last-mentioned order.

[2] In our opinion the trial court had jurisdiction to make the order of March 16 appointing a receiver. Section 564, subd. 4, of the Code of Civil Procedure, provides that a receiver may be appointed "after judgment * * * in proceedings in aid of execution, when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment." See, also, *Habenicht v. Lissak*, 78 Cal. 351, 20 P. 874, 5 L.R.A. 713, 12 Am.St. Rep. 63; *Pacific Bank v. Robinson*, 57 Cal. 520, 40 Am.Rep. 120; 11 Cal.Jur. 155, 156. Appellant cites numerous authorities, but we find none of them in point.

This was not an attempt to bring an independent action in the nature of a creditor's bill, but respondent here proceeded strictly in accordance with the statutory provisions for proceedings supplemental to execution. That the trial court had jurisdiction to appoint a receiver in such proceedings is clearly indicated in one of the authorities cited and relied upon by appellant. *McCutcheon v. Superior Court*, 134 Cal.App. 5, 24 P.(2d) 911. We further believe it clear from a reading of the Code section above quoted and the recital of the facts above set forth that the showing made by respondent was sufficient to justify the making of the order in question.

[3] Appellant further contends that he was denied the opportunity to be heard on his claim of exemption of the money to be collected by the receiver. This contention is without merit as to the earnings which had become due to appellant up to the time of the making of the order appointing the receiver. Appellant's claim of exemption was made an issue before the trial court and appellant had a full opportunity to be heard thereon. There was ample evidence that the earnings affected by the order as hereinafter modified were not necessary for the support of appellant's family and the trial court properly concluded that said earnings were not exempt. Code Civ.Proc. § 690, subd. 10.

[4-6] The further claim is made that the trial court erred in ordering the receiver to collect so-called future earnings as well as those already earned. In this connection, appellant contends that the receiver should not have been authorized to collect any salary earned after the issuance of the order to show cause on February 28 and particularly should not have been authorized to collect any salary which had not been earned at the time of the appointment of the receiver on March 16. In support of his contention he cites certain authorities which hold that a garnishment does not serve to impound "future earnings." We are here concerned, however, not with the question of what may be reached by garnishment, but what may be reached by proceedings supplemental to execution. Appellant also cites certain authorities from other jurisdictions, most of which deal with exempt earnings, and in some of which it is indicated that no salary earned or other property acquired

after the issuance of the order of examination or order to show cause may be reached in such supplementary proceedings. We believe that the rule, indicated by such authorities is not based upon sound reason in the light of the obvious purpose of the statutory provisions for proceedings supplemental to execution. If the judgment debtor acquires nonexempt property of any kind between the time of the issuance of the order of examination or order to show cause and the time of the hearing thereof, we know of no reason why such property should not be held to be reachable in the proceedings then pending. We therefore conclude that the trial court did not err in ordering the receiver to collect the money representing the salary of the judgment debtor earned up to the time of the appointment of the receiver on March 16, which money had been found by the court to be not exempt from execution. But the receiver was also directed to collect and forthwith pay over to respondent all earnings "*to become due*" to appellant under his agreement with RKO Studios until said judgment *had been fully satisfied*. The order further directed certain named persons, "and all other persons having in their possession or under their control any money or earnings of said judgment debtor now due or belonging to said judgment debtor, including the moneys above referred to, *or who shall hereafter have in their possession or under their control any money or earnings of said judgment debtor at a time when said money or earnings are due and owing to said judgment debtor, shall forthwith deliver the same to said H. F. Ramacciotti, as such receiver, until said judgment, together with costs and accruing costs shall have been satisfied.*" (Italics ours.) It will thus be seen that certain portions of the order directed the taking of the entire future earnings to become due to appellant until the judgment was fully satisfied.

Appellant strenuously insists that this was error while respondent claims that said portions of the order were proper because the judgment was one for alimony and not an ordinary money judgment. Respondent apparently concedes that said portions of the order would have been erroneous if made in the enforcement of an ordinary money judgment and in our opinion the judgment before us must be treated as an ordinary money judgment.

While the original judgment for alimony in New York was the basis of the judgment before us, the wife, during her lifetime, sought an ordinary money judgment here in this action at law for the unpaid balance due upon the New York judgment. The judgment herein was therefore not a judgment for alimony, but was an ordinary money judgment. See *Creager v. Superior Court*, 126 Cal.App. 280, 14 P.(2d) 552; In re *Williams' Estate* (Sur.) 118 N.Y.S. 562. In the last-named case the court said at page 565 of 118 N.Y.S.: "From these authorities it would appear that when the claimant saw fit to transfer her claim, which was in judgment in the state of South Dakota, to a suit at law in the state of New York, and recover judgment thereupon, the judgment obtained was simply a mere money judgment, and said judgment was enforceable, not as a judgment in alimony, as the original judgment in South Dakota could be enforced, but simply as a money judgment, similar to a judgment *ex contractu*."

We have found no authority for the taking of the entire future earnings of the judgment debtor for the purpose of satisfying a judgment under any circumstances, and certainly there is none sanctioning such procedure in the enforcement of an ordinary money judgment. Future earnings may or may not be earned, and, if earned, such earnings may or may not be exempt. It would appear that any rule which would permit the trial court, in enforcing an ordinary money judgment, to direct the collection of the entire future earnings of a judgment debtor would result in wholly depriving the debtor of his means of livelihood and would be against public policy. The language of the court in *Mutual Service Corporation v. Hugren*, 225 Ill.App. 216, seems to support this view. It was there said at page 221 of 225 Ill.App.: "Debts ought in justice to be paid, but the creditor ought not to be permitted to seize the means whereby the laborer lives while earning that wherewith to pay, and the State is vitally interested that such injustice should not be permitted." We are therefore of the opinion that the order appealed from should be modified so as to eliminate therefrom the directions to the receiver to collect the earnings to become due to appellant after the date of the appointment of the receiver.

[7] Lastly, appellant apparently contends that the judgment could not be enforced against him until the security furnished pursuant to the agreement of 1932 by way of a deed of trust had been exhausted. He cites and relies upon *Bank of Italy, etc., Ass'n v. Bentley*, 217 Cal. 644, 20 P.(2d) 940. In our opinion, this contention is without merit. The agreement made in 1932 was clearly an agreement of forbearance and the judgment was not merged therein. The deed of trust was not given to secure the judgment as such, but was given to secure the promises made by appellant and his wife in said agreement. By the express terms of the agreement, the promise to refrain from enforcing the judgment was to be binding only "as long as the said Tearles shall perform all of the covenants herein provided to be performed by them." Upon their failure to keep their promises made in said agreement, we believe that respondent was entitled to proceed with the enforcement of the judgment and that the rule set forth in *Bank of Italy, etc., Ass'n v. Bentley*, supra, has no application to the facts before us.

The order appealed from is modified by eliminating therefrom all portions thereof referring to earnings of the judgment debtor to become due to the judgment debtor after the time of the making of said order on March 16, 1934, and, as so modified, said order is affirmed. The parties will bear their own costs on this appeal.

I concur: STURTEVANT, J.

NOURSE, Presiding Justice.

I dissent. I am not in accord with the suggestion as to the harshness of the decree in this case. The appellant has played ducks and drakes with the courts over a long period of years. He failed and refused to pay the alimony when it became due and compelled the wife to obtain a judgment for the sums in arrears. He appealed from that judgment on grounds which were obviously frivolous, but which were sufficient to delay its enforcement during the life of the wife. He entered into a written contract for the settlement of these claims and promptly repudiated his contract when payments became due. In collusion with his employer he arranged for advance payments of his daily salary in order to defeat execution. The respondent appealed to the

equity side of the court for the appointment of a receiver and that seems to be the only way that the court could proceed in order to protect itself as an effective instrument of the law against the trickery of the appellant.

To my mind the question before us is one of power alone—must the court confess its impotence to enforce a valid judgment when opposed by the collusion and fraud of one of the parties. The power to appoint a receiver in a case of this kind cannot be denied; it is expressly authorized by statute. If the court is convinced by the conduct of the appellant that his future earnings must be impounded to prevent further fraudulent practices, such an order should not be disturbed in the absence of a showing of an abuse of discretion and such has not been shown here.

It may be conceded that, as a general rule, future earnings of the judgment debtor do not ordinarily vest in the receiver. But no authorities have been cited holding that, in the absence of a statute to the contrary, a court of equity *may not direct* the receiver to collect such earnings if the facts warrant it. The appellant relies on the fact that there are no statutory provisions expressly authorizing such procedure. To my mind the case is controlled by the fact that there is no statute to the contrary and that a court of equity is therefore authorized, under its inherent powers, to take such steps not prohibited by law to make it a court of equity in fact as well as in name.

The main opinion supports a reversal of the order because it sought to impound the "entire" future earnings of the appellant. The argument is that since the order was so drastic the court was without power to impound *any* of the future earnings. This feature was, at the most, an abuse of discretion, but power and jurisdiction cannot be determined by a single act which is an abuse of discretion. If the appellant had come into the court with clean hands, it is fair to assume that his claims of exemptions would have been given full consideration and there seems to be no reason why that cannot now be done under the order as it reads. But if there be any doubt on this score, a modification of the order expressly reserving in the trial court the power to hear such claims and to release a portion of these earnings would be the proper

result of this appeal rather than the elimination from the order of all matters relating to future earnings.



10 Cal.App.2d 426

In re KRUCE'S ESTATE.

CLIPPINGER et al. v. TITLE INS. &
TRUST CO. et al.

Civ. 10654.

District Court of Appeal, Second District,
Division 1, California.

Dec. 2, 1935.

Hearing Denied by Supreme Court
Jan. 30, 1936.

1. Wills ⚡450

A will should be interpreted so as to give effect to every expression therein, unless to do so would interfere with obvious wishes of testator.

2. Wills ⚡858(5)

Under will leaving portion of estate in trust for testator's daughter which provided that if daughter should die before age of 41, leaving no issue, and should predecease testator's wife, income from trust estate should be paid wife, and upon her death trust corpus should be paid to wife's heirs at law, where wife predeceased daughter, trust corpus held to vest in wife's executor under residuary provision of testator's will.

3. Wills ⚡687(1)

Where will created trust for testator's daughter providing that, if daughter died before reaching age of 41 and predeceased testator's wife, wife should have income from testator's estate and upon her death corpus should be paid to wife's heirs at law, there was no implied gift of trust corpus to wife's heirs at law where wife predeceased daughter.

4. Wills ⚡441, 470

In ascertaining intention of testator, court must consider will and its entire scheme, property disposed of, persons named as devisees and legatees, and words and context should be considered together and construed according to their surroundings.

5. Wills ⚡858(5)

Residuary provision of will is controlling in absence of a contrary specific disposition of corpus of trust estate after termination of trust created in will.

6. Wills ⚡684(5)

In absence of contrary testamentary direction, ordinary and current expenses of a trust, including trustees' compensation, should be paid out of income and extraordinary and unusual charges should be paid from corpus of estate.

7. Trusts ⚡274(3)

Allowance for services consisting of closing of trust and distributing property remaining after death of life tenant were properly charged against trust corpus and not against balance of income payable to estate of life tenant, since services performed were necessarily for benefit of remaindermen and unrelated to management of trust for benefit of life estate.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Proceeding by the Title Insurance & Trust Company and W. R. Hervey, executor of the will of Lydia C. Kruce, for settlement of trustee's final account and for distribution of the estate of Edwin J. Kruce, opposed by Harvey J. Clippinger and others. From a decree, Harvey J. Clippinger and others appeal.

Affirmed.

A. J. Getz, of Los Angeles, for appellants Violet Miller Dixon, M. K. Miller, Ralph Miller and Norton J. Miller.

Glen H. Munkelt, of San Diego, for appellants Harvey J. and Charles Clippinger.

Hervey & Hervey, of Los Angeles, for respondent executor.

SHINN, Justice pro tem.

This is an appeal from a decree settling a trustee's final account and for distribution.

The testator, Edwin J. Kruce, by his will, left a portion of his estate in trust for the immediate benefit of his daughter, Edwina Janet Kruce; the residue of his estate he left to his wife, Lydia C. Kruce. The terms of the trust which we are called upon to interpret read as follows: "(d) If my said daughter, Edwina Janet Kruce, shall die before she attains the age of 41 years, leaving no issue her surviving, and my said wife, Lydia C. Kruce, is then still living, the income from said trust estate, created primarily for the benefit of my said daughter, shall be paid to my said wife, for and during the term of her nat-

ural life, and thereupon the moneys, property and securities then in said trust shall be transferred and paid to her heirs at law, then living, in accordance with the laws of the State of Michigan, then in force, governing the descent and distribution of property of persons dying intestate."

Lydia C. Kruce predeceased her daughter Janet, and the latter died at the age of 28 years without issue. The trial court so construed the quoted provision of the trust as to exclude appellants, heirs at law of Lydia C. Kruce, from any share in the principal of the trust estate and distributed the same to respondent, executor of the will of Lydia C. Kruce. The theory adopted by the trial court was that the will failed to make specific distribution of the corpus of the trust estate, and that the same therefore went to the estate of Lydia C. Kruce, under the residuary provision of the will. This ruling presents the first question for our consideration.

[1-3] The bequest of the corpus of the trust estate to appellants was conditioned upon the death of Janet before attaining the age of 41 years, and without issue, and also upon the death of Lydia C. Kruce. Under a literal reading of the will the bequest of the remainder was also contingent upon Lydia's surviving Janet. The word "thereupon" relates to and designates the events in which the remainder was to go to the heirs of Lydia, one of the stated events being that the wife should be living upon termination of the daughter's estate. Appellants ask us to disregard the words "and my said wife Lydia C. Kruce is then still living" as surplusage, because without them the will would sufficiently provide for the payment of income to the wife during her lifetime. We would not be justified in doing this. A will should be interpreted so as to give effect to every expression therein unless to do so would interfere with or prevent the obvious wishes of the testator. It clearly appears that the will gave the principal of the trust estate to the heirs of Lydia C. Kruce in the event of her surviving her daughter, and it is equally clear that the testator did not specifically provide for the contingency that she might predecease her daughter, as she in fact did. Appellants, while maintaining that the will should be interpreted as expressly bequeathing the remainder of the trust estate to them, further contend that there was an implied gift of such remainder to them, in the contingency that actually happened, namely Lydia's prede-

ceasing Janet. In order to sustain such an interpretation the court must be able to read in the entire will a desire of the testator that the principal of the trust should go to appellants in either event. This intention must be so clearly apparent as to convince the court that the testator had no other intention, or that a contrary intent cannot reasonably be supposed. In re Estate of Blake, 157 Cal. 448, 108 P. 287; In re Estate of Franck, 190 Cal. 28, 210 P. 417; Symonds v. Sherman, 219 Cal. 249, 26 P.(2d) 293; Denise's Ex'rs v. Denise, 37 N.J.Eq. 163; Bishop v. McClelland's Ex'rs, 44 N.J.Eq. 450, 16 A. 1, 1 L.R.A. 551; Coale v. Smith, 4 Pa. 376.

[4, 5] In ascertaining the intentions of the testator, the court must consider the will and its entire scheme, the property disposed of, the persons named as devisees and legatees, the words and context should be considered together, and words used in the will should be construed according to their surroundings. In re Estate of Franck, supra. When this is done and the wording of the will has been given a liberal interpretation with a view to carrying out the intentions of the testator, we are unable to read into it any expression, or attempt at expression, of a desire that the principal of the trust estate should go to appellants in the event that the daughter's estate should be terminated after the death of the wife. We are not asked to construe an imperfect or incomplete disposition, but to supply one which is not expressed at all, and which, we think, is not necessarily implied. If the testator omitted, as we are satisfied he did, to make a specific disposition of the remainder of the trust estate in the event that has occurred, that omission may not be supplied by the court. This is true whether the omission be the result of design or oversight. Since the will is silent as to any specific disposition of the remainder under the facts presented, we cannot say that it was any more the intention of the testator to leave the property in question to appellants, under the proven circumstances, than it was to have it go to the estate of the deceased wife, as a part of the residue bequeathed to her. The residuary provision is controlling in the absence of a contrary specific disposition.

We conclude, therefore, that inasmuch as Lydia C. Kruce was not living at the time of the termination of the daughter's interest in the trust estate, the principal of that estate has not been bequeathed to

appellants, and that the trial court therefore properly distributed the same to respondent, as executor of the estate of the wife.

[6,7] Appellants advance the further claim that the court erred in charging the trustees' compensation of \$750 and attorneys' fees of \$100, for services rendered in closing the trust, to the corpus of the trust, rather than to the income payable to the estate of the daughter, Janet Kruce Langford. The will provided for the payment of the net income to the daughter after deducting all necessary taxes, costs, and expenses, including the compensation of said trustees, the same to be paid in monthly installments. It is appellants' contention that under this provision of the will the court was bound to charge the expenses in question to income. We do not agree that the will should be given this construction. It is not questioned that in the absence of contrary testamentary directions the ordinary and current expenses of a trust, including the trustees' compensation, should be paid out of income and that extraordinary and unusual charges should be paid from the corpus of the estate. In *re Woods*, 6 Coff.Prob.Dec. 451; In *re Estate of Dare*, 196 Cal. 29, 42, 235 P. 725; In *re Estate of Gartenlaub*, 185 Cal. 648, 655, 198 P. 209, 16 A.L.R. 520. We do not think the provisions of the will depart from this rule. The direction of the will would seem to apply to the current compensation and expenses of the trustees and not to anything of an extraordinary nature. The services for which the allowances were made consisted of closing the trust and distributing the property remaining therein after the death of the life tenant. They were performed necessarily for the benefit of the remaindermen and were unrelated to the management of the trust for the benefit of the life estate. They were not such ordinary and current expenses as would have to be deducted from the income periodically in order that the net income might be computed and paid to the life tenant each month as directed by the will. The accumulated income payable to the estate of the daughter amounted to the sum of about \$1,800; the remainder of the estate distributed to respondent carried a value of \$151,000. The matter in dispute was in issue at the trial. The court charged the expenses to the estate capital after taking evidence as to the nature and extent of the services. This evidence was

such as to justify the court's order that the expenses in question were not properly chargeable against the balance of income payable to the estate of Janet Kruce Langford.

The decree settling the final account of the trustee and distributing the estate is affirmed.

We concur: HOUSER, P. J.; YORK, J.



10 Cal.App.2d 202

HENSLEE v. FOX et al.

Civ. 9843.

District Court of Appeal, First District,
Division 2, California.

Nov. 15, 1935.

Rehearing Denied Dec. 14, 1935.

Hearing Denied by Supreme Court
Jan. 13, 1936.

1. Automobiles ⇨213

Motorcyclist who struck right front fender of truck which was backing into boxcar held contributorily negligent whether street whereon accident happened was public thoroughfare or not, where motorcyclist was traveling on left-hand side of middle of driveway for 125 feet prior to accident, and there was as much clear space to his right as to his left (Gen.Laws 1931, Act 5123).

2. Negligence ⇨83

Doctrine of last clear chance rests on what defendant actually knew.

3. Automobiles ⇨242(8)

In action on theory of last clear chance for injuries sustained by motorcyclist who struck right front fender of truck which was backing into boxcar, motorcyclist had burden to show that truck driver had either space or time within which to back truck out of motorcyclist's path.

4. Automobiles ⇨244(59)

Last clear chance doctrine held inapplicable under evidence, in action for injuries sustained by motorcyclist who struck right front fender of truck which was backing into boxcar.

Evidence disclosed that truck driver observed motorcyclist 200 feet away who was then driving forward while looking up at the top of the terminal building, that after he had driven truck alongside boxcar, driver looked back from time to

time and saw motorcyclist at least 12 times, and at all times motorcyclist was looking up toward the top of the building, that the truck driver started and stopped several times, that reaching conclusion that there might be a collision the truck driver stopped truck and was standing still when the motorcyclist collided with the right front fender of the truck, and that there was no proof to show that truck had space or time within which to back his truck in time to avoid collision.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by James Henslee against John Fox and others. From a judgment for plaintiff, defendants appeal.

Reversed.

Cooley, Crowley & Supple, of San Francisco, for appellants.

Ingemar E. Hoberg and Arthur Klang, both of San Francisco, for respondent.

STURTEVANT, Justice.

This is an appeal by the defendants from a judgment based on the verdict of a jury which awarded the plaintiff damages for injuries suffered in an automobile collision.

The accident occurred in Berry street between Third and Fourth streets in San Francisco. That portion of Berry street is private property owned by the Southern Pacific Company and maintained by it to facilitate the loading and unloading of freight at Grocers Terminal Building. Whether Berry street is a public thoroughfare was, on the trial, treated as a question of fact. Evidence pro and con was introduced by the parties, and the issue was submitted under appropriate instructions for determination by the jury.

The street runs east and west. It is 57 feet wide from curb to curb. The diagram used in the trial shows 457 feet of the street leading from Third street west. The Grocers Terminal Building extends along the entire southern line of such portion, and a railroad track extends along the entire northern line. No sidewalks are shown on either the north or the south line. On the day of the accident Carl Forrest, a truck driver, had driven a truck up to a boxcar on the north side of Berry street at a point in about the middle of the block. The plaintiff, driving a motorcycle with a sidecar attached, entered Berry

street from Third street, drove past the truck so parked by Forrest to the premises occupied by Sussman & Wormser in the western end of the Grocers Terminal Building, made a delivery, and then the plaintiff turned his motorcycle around and started to go back into Third street. At about that same time Forrest commenced to "straighten" up his truck; that is, he commenced to so place it that the rear end would be abutting the door of the boxcar. As to the movements of each party the evidence is conflicting. There were only two eyewitnesses, the plaintiff and Forrest. The plaintiff testified that when he started to return to Third street a truck was parked on the south line of the street and standing almost at right angles thereto. As we scale the diagram contained in defendants' brief, said truck stood on the opposite side of the street from the truck parked by Forrest and about 75 feet west. The southerly truck the witness estimated to be about 8 feet wide, 25 feet long, and to be standing 10 or 12 feet from the curb. Continuing, he testified that he proceeded to drive around the north or front end of the southerly truck, turning slightly to his right. When at a point about 40 or 50 feet to the west he saw Forrest's truck. It was standing still. At that time it stood at an angle to the boxcar. He showed the jury by placing a card on the diagram, but the record does not show the illustration to us. When plaintiff was 3 or 4 feet from Forrest's truck he saw it start forward and turn toward plaintiff. Before starting up he did not observe Forrest give any signal. The truck moved forward 3 or 4 feet, and the impact occurred. He claimed the bumper of the truck ran over and bent down the foot pedal on his car. The witness testified that another truck was parked with its end gate abutting the Grocers Terminal Building opposite Forrest's truck and slightly to the east. He also testified that other trucks varying in size were in Berry street, but he did not specially locate them. The witness testified that the impact occurred at a point which he marked on the diagram as being slightly north of the middle line of Berry street, or, in other words, slightly on his left-hand side of Berry street. On the fender of the right front wheel of Forrest's truck the photograph thereof shows an indentation and enamel broken on the outer edge, near the top and about two feet from the extreme front end of the truck. The defendants claim that the

mark was made by the handle bar of plaintiff's motorcycle. It may have been. There is no direct evidence on the point.

[1] The pleadings presented the issues of both negligence and contributory negligence. Both issues were fully tried and submitted under appropriate instructions. But the defendants claim that the plaintiff was guilty of contributory negligence as a matter of law. They cite and rely on the cases which involved accidents which occurred on the public highway and which were ruled by the provisions of the California Vehicle Act (2 Deering's Gen.Laws 1931, p. 2453, Act 5128. If we assume that the statute mentioned rules the instant case, under uncontroverted evidence the plaintiff was guilty of contributory negligence which was the proximate cause of his injury. As shown by the record, the plaintiff was on his left-hand side of the middle of the driveway at the time of the accident and had been so traveling for approximately 125 feet as he came toward Third street. True, there were other vehicles on his right-hand side, but there were other vehicles on his left-hand side; the territory was a busy place. But the record shows that the street was no more occupied by vehicles on the plaintiff's right than it was by those on his left, and that there was as much clear space between the middle line of the street and the vehicles on his right as between that line and the vehicles on his left. If he had been on the right-hand side of the middle line the accident never would have happened. If we assume the driveway in which the accident occurred was not a public highway, that fact does not place the plaintiff in a more advantageous position. After the plaintiff had made his delivery, turned, and drove directly toward Third street, if Forrest started to move forward their lines of travel must necessarily intersect in a very few feet. In *Campbell v. Chicago City Ry. Co.*, 212 Ill.App. 344, at page 351, the court said: "When two men are driving on lines that visibly intersect, the general obligation of ordinary care becomes for each a definite duty, and if, as they approach, their contiguity and mutual movements suggest a probable or even a possible collision, neither is entitled to act on the assumption that the other will give way." Under the undisputed facts the plaintiff drove east toward Third street immediately prior to the accident traveling at 10 to 12 miles an hour. He did not

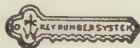
pause nor attempt to inform himself whether Forrest's truck was about to move forward. It was his duty to have done so.

[2-4] The defendants complain because the court instructed the jury on the doctrine of the last clear chance. The plaintiff replies by quoting evidence in addition to what has been set forth above. Carl Forrest testified that he saw the plaintiff when he was 200 feet west of the point of the collision. He testified that the plaintiff was driving forward while looking up at the top of Grocers Terminal Building. Claiming such evidence shows that he was "totally unaware" of his danger, the plaintiff then argues he was entitled to have the doctrine of the last clear chance stated to the jury. *Girdner v. Union Oil Co.*, 216 Cal. 197, 202, 13 P.(2d) 915. That argument does not carry the plaintiff far enough. The doctrine rests on what the defendant actually knew. *Herbert v. Southern Pacific Co.*, 121 Cal. 227, 232, 53 P. 651; *Collins v. Marsh*, 176 Cal. 639, 643, 169 P. 389. Turning to what Forrest actually knew, the record is quite full and complete. He testified that after he had driven his truck alongside of the boxcar, from time to time he looked back toward Third street. He saw the plaintiff when the latter was 200 feet west of him. He saw him at least twelve times. At all times the plaintiff was looking up toward the top of the Grocers Terminal Building. For that reason Forrest started and stopped several different times thinking the plaintiff would "wake up." Finally, reaching the conclusion there might be a collision, Forrest stopped his truck and it was standing still when the plaintiff came up and ran into the right front fender. The plaintiff did not pursue the subject and show by any evidence that when Forrest realized a collision was possible and stopped his truck he then had either space or time within which to back his truck out of the path the plaintiff was traveling. The burden was on the plaintiff to do so. *Young v. Southern Pacific Co.*, 189 Cal. 746, 758, 210 P. 259. But we are not holding that, under the facts of this case, in the exercise of ordinary care Forrest was called upon to back up. *Campbell v. Chicago City Ry. Co.*, supra. Under these circumstances we think it is perfectly clear it may not be said after Forrest realized plaintiff's inability to escape danger Forrest had the last clear chance to avoid injuring the plaintiff by the exer-

cise of ordinary care and failed to do so. Therefore, it was reversible error to instruct the jury with respect to the doctrine of the last clear chance. *Poncino v. Reid-Murdock & Co.*, 136 Cal. App. 223, 228, 28 P.(2d) 932.

The judgment appealed from is reversed.

We concur: NOURSE, P. J.;
SPENCE, J.



10 Cal.App.2d Supp. 763

PEOPLE v. STEVENS.

Cr. A. 1250.

Appellate Department, Superior Court, Los
Angeles County, California.

Nov. 27, 1935.

Licenses 16(2)

Party engaged in purchasing walnuts, cracking them, extracting the kernels, and offering kernels for sale after they had been cleaned and graded, *held* not a "dealer" within statute defining "dealer" and requiring such dealer to obtain a license, notwithstanding party had bought some walnuts without paying full cash price therefor (St. 1933, p. 274, § 1261).

Word "dealer" is defined as a person who makes a business of buying and selling goods, as distinguished from a manufacturer, without altering their condition.

[Ed. Note.—For other definitions of "Dealer," see Words & Phrases.]

Appeal from Municipal Court of Los Angeles; Leo Aggeler, Judge.

C. P. Stevens was convicted of acting as a dealer without a license in violation of section 1261, Agricultural Code, as amended by St. 1933, c. 25, p. 274, and he appeals.

Reversed and remanded for a new trial.

Clifford W. Twombly, of Arcadia, for appellant.

Buron Fitts, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for the People.

SCHAUER, Judge pro tem.

Defendant was engaged in the business of purchasing walnuts, cracking them, extracting the meats, discarding the shells, cleaning, air-blowing, brushing, sorting, and grading such meats, in certain grades washing and drying them, and then offering for sale the product so produced. It required about a day and a half of labor for one man to produce 25 to 30 pounds of meats ready for sale, and the cost of the processing was from 7 cents to 10 cents on each pound. The defendant admittedly bought some walnuts for which he did not pay the full price cash on delivery. The case was submitted upon stipulated facts and uncontradicted testimony of the defendant who was found guilty of acting as a "dealer" without a license in violation of section 1261, Agricultural Code, as amended in 1933, Statutes of 1933, c. 25, p. 274.

Such section defines the term "dealer" as meaning "any person other than a commission merchant who for the purpose of resale at wholesale obtains from the producer thereof possession or control of any farm product except by payment to the producer, at the time of obtaining such possession or control, of the full agreed price of such commodity in lawful money of the United States."

We think that the evidence, hereinabove epitomized, fails to establish that defendant acted as a "dealer" within the definition above quoted. The defendant bought walnuts, not to resell as such upon a turn in the market, but to provide himself with material which he himself used in carrying on a business which, by virtue of separating the material bought, discarding a portion of it (the shells) and applying skilled labor and certain natural elements (air and water) to the remaining portion (the meats), enabled him to offer for original sale—not resale—a product as different upon principle from that which he had purchased as would be the cabinet produced by a skilled artisan from lumber acquired in the rough. A cabinet maker would hardly be called a lumber dealer.

In *Chattanooga Plow Co. v. Hays*, 125 Tenn. 148, 140 S.W. 1068, quoted in *Phillips v. Byers*, 189 Cal. 665, 670, 209 P. 557, 559, it is said: "The marked distinction between a manufacturer and a merchant is that the merchant, or dealer, sells to earn a profit, and the manufacturer sells

to take profit already earned. He must buy the materials out of which to make his finished product, and he must sell the product of his factory after it is finished. But such dealings are not his occupation. The one supplies him with materials with which to pursue it, while the other merely enables him to take the profit earned.'"

In the case of *Phillips v. Byers*, *supra*, a corporation which purchased raw fruits and vegetables, canned, and then sold them to wholesalers, was held to be a manufacturer, not a merchant or dealer. In *Norris Brothers v. Commonwealth*, 27 Pa. (3 Casey) 494, 495, we find this statement: "A dealer * * * is not one who buys to keep, or makes to sell, but one who buys to sell again. He * * * depends for his profit, not upon the labour he bestows on his commodities, but upon the skill and foresight with which he watches the markets." The case of *State v. Chickasaw Wood Products Co.*, 169 La. 1179, 126 So. 914, 916, quotes from Webster's New International Dictionary defining the word "dealer" in part as "a person who makes a business of buying and selling goods, as distinguished from a manufacturer, without altering their condition."

In *State v. Chadbourn*, 80 N.C. (Kenan) 479, 30 Am.Rep. 94, in holding that one who bought timber and converted it into lumber for sale was a manufacturer rath-

er than a "merchant" or "trader," the Supreme Court of North Carolina said, respecting the business of a "trader": "The goods are sold substantially in the form in which they are bought, and the difference between the sums paid and received constitutes the profit of the business. The defendants' occupation does not answer this definition. They are rather manufacturers who by skill and labor convert what they get into another and more valuable form of property. The manufacturer of shoes purchases the leather and other materials from which they are made, and then sells them at a large advance. He both buys and sells, but he is not a trader. So with the defendants who purchase the tree or log and dispose of the lumber and boards which are made from it. They do not buy and sell the same article in an unchanged condition. The manufacturing process intervenes, and this gives name and character to their pursuit." To the same effect is the decision in *State v. Yearby*, 82 N.C. (Kenan) 561, 33 Am.Rep. 694, regarding the business of a butcher.

The judgment and the order denying motion for a new trial are reversed, and the cause is remanded to the municipal court for a new trial.

We concur: SHAW, P. J.; FOX, J.

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4 Cal.2d 686

CALDWELL v. TAYLOR et al.
L. A. 14898.

Supreme Court of California.
Dec. 6, 1935.

Rehearing Denied Jan. 2, 1936.

1. Wills ⚡55(5), 166(8)

Evidence of alleged fraud and undue influence by beneficiary in procuring execution of will while deceased was in weakened condition from cancer and constant administration of drugs held to support judgment for defendants.

2. Appeal and error ⚡994(3), 1012(1)

Credibility of witnesses and weight to be accorded to their testimony is for trial court, which cannot be reviewed on appeal.

In Bank.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Suit by Oscar P. Caldwell against Leonore Taylor, sometimes known as Leonore Fisher Caldwell, and the Bank of America Trust & Savings Association. Judgment for defendants, and plaintiff appeals.

Affirmed.

Daniel A. Knapp and George R. Maury, both of Los Angeles, for appellant.

Richard A. Dunnigan and Harold E. Thomas, both of Los Angeles, for respondents.

PER CURIAM.

This is a suit in equity by Oscar P. Caldwell, only son of the deceased, Perry Moore Caldwell, seeking to have the defendant, a beneficiary named in the will as Leonore Fisher Caldwell, declared an involuntary trustee of the property devised to her upon the ground that the will was procured by her fraud and undue influence. The Bank of America Trust & Savings Association (successor in interest to the Bank of Italy National Trust & Savings Association) is likewise sought to be charged as constructive trustee in its capacity as executor under the will of Perry Moore Caldwell.

[1,2] The plaintiff seeks the aid of equity in this independent suit upon the

ground that the probate of the will was procured by the fraud of the defendant Taylor in that, by concealment of the facts, she prevented the plaintiff from making a timely contest of the will. The legal questions relevant to the claim of fraud which prevented the contest of the will were passed upon by this court upon appeal from an order sustaining demurrers to the complaint, and it was held that a case had been alleged sufficient for the interposition of equity. *Caldwell v. Taylor*, 218 Cal. 471, 23 P.(2d) 758, 88 A.L.R. 1194. Upon the trial of the case the court found for the plaintiff upon the issue of fraud which prevented him from seeking a timely remedy in the probate court, but also found that the will was not procured by the fraud or undue influence of Leonore Taylor. A reversal of the judgment for the defendant is sought upon the ground that the findings against undue influence and fraud in the procurement of the will are unsupported by the evidence.

The probated will bears the date July 9, 1929. By it Perry Moore Caldwell left to his "wife", Leonore Fisher Caldwell, \$4,500 in cash and one-half the income of a \$25,000 trust fund for life, which upon her death was to be paid to the plaintiff quarterly until he reached the age of 45, also upon her death the trust as to one-half of the trust fund was to cease and half the principal to be paid to the plaintiff. Upon plaintiff's reaching the age of 45 the entire trust was to terminate and the entire principal was to go to him. One-half the residue was devised to the plaintiff absolutely and the remaining half of the residue was left in trust for him until he reached the age of 45. The estate was valued at \$60,000 at the time of death, but the court found that its present value, or value at the time of trial, had diminished to \$29,500; the practical effect being to leave plaintiff nothing but the expectancy upon the death of the defendant, whose life expectancy was about the same as his own.

Perry Moore Caldwell died in a hospital of exhaustion caused by a cancer on August 3, 1929. On May 29, 1929, he married the plaintiff in Tia Juana, Mexico. Defendant was admittedly the

wife of one Carl L. Taylor, from whom she had an interlocutory decree of divorce at the time of her purported marriage to Caldwell. Defendant also admits to a long police record of convictions for lewdness, vagrancy, prostitution, and similar offenses. Her contention is, however, that Caldwell knew all these matters and was determined to marry her in spite of her past history and existing marriage to Taylor. At that time Caldwell was suffering from a cancer of the larynx, for which he had already undergone an operation in February, 1929, and could not speak above a whisper. After the marriage defendant took decedent to an apartment in Los Angeles, from which he was taken to a hospital, following a hemorrhage, on June 9, 1929. Caldwell had three additional operations and repeated hemorrhages and, from the time he was taken to the hospital, was regularly given opiates. He could communicate only by signs and by writing notes and was extremely weak. Defendant was in constant attendance upon him. She wrote plaintiff in Portland about June 16, telling him of his father's condition. The plaintiff arrived in Los Angeles about June 20. He says that it was next to impossible to see his father without the defendant being present and that, on being warned by the doctor, he attempted to investigate her but was unsuccessful. On June 10, Harold E. Thomas, an attorney employed by the Bank of Italy was notified by telephone by the bank to go to the hospital to draw a will for Caldwell. On June 11 Thomas had a conversation with decedent, who made his wishes known by means of notes and by nodding or shaking his head in response to questions put by Thomas, whereupon, at the bedside of decedent, in the absence of defendant, Thomas wrote out a will in long hand and it was executed by the decedent (by placing his signature on each of the three pages) and witnessed by Thomas and a nurse. This will was identical with the typewritten will of July 9, 1929, which was probated. Thomas' story is that, some time between June 27 and July 9, the defendant came to his office declaring that the plaintiff had arrived and was determined to contest the will; that she also told Thomas that Caldwell knew the facts of her past history. Thomas then

prepared a statement to this effect for decedent to sign; decedent read it and signed it and returned it to him. The later execution of the probate will was Thomas' own idea, he and his wife signing as witnesses after he had first read the will to the decedent and questioned him as to his continuing desire to dispose of his property in that way. Defendant was not present at its execution.

Damon, attorney for defendant over a period of years, testified that Caldwell came with the defendant to his office to arrange for procuring her divorce from Taylor; that he (Damon) warned him that he could not marry her while she had only an interlocutory decree, but that Caldwell refused to listen to him; and that Caldwell at this time further said he was aware of her police record.

The appellant relies upon the inference to be drawn from the circumstances, the previously expressed intention of decedent to leave the entire estate to plaintiff, his weak and enfeebled condition, the clouded condition of his mind due to the continual administration of drugs, the character record, opportunity to and obvious interest of defendant in procuring such a will, and the improbability that a man of the age, character, intelligence, and education of the decedent would enter a bigamous marriage with the defendant had he had full knowledge of her history and existing marriage. Opposed to this is the positive testimony of Damon and Thomas of decedent's knowledge of defendant's character and married status and that both the marriage and the making of the will were voluntary and deliberate acts of the decedent.

There are also in evidence several disconnected writings of the decedent, said to have been made by him in response to questions and statements made to him by Thomas or his son, and samples of his handwriting and signatures which would indicate, at the least, that he was not always able to write without assistance. These writings can be construed as supporting the plaintiff's hypothesis but do not preclude all possibility of the truth of defendant's story, while some of them even lend it support. The evidence is extremely conflicting, and a reading of the record dis-

closes that contrary findings would probably be held to be supported. In this state of the record the issue turns almost entirely upon the credence given the testimony of Damon and Thomas. Not only is it clear from the findings that they were believed, but the trial court so states in the memorandum for decision which is contained in the record brought up. The credibility of witnesses and the weight to be accorded their testimony is a matter for the trial court and cannot be gone into on appeal.

The judgment is affirmed.



4 Cal.2d 615

TANENBAUM v. INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 15497.

Supreme Court of California.

Nov. 22, 1935.

1. Master and servant ☞376(2)

Acceleration, aggravation, or lighting up of pre-existing disease as result of employment is "injury" for which full compensation is recoverable for entire disability suffered.

[Ed. Note.—For other definitions of "Injury," see Words & Phrases.]

2. Master and servant ☞405(4)

Award limiting compensation for disability resulting from accident which aggravated employee's pre-existing arthritis, to proportion of disability due to aggravation, held justified under evidence that part of disability was due to natural progress of the disease (St. 1919, p. 911, § 3 (4)).

3. Master and servant ☞414

Determination of percentage of employee's disability, resulting from aggravation of pre-existing disease, which may be attributed to injury is within commissioner's discretion (St. 1919, p. 911, § 3 (4)).

In Bank.

Original proceeding by Lena Tanenbaum for writ of review to annul an award of the Industrial Accident Commission, opposed by the Commission and others.

Award affirmed.

George C. Faulkner, William T. Doyle, Henry G. Sanford, Sidney Rhein, and Faulkner, Doyle & Sanford, all of San Francisco, for petitioner.

Everett A. Corten and Emmet J. Seawell, both of San Francisco, for respondents.

WASTE, Chief Justice.

Review to annul an award of the Industrial Accident Commission.

The petitioning employee, a woman fifty-four years of age, was injured in the course and scope of her employment as a grocery clerk when, upon being accidentally run against by another employee, she was precipitated backward, striking the tip of her right shoulder against the corner of a fruitstand. That the injury arose out of the employment is not questioned. Following hearings upon the application for adjustment of claim, the commission determined that petitioner was entitled to a permanent disability rating of 32¾ per cent. Subsequently, and upon petition of the employer's insurance carrier, the commission found that "said permanent disability was partly caused by pre-existing dormant disease and partly by said injury" and apportioned the same on the basis of 33¾ per cent. to pre-existing disease (arthritis) and 66¾ per cent. to the industrial injury. Section 3(4) of the Workmen's Compensation Act (St. 1917, p. 833, as amended by St. 1919, p. 911) authorizes such apportionment. It provides that "the term 'injury,' as used in this act, shall include any injury or disease arising out of the employment including injuries to artificial members. In case of aggravation of any disease existing prior to such injury, compensation shall be allowed only for such proportion of the disability due to the aggravation of such prior disease as may reasonably be attributed to the injury."

We shall not attempt to detail the contents of the several medical reports filed with the commission. Substantially all of them recognize the presence of a pre-existing, though latent, arthritic tendency in petitioner's system. Petitioner testified that prior to the injury she had never suffered from arthritis, rheumatism, or other joint or muscular ailments.

It is the petitioner's contention that the amended findings and award are with-

out justification or support and that the entire disability, as originally determined, should be charged to the injury. In short, it is urged that there can be no apportionment of liability except where the pre-existing disease is both active and disabling.

In support of her theory that there can be no apportionment of disability in the present case because of the dormant character of the pre-existing disease, the petitioner refers us to such cases as *Thorreau v. I. A. C.*, 120 Cal.App. 67, 70, 7 P. (2d) 767, and *State Comp. Ins. Fund v. Smith*, 9 I.A.C.Rep. 206, 207, wherein apportionment is held to be proper when there has been an aggravation or acclamation of an active and progressive pre-existing disease.

[1] It is now definitely settled that the acceleration, aggravation, or "lighting up" of a pre-existing disease is an injury in the occupation causing the same. *Eastman Co. v. I. A. C.*, 186 Cal. 587, 594, 200 P. 17; *Mullane v. I. A. C.*, 118 Cal.App. 283, 287, 5 P.(2d) 483; *Georgia Cas. Co. v. I. A. C.*, 87 Cal.App. 333, 262 P. 394; 17 I.A.C.Rep. 139. The underlying theory is that the employer takes the employee subject to his condition when he enters the employment, and that therefore compensation is not to be denied merely because the workman's physical condition was such as to cause him to suffer a disability from an injury which ordinarily, given a stronger and healthier constitution, would have caused little or no inconvenience. In such cases full compensation for the entire disability suffered is recoverable although the physical condition of the employee contributed to and increased the disability caused by the injury or prolonged and interfered with healing and recovery. In other words, there is no authority for prorating the extent of the disability due to the accident itself on the one hand and that due to the aggravation caused by the employee's physical condition on the other. *Hendrickson v. I. A. C.*, 215 Cal. 82, 86, 8 P.(2d) 833.

[2,3] We find nothing in the above authorities, or in others that have come to our attention, that in any way militates against the apportionment made in the present case. As we read the record in this proceeding, the petitioner is now suf-

fering from a disability made up in part of an industrial disability growing out of the injury, including the aggravation or "lighting up" of the pre-existing dormant arthritic condition, and, in part, though in a lesser degree, of what may be termed a nonindustrial disability resulting from the normal progress of the pre-existing arthritis. Obviously, the latter disability is not attributable to industry and should not be saddled thereon. It is this latter or nonindustrial disability, resulting from the natural and normal progress of the pre-existing condition, that underlies the finding that petitioner's permanent disability is "partly caused by pre-existing dormant disease and partly by said injury" and requires the apportionment here made. Such apportionment finds ample support in at least one of the medical reports filed with the commission wherein it is declared, in part, that "all direct effects of the injury should have passed away in a month or two, and if effects of the injury persist after a year and a half, it could partly be from an acceleration of her pre-existing disease caused by the injury. I would feel that it would be fair to consider that half of her disability at the present time is due to the acceleration of her arthritis from the injury and the balance is due to the natural progress of a pre-existing arthritis in a person of her age."

A second medical report is to the effect that in a woman of petitioner's age "arthritis is a factor and could be expected to limit her ability to do work involving much lifting above the level of her shoulders, even if she had not sustained an injury."

It is apparent that the apportionment here made is even more favorable to petitioner than is warranted by the medical report first above quoted. However, it is settled that the determination of the percentage of disability is a matter left to the sound discretion of the commission. *Hines v. I. A. C.*, 215 Cal. 177, 188, 8 P.(2d) 1021; *Frankfort Gen. Ins. Co. v. Pillsbury*, 173 Cal. 56, 159 P. 150.

The award is affirmed.

We concur: CURTIS, J.; CONREY, J.; LANGDON, J.; SHENK, J.; THOMPSON, J.

4 Cal.2d 622

PEOPLE v. BRITTON et al.
Cr. 3904.

Supreme Court of California.
Nov. 26, 1935.

I. Criminal law ⚖857(1)

Presence of alternate juror in jury room while jury was deliberating upon verdict held reversible error, notwithstanding instruction that, while alternate juror might listen to deliberations, she was not to express any opinion or participate therein.

CURTIS and SEAWELL, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas P. White, Judge.

Floyd C. Britton and others were indicted for an offense, and Linden Parker and Joy Parker were convicted of robbery and kidnapping for the purpose of robbery, and they appeal.

Judgment reversed.

Prior opinion, 45 P.(2d) 368.

K. R. Jensen, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

WASTE, Chief Justice.

Upon due consideration of this cause, after transfer from the District Court of Appeal of the Second Appellate District, Division 2, we are of the view that the decision and judgment of that court correctly disposes of the question involved. As noted in the opinion of Mr. Justice pro tem. Fricke [(Cal. App.) 45 P.(2d) 368], the identical question was decided by the District Court of Appeal of the Second Appellate District, Division 1, a few months ago. We are of the view that that opinion (People v. Bruneman, 4 Cal.App.(2d) 75, 40 P.(2d) 891), written by Mr. Presiding Justice Conrey, now an associate justice of this court, thoroughly presents the situation and determines the question. On the authority of that decision, on which the District Court of Appeal rested the present decision, we believe that further consideration by this court is unnecessary. We therefore adopt the opinion of Mr. Justice Fricke, supra, as follows [(Cal.App.) 45 P.(2d) 368, 369]:

"Appellants were found guilty of robbery, and kidnapping for the purpose of robbery. In view of the necessity of reversing the convictions for the cause hereinafter stated, there is no occasion to decide other points involved, as they present no questions of law which are not well settled. Neither does it appear that these questions will necessarily arise upon a retrial of the cause.

"Appellants claim reversible error, because when the jury retired to deliberate, the court directed that the alternate juror should retire to the jury room with the jury, and that this was error, even though the court instructed such alternate juror that while she might listen to the deliberations of the jury, she should not express any opinion or participate by word or action in those deliberations.

"Subsequent to the appeal herein, this identical question was decided in People v. Bruneman [4 Cal.App.(2d) 75], 40 P.(2d) 891, and we agree with the conclusions therein stated, that the presence of the alternate juror in the jury room while the jury was deliberating upon its verdict was reversible error."

The judgments are reversed.

We concur: SHENK, J.; THOMPSON, J.; LANGDON, J.; CONREY, J.

CURTIS, Justice.

I dissent. No possible injury was sustained by the defendant by reason of the presence in the jury room of the alternate juror during the deliberations of the jury. It is presumed that she obeyed the instructions of the court, and, if so, the verdict was not in any way influenced by her or by her presence in the jury room during the deliberations of the jury. There is no evidence that the alternate juror disobeyed the instructions of the court, but even if she did disobey such instructions and did participate in such deliberations, she did no more than she would have had a perfect legal right to do had one of the regular jurors become unable to act and the alternate juror was ordered to take her place. If her participation in the deliberations of the jury after she became a regular juror would not have been prejudicial to defendant, it is difficult to understand how these very same acts prejudiced the defendant when they were performed by her as an alternate juror. It may have been error to

permit the alternate juror to be present during the deliberations of the jury, but as the defendant sustained no injury thereby, the judgment should not be reversed for such error.

I concur: SEAWELL, J.



4 Cal.2d 693

REID et al. v. MERRILL et al.
L. A. 14669.

Supreme Court of California.
Dec. 17, 1935.

1. Pleading ☞15

Allegations of certain defense *held* part of cross-complaint referring to such allegations by appropriate numbers and purporting by such reference to incorporate allegations in cross-complaint as fully as though paragraphs were set forth therein.

2. Reformation of Instruments ☞37

In foreclosure action, cross-complaint alleging that mortgage note was made for 3 instead of 5 years by mutual mistake, and also with intent by payee to defraud, *held* to state no cause of action against plaintiffs, where persons against whom reformation was sought were not named, and cross-complaint did not allege any relation between payee and plaintiffs, nor what interest plaintiffs had in note.

3. Mortgages ☞481

In foreclosure action, judgment for plaintiffs *held* proper in view of findings that principal was unpaid and that mortgage note was for 3-year term, and that, contrary to defendants' contention, there was no agreement that note should be for 5 years.

4. Judgment ☞161

Since cross-complaint stated no cause of action against plaintiffs, plaintiffs were not called on to plead thereto, and hence, after trial and judgment on merits, court properly granted successful plaintiffs' motion to set aside default previously entered for failure to answer cross-complaint, without requiring that answer or other pleading accompany motion (Code Civ.Proc. § 473, as amended by St. 1933, p. 1851).

5. Mortgages ☞454(1)

In foreclosure action, affirmative defense alleging that payee, with fraudulent intent,

made mortgage note for 3 instead of 5 years, but not alleging any relation between payee and plaintiffs, nor what interest plaintiffs had in note, *held* insufficient, and hence evidence in support of issues sought to be raised was properly excluded.

In Bank.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action by Dorothy J. Reid and others against A. F. Merrill and wife, with a cross-complaint by defendants. From a judgment for plaintiffs, and from an order setting aside a default previously entered against plaintiffs, and also from an order denying a new trial, defendants appeal.

Affirmed.

John L. Mace, of Los Angeles, for appellants.

Meserve, Mumper, Hughes & Robertson, of Los Angeles, for respondents.

WASTE, Chief Justice.

Action to foreclose a mortgage. It was alleged in the complaint that the due date of the note was September 25, 1932. The answer admitted the allegations of the complaint, except that of the due date, and in that behalf alleged "that said promissory note was, and was agreed to be, for a term of five years from September 15, 1929"; in other words, that it fell due two years after the date alleged in the complaint. As a first and affirmative defense, and also by way of a cross-complaint for reformation of the promissory note, the defendants pleaded facts to the effect that defendants and Alice Craig Stone entered into an agreement in writing that the said Alice Craig Stone would loan the defendants the sum of money involved, the amount to be represented by a promissory note of the defendants, secured by a mortgage, with a maturity date of September 15, 1934; that Alice Craig Stone prepared a promissory note and mortgage which were signed and executed by the defendants at the instance and request of Alice Craig Stone, the defendants believing and relying upon the representations made by Alice Craig Stone "that the promissory note and mortgage conformed to the written agreement of the parties relative to the term of the promissory note; that in fact the promissory note so executed by

defendants was made for a term of three years by the said Alice Craig Stone with knowledge of said agreement that the term thereof would be for a period of five years, and with intent to deceive and defraud said defendants."

[1,2] The defendants in their cross-complaint referred by appropriate numbers to the allegations of the first affirmative defense of the answer, "and by [such] reference incorporates and alleges the same [in the cross-complaint] as fully as though said paragraphs were set forth [therein]." It was further alleged in the cross-complaint that "by mutual mistake of the parties" the note was made to mature on September 15, 1932, instead of on September 15, 1934. Without, for the moment, considering the sufficiency of the cross-complaint, we are of the view that the allegations of the first affirmative defense thus referred to and incorporated in the cross-complaint must be considered as part of that pleading. *Green v. Clifford*, 94 Cal. 49, 52, 29 P. 331; *Treweek v. Howard*, 105 Cal. 434, 442, 39 P. 20. Considered, then, as a whole, does the cross-complaint state a cause of action against respondents (plaintiffs)? In answering this question, the fact must be kept in mind that Alice Craig Stone, the payee named in the note, is not named as, and is not made, a party to the action. Our study of the pleadings leads us to the conclusion that it does not. The persons against whom the allegations of the cross-complaint are directed (presumably, of course, the plaintiffs) are not named, either directly or by inference. Who are the present owners of the note and mortgage does not appear. The acts complained of are acts committed by Alice Craig Stone, not a party to the action, who loaned the money and who is alleged to have caused the wrong due date to be inserted in the note "with intent to deceive and defraud" the defendants. No other specifications of fraud are contained in the cross-complaint. It in no way appears against whom the defendants seek reformation of the promissory note. It does not even appear, other than inferentially, that the plaintiffs have any interest in the note, and the extent of their interest, if there is any, does not appear. No connection or relation whatever between Alice Craig Stone and plaintiffs is alleged; nor can it be inferred from what is alleged. From these observations concerning its allegations, it follows that the cross-com-

plaint must fall for the reason that it is not sustainable on its own allegations of fact. *Coulthurst v. Coulthurst*, 58 Cal. 239. It does not contain the requisite facts.

At the instance of the defendants, the default of plaintiffs for failure to answer the cross-complaint was entered. This action was not called to the attention of the court or plaintiffs until after trial was had on the merits, and which resulted in a judgment and decree foreclosing the mortgage. On discovery of the entry of default, the court, on motion of the plaintiffs, set aside the default, and refused to require the plaintiffs to file answer or demurrer thereto. Defendants appeal from the judgment, from the order setting aside the default, and from an order denying a new trial.

[3] There is no merit in any of the appeals. The findings of the trial court show that no interest was paid on the note for one year and a half before the action to foreclose was commenced. No part of the principal was paid, although judgment was not had and entered until after the date of the payment of the note alleged by the defendants. Assuming the defendants had sufficiently pleaded the facts attempted to be set up as a cross-complaint, the trial court held in favor of the plaintiffs, and expressly found that the defendants promised and "agreed in all respects as recited and set forth in said note," and "in particular * * * agreed to pay to Alice Craig Stone, * * * or her order * * * the sum of \$8,500 three years after September 15, 1929," with interest. The court also expressly found there was no agreement or intention that the due date of the note should be other than as pleaded in the complaint. There are, therefore, complete findings in favor of the plaintiffs on all the facts which defendants attempted to allege as affirmative defense and by way of cross-complaint.

[4] The cross-complaint failing to state facts amounting to a cause of action against the plaintiffs, the plaintiffs were not called upon to plead to it. It was therefore not error for the trial court, after the trial and judgment on the merits, to vacate the default entered, without requiring the motion to set aside to be accompanied by an answer or other pleading. *Code Civ.Proc. § 473*, as amended by *St. 1933, p. 1851*.

[5] The matter pleaded by the defendants, identical with the allegations of the

purported cross-complaint, had all the infirmities of that pleading, and did not meet the requirements for an affirmative defense. The trial court, therefore, correctly refused to admit any evidence in support of issues thereby sought to be raised.

The judgment and order appealed from are, and each is, affirmed.

We concur: SEAWELL, J.; THOMPSON, J.; SHENK, J.; CURTIS, J.; LANGDON, J.



4 Cal.2d 659

In re OUNJUIAN'S ESTATE AND GUARDIANSHIP.

HINES, Adm'r of Veterans' Affairs, et al. v. MILLER.
L. A. 14716.

Supreme Court of California.
Nov. 29, 1935.

Rehearing Denied Dec. 26, 1935.

1. Insane persons ⇨45

Agreement of incompetent's guardian with his surety that surety should have joint control with him over estate funds *held* not to have made guardian guarantor of funds and liable for loss occasioned by bank's failure, in view of statute authorizing such an agreement (St. 1915, p. 1438).

2. Insane persons ⇨45

Failure of agreement of incompetent's guardian with surety that surety should have joint control with him over estate funds, to provide that money might be withdrawn by order of court or judge in accordance with statute authorizing such an agreement between fiduciary and surety, *held* not to invalidate agreement, since general law became part of contract and authorized such withdrawal without specific authorization in agreement (St. 1915, p. 1438).

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Final accounting by Theodore Miller, former guardian of the estate of Alea K. Ounjuian, an incompetent person. From an

order settling the account, Frank T. Hines, Administrator of Veterans' Affairs, and United States Veterans' Administration, and Albert P. Keck, guardian of such estate, appeal.

Affirmed.

For prior opinions, see 38 P.(2d) 583; 39 P.(2d) 427.

Veit & Shunk, H. C. Veit, and J. C. Shunk, all of Los Angeles, for contestants appellants.

William H. Hodges and Carlos S. Hardy, both of Los Angeles, for appellant Keck, guardian.

Mills, Hunter & Dunn, C. R. Liljestrom, and Chenoweth & Whitehead, all of Los Angeles, for respondent.

R. P. Wisecarver, Jesse H. Steinhart, John J. Goldberg, Thomas E. Davis, H. W. B. Smith, Hadsell, Sweet, Ingalls & Lamb, and Redman, Alexander & Bacon, all of San Francisco (Hartley F. Peart, of San Francisco, of counsel), amici curiæ.

LANGDON, Justice.

The respondent Miller was on January 15, 1930, appointed guardian of the estate of Alea K. Ounjuian, an incompetent person. In 1930 and 1931 he had in his possession money of the estate in the sum of \$8,000, awaiting investment. This amount he deposited in the Bank of West Hollywood, in his name as guardian. The bank failed in June, 1931. Dividends were paid during liquidation, but on November 3, 1933, when respondent filed his final account, a balance of \$5,227.38 was still owing. Respondent sought to be allowed a credit as to this sum. Objections were filed on behalf of the United States Veterans' Administration. The lower court allowed the credit, and this appeal followed.

[1] There is no claim that the respondent acted illegally, fraudulently, or negligently, and it is clear that the deposit was a temporary one for safekeeping, and not an investment of the funds of the estate. The only ground of appeal which requires consideration arises from the fact that the guardian, upon his appointment, entered into an agreement with the United States Fidelity & Guaranty Company, his surety, giving the latter joint control over the funds in the bank, so that the respondent could not draw any of the money on deposit without the countersignature of a representative of the bonding company. In *Estate of*

Wood, 159 Cal. 466, 114 P. 992, 36 L.R.A. (N.S.) 252, the court held that where a trustee or similar fiduciary enters into an arrangement which limits his control over trust moneys, he becomes a guarantor of the fund, and is responsible for their loss. The theory behind the decision is that any such arrangement hampers the guardian in the performance of his duty to safeguard the funds.

The court in *Estate of Wood*, supra, suggested that only the Legislature might provide a method by which a surety company might have some control over the funds. 159 Cal. 466, 473, 114 P. 992, 36 L.R.A. (N.S.) 252. A few years later, in 1915, a statute was enacted to govern the deposit of money held by bonded fiduciaries. It provides: "It shall be lawful for any party of whom a bond undertaking or other obligation is required to agree with his surety or sureties for the deposit of any or all moneys and assets for which such surety or sureties are or may be held responsible, with a bank, savings bank, safe deposit or trust company, authorized by law to do business as such, or other depository approved by the court, or a judge thereof, if such deposit is otherwise proper, for the safekeeping thereof, and in such manner as to prevent the withdrawal of such money and assets or any part thereof, without the written consent of such surety or sureties, or an order of court, or a judge thereof, made on such notice to such surety or sureties as such court or judge may direct; provided, however, that such agreement shall not in any manner release from or change the liability of the principal or sureties as established by the terms of the said bond." Stats. 1915, p. 1438; 3 Deering's Gen. Laws 1931, Act 8317, p. 4690.

There can be no doubt that the legislative purpose in the enactment of this statute was to overcome the effect of the decision in *Estate of Wood*, supra. By expressly authorizing the fiduciary to enter into agreements of joint control with a surety, the Legislature has indicated that the arrangement is perfectly proper, and that the guardian who makes it is free from fault. Consequently he cannot be held accountable for the loss of estate funds merely by reason of such a lawful agreement, but only upon a showing of some other culpable conduct.

[2] The agreement in the instant case provided for joint control, and removal of funds only upon written consent of the

surety, but did not specifically provide that the money might be withdrawn by order of court or a judge. It is urged that by failure to include this provision the benefits of the statute are lost. We are unable to perceive the force of this argument. There is no rule of law which declares that an agreement made under authority of a statute must follow the express language of the statute. It is elementary that the general law enters into and becomes a part of the contract. Hence, although the agreement herein merely provides for withdrawal of the funds upon written consent of the surety, the guardian may still, under the general law which governs his duties, withdraw funds upon an order of the court or judge. All the protection specified by the statute of 1915 is therefore found in the present arrangement and there is no reason why that statute should not apply.

It should be observed that the question whether estate funds are best protected by unhampered control of a trustee, or by joint control of a trustee and surety is one of policy, and the Legislature has made it clear that there is nothing objectionable in the method employed herein.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; THOMPSON, J.; SEAWELL, J.



4 Cal.2d 690

BRITTON v. HAMMELL.

L. A. 14562.

Supreme Court of California.

Dec. 6, 1935.

Rehearing Denied Jan. 2, 1936.

Husband and wife ☞267(7)

Deeds of gift to community property executed by husband without wife's consent could be set aside as to entire property, not merely as to one-half, in action commenced by wife during husband's lifetime, although husband died before action was determined.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by John H. Britton, as administrator of the estate of Sophie Britton, deceased, against D. C. Hammell. Judgment for plaintiff, and defendant appeals.

Affirmed.

Dana R. Weller and Thomas H. Hearn, both of Los Angeles, for appellant.

Leland J. Allen, of Los Angeles, for respondent.

Everett W. Mattoon, Co. Counsel, of Los Angeles, for defendant Frank Bryson.

LANGDON, Justice.

This is a second appeal in the same cause. In the first, a judgment for defendant was reversed. *Britton v. Bryson*, 216 Cal. 362, 14 P.(2d) 502. Upon a retrial of the case, judgment went for plaintiff, and defendant appealed.

John H. Britton procured a decree of divorce from Sophie Britton in Bent county, Colo., March 30, 1891. He acquired property in 1916. In 1923 and 1924 he conveyed title to said property to Rose E. Britton, supposedly his wife. She later conveyed it to him as his separate property. Rose E. Britton died in 1926, and John H. Britton then made deeds of gift to defendant D. C. Hammell.

In 1926 Sophie Britton brought this action against John H. Britton and defendant Hammell to declare the deeds to Hammell void and to compel the return of the property to the community. Answers were filed, but the divorce decree of 1891 was not pleaded. In 1927 John H. Britton died, and his administrator, Frank Bryson, substituted as a party defendant, pleaded the 1891 decree as a bar. Thereafter, in 1928, Sophie Britton brought an action in Bent county, Colo., and procured a judgment annulling the divorce decree of 1891, for fraud.

The lower court in the first trial of this cause held that the Colorado decree of 1891 was valid. In *Britton v. Bryson*, supra, this court reversed the judgment. Substantially the same evidence was presented at the new trial, and the lower court concluded that the plaintiff was still the wife of John H. Britton at the time the deeds were made; that they were, in consequence, void for lack of her consent. Sophie Britton has since died, and her administrator has been substituted as plaintiff.

The merits of this appeal are concluded by our first decision already referred to,

and only one point raised by appellant requires discussion. He contends that, assuming the invalidity of the deeds of gift, nevertheless under our decision in *Trimble v. Trimble*, 219 Cal. 340, 26 P.(2d) 477, the wife may set them aside only as to one-half thereof. The above decision, however, was concerned with an action by the wife after her husband's death, and proceeded on the theory that at his death he had a right to dispose of that part of the property, and her right was therefore limited to recovery of one-half. In the instant case the action was commenced by the wife during the husband's lifetime to restore the property to the community. There appears to be no case in this state which determines the extent of the rights of the wife who, during the marriage, attacks a gift of community property made by the husband to a third party. See 1 So. Cal. Law Rev. 467. The decisions, reviewed in *Trimble v. Trimble*, supra, all involve actions brought by the wife after the husband's death.

There is, in our opinion, a sound reason why the wife, suing during the marriage, should be permitted to set aside the gift of community property in its entirety. If she were only permitted to recover a one-half interest, and that one-half interest recovered were to remain community property, it would still be subject to the husband's control, with the result that the protection given the wife by the statute would be substantially nullified. If, on the other hand, the one-half interest recovered were regarded as her separate property, there would be a resulting division or partition of the community property during the marriage by the husband's arbitrary act, without consent of the wife. Our law does not contemplate this means of dividing the community property. It provides only for division after dissolution of the community by death or divorce or by transfer by the husband with the wife's consent to a third person or to the wife.

It is true that there is also no express provision in our statutes to cover the situation where the wife sues after the husband's death. The case of *Trimble v. Trimble*, supra, and other decisions holding that recovery in such case is limited to one-half the property, must rest, ultimately, upon the theory that the husband had the right, at his death, to give away one-half by will; and that his gift before death, if limited in effect to one-half the property transferred, could be viewed as the equiva-

lent of a provision by will. See concurring opinion of Preston, J., in *Lahaney v. Lahaney*, 208 Cal. 323, 329, 281 P. 67. But this theory cannot justify a similar result where the wife brings her action during the marriage. The husband has no right, prior to death, to give away any of the community property without the wife's consent; and the gift cannot be regarded as the equivalent of a will because the time for effective exercise of the power of testamentary disposition has not yet arrived. Suppose, for example, the parties are divorced for the adultery or extreme cruelty of the husband, and the court, as it must, awards the greater part of the community property to the wife. *Quagelli v. Quagelli*, 99 Cal.App. 172, 277 P. 1089. Should the husband's prior gift, in violation of the law, be permitted to defeat this power of the court to compensate the innocent party?

Enough has been said to show clearly that the full measure of protection of the wife's rights during the existence of the community can only be gained by restoring the entire property to the community. This being so, the prior cases limiting recovery to one-half are not inconsistent, because they all hold, in substance, that the wife's rights after death of the husband are fully protected by that limited recovery.

The judgment is affirmed.

We concur: WASTE, C. J.; CONREY, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; THOMPSON, J.



4 Cal.2d 681

ELMS v. ELMS et al.

S. F. 15472.

Supreme Court of California.

Dec. 4, 1935.

Rehearing Denied Jan. 2, 1936.

1. Divorce ⇨72, 73

Either party to divorce action may bring in third parties claiming interest in property alleged to be community and adjudicate their claims, and if neither spouse names as defendants the parties who claim rights in

property alleged to be community, such parties may intervene themselves and establish their rights (Code Civ.Proc. § 387).

2. Divorce ⇨249(3)

Court in divorce proceeding has duty to make equitable distribution of community property and to provide for support of wife, and if property alleged by one spouse to be community is in fact in whole or in part claimed by third persons, court should determine as between spouses whether property is community or owned by third persons (Civ. Code, § 139; Code Civ.Proc. § 387).

3. Divorce ⇨11

State has an interest in marriage and divorce and favors orderly disposition of action including determination of property rights of parties (Code Civ.Proc. § 387).

4. Parties ⇨40(2)

Claim to or lien upon property which is subject of litigation generally gives right to intervene.

5. Parties ⇨38

That interveners may protect their interests by bringing separate actions does not defeat their right to intervene.

6. Divorce ⇨249(1)

If reasons exist why marriage bonds should be severed promptly before adjudication of property rights can be made, court has discretion to grant divorce reserving question of property rights for subsequent adjudication (Code Civ.Proc. § 387).

7. Divorce ⇨73

In divorce action, spouses' adult children who alleged that they had interest in realty standing in names of parents and which was claimed by wife to be community property, by reason of having contributed to purchase of property and to discharge of liens thereon under agreement with parents that property should be held in trust for children to extent of their contributions, held entitled to intervene, notwithstanding neither spouse named children as parties (Code Civ.Proc. § 387).

CONREY, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; May D. Lahey, Judge.

Action by Lola M. Elms against Fred G. Elms wherein Howard R. Elms and another intervened. From an adverse judgment after sustaining plaintiff's demurrer to complaint in intervention, interveners appeal.

Reversed.

A. A. Montagne, of Oakland, for appellants.

Hanna & Morton, of Los Angeles, and Gordon Johnson and Gardiner Johnson, both of San Francisco, for respondent.

SEAWELL, Justice.

Howard R. Elms and Alberta E. Montagne, adult children of plaintiff Lola M. Elms and defendant Fred G. Elms, filed a complaint in intervention in this action for divorce. They alleged that they had an interest in certain real property standing in the names of their parents, which was claimed by the plaintiff wife to be community property, by reason of having contributed, respectively, \$5,000 and \$3,000 to the purchase of said property and to the discharge of liens thereon, under an agreement with their parents that the property should be held in trust for them to the extent of their contributions. The court sustained plaintiff's demurrer to the complaint in intervention, and thereafter entered judgment that interveners take nothing. The question presented by this appeal is whether the interveners may litigate their rights in said property in the divorce action, or must resort to a separate suit.

Said real property consists of a dwelling house and an apartment house in the city of Berkeley, and the community personal property, of household and apartment furniture and furnishings. Plaintiff alleged that said real and personal property was of the value of \$9,000, and prayed that it all be set aside to her. As grounds for divorce she alleged acts of mental cruelty. The defendant husband in his answer to the divorce complaint alleged that said real property was held in trust for Howard Elms and Alberta E. Montagne to the extent of their payments and contributions. On the same day that it sustained the plaintiff's demurrer to the complaint in intervention, the court ordered that the allegations with reference to the property being held in trust for Howard Elms and Alberta E. Montagne be stricken from defendant's answer. The complaint in intervention had been filed with leave first obtained from one of the judges of the superior court, as provided by section 387, Code of Civil Procedure, but the motion to strike the allegations as to the existence of a trust from the answer, and the demurrer to the complaint in intervention came before a different judge of said court.

[1] It is stated generally that the husband and wife are the only parties to an action for divorce. However, the right of the wife to name as a defendant a third person to whom the husband has conveyed community property or separate property in fraud of her rights has been recognized in several cases in this state. *Kashaw v. Kashaw*, 3 Cal. 312, 322; *Cummings v. Cummings*, 75 Cal. 434, 442, 17 P. 442; *Weyer v. Weyer*, 40 Cal.App. 765, 768, 182 P. 776; *Warner v. Warner*, 100 Cal. 11, 34 P. 523; *California Filter Co. v. Superior Court*, 97 Cal.App. 99, 104, 274 P. 1012; *Callnon v. Callnon* (Cal.App.) 46 P. (2d) 988. In an action for divorce, the court not only severs the marital tie, but divides the community property, and makes provision for the support of the wife. We regard the above cases as establishing the rule that either party to the divorce action may bring in third parties claiming an interest in property alleged to be community, and adjudicate the claims of such parties in the divorce action. We are further of the view that if neither party to the divorce action names as defendants the third parties who claim rights in property alleged to be community, such parties may intervene themselves in the divorce action and establish their rights.

[2] There are sound reasons in policy why the court in an action for divorce should be permitted to adjudicate the rights of third parties in property alleged by one or both of the spouses to be community property. One of the duties of the court sitting as a court of equity in a divorce proceeding is to make an equitable distribution or award of community property, and to provide for the support of the wife. The court can scarcely make a fair distribution or allotment of parcels of community property without determining what property is community. If property alleged by one of the spouses to be community is in fact in whole or in part claimed by third persons, the court should determine as between the spouses whether the property is community, or owned by third persons. If a third party claimant cannot be made a party and his rights adjudicated, it may be held in a separate action brought by or against such claimant that he is the owner of the property, with the result that a division of all community property made between the spouses in the divorce action, based on a determination that certain property was owned by them,

will be rendered inequitable as between them.

The question as to whether alimony should be awarded and the amount thereof may also depend upon the existence of community property and the disposition made thereof. If the third party claimant is not brought into the divorce action, property treated as community property in the divorce action may subsequently in a separate suit be adjudged as against the spouse to whom it was awarded in the divorce action to be the property of such claimant. This may be followed by an application under section 139, Civil Code, for an increase in alimony, on the ground that the judgment in favor of the third party removed a source of income. If the rights of the third party are determined in the divorce action, not only will a separate action to determine the rights of such party be avoided, but also a possible proceeding for modification of the alimony allowance will not be necessary.

[3-5] If neither party to a divorce action brings in a third party claimant he should be permitted to intervene. The state has an interest in marriage and divorce and favors an orderly disposition of the action including the determination of the property rights of the parties. The law abhors multiplicity of actions, consuming the time of the court and entailing additional expense to the people. It is to the interest of the people, as well as the parties particularly involved, that there be an end of litigation. *Interest rei publicæ ut sit finis litium*. A claimant to property alleged in the divorce action to be community, has an interest in the matter in litigation and an interest against both spouses in property alleged by either of them to be community property of the marriage. Section 387, Code of Civil Procedure, authorizes an intervention as follows: "At any time before trial, any person, who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding." A claim to or lien upon the property which is the subject of the litigation generally gives a right to intervene. *Stich v. Goldner*, 38 Cal. 608; *Coffey v. Greenfield*, 55 Cal. 382; *Cummings*

52 P.(2d)—15

v. Cummings, 55 Cal.App. 433, 203 P. 452; 20 Cal.Jur. 520. In the instant case the real property in which interveners claim an interest is before the court upon plaintiff's prayer that all community property be set aside to her. The fact that the interveners may protect their interests by bringing a separate action does not defeat their right to intervene. 20 Cal.Jur. 521, and cases there cited.

[6] Respondent contends that if cognizance may be taken in divorce actions of claims of third parties to property before the court, undue delay will result. If reasons exist why the marriage bond should be severed promptly before an adjudication of property rights can be had, it is within the discretion of the court to grant the divorce, reserving the question of property rights for subsequent adjudication. *Pereira v. Pereira*, 156 Cal. 1, 10, 103 P. 488, 23 L.R.A.(N.S.) 880, 134 Am.St.Rep. 107; 1 Cal.Jur. 1036.

[7] The recent decision of the District Court of Appeal in *Callnon v. Callnon*, 46 P.(2d) 988, is not inconsistent with our conclusion herein, but expressly recognizes the right of the court in a divorce action to adjudicate claims of a third party to property before the court. The basis of the court's decision in that case was that the judgment in the divorce action, relied on as *res judicata* in a later suit, did not in fact adjudicate the rights of the third party in certain real property, since the issues made by the pleadings did not relate to the ownership of said property, but to a claim for reimbursement for community moneys alleged to have been expended. Said decision was not directed to the point that although the parties to the divorce action may bring in third party claimants, such claimants cannot intervene if neither of the parties has named them as defendants. We conclude that the court erred in sustaining plaintiff's demurrer to the complaint in intervention.

The judgment is reversed.

We concur: WASTE, C. J.; THOMPSON, J.; CURTIS, J.; LANGDON, J.; SHENK, J.

I dissent: CONREY, J.

4 Cal.2d 668

PARKER et al. v. JAMES E. GRANGER,
Inc., et al., and seven other cases.

L. A. 15204-15211.

Supreme Court of California.

Nov. 29, 1935.

Rehearing Denied Dec. 26, 1935.

1. Appeal and error ⇨1064(1)

Error, if any, in instructing jury that before *res ipsa loquitur* doctrine could apply plaintiff must first show that defendant possessed superior knowledge, or was in better position to obtain such knowledge, regarding cause of accident *held* harmless, in view of evidence that defendant was not in exclusive control of airplanes involved in collision.

2. Negligence ⇨121(3)

In actions involving collision between airplanes which, together with licensed pilots, were rented to film company by defendant owner through codefendant corporation, evidence that film company's director occupied seat behind dual control of one airplane and that assistant director was at dual control of other airplane and that director agreed to wiggle wings of airplane as signal to turn *held* to warrant finding that defendants were not in exclusive control of airplanes, and hence *res ipsa loquitur* doctrine was inapplicable.

3. Jury ⇨127

Denial of request for leave to challenge for cause a juror who stated after jury was sworn, but before any evidence was offered, in actions for deaths caused by collision between airplanes, that his views as to right to protection of persons going up in airplanes depended on whether they were passengers or were being paid big salaries and knew what they were "going up against" *held* not abuse of discretion, where juror stated that he would follow court's instructions.

4. Evidence ⇨325

Document, issued by Federal Department of Commerce, containing regulations as to licensing of aircraft and rules of air traffic, *held* properly excluded as incompetent, irrelevant, and immaterial in actions involving collision between airplanes during intrastate flight (St. 1929, p. 1874).

5. Evidence ⇨47, 48

Court takes judicial knowledge of official acts and regulations of department of federal government, and evidence thereof is not required (Code Civ.Proc. § 1875, subd. 3).

6. Trial ⇨136(3)

All questions of law and construction of statutes and other writings must be decided

by court, which must declare to jury court's knowledge, when made evidence of fact (Code Civ.Proc. §§ 608, 609, 2102).

7. Commerce ⇨13

State has exclusive power to prescribe rules for operation of aircraft in purely intrastate flights (St. 1929, p. 1874).

8. Negligence ⇨22

Conduct of pilots and others involved in collision between airplanes during intrastate flight will be judged only under general law and rules of negligence applicable to case, in absence of state law prescribing air traffic rules (St. 1929, p. 1874).

9. Evidence ⇨508

Questions to expert witnesses as to meanings of aeronautical terms in trial of actions involving collision between airplanes *held* proper.

10. Evidence ⇨553(1)

Overruling of plaintiffs' objections to hypothetical questions, assuming facts concerning which there was supporting evidence, framed in accordance with theory of defense and in line with defenses, as were answers thereto, *held* not error prejudicial to plaintiffs.

11. Negligence ⇨129

Conversations between motion picture director and president of corporation contracting to furnish film company airplanes and licensed pilots for use in filming picture *held* admissible in actions against such corporation, film company, and others for deaths of pilots, director, and other employees of film company.

12. Trial ⇨139(1)

Plaintiff may move for directed verdict, where cause of action alleged in complaint is supported on whole evidence and no support is given any of defenses alleged.

13. Trial ⇨143

Plaintiff's motion for directed verdict may not be granted, where there is substantial conflict in evidence as to basis of plaintiff's cause of action or any defense thereto.

14. Trial ⇨139(1)

To authorize direction of verdict, evidence must be undisputed or so conclusive that court, in exercise of sound discretion, would be compelled to set aside contrary verdict.

15. Appeal and error ⇨973

Trial court's ruling as to whether given state of facts shows negligence as matter of law or sustains defense will not be disturbed on appeal, in absence of clear showing of abuse of discretion.

16. Appeal and error ⇐997(1, 3)

Evidence in conflict or reasonably supporting different inferences held to preclude appellate court from disturbing trial court's discretionary ruling denying parties' motions for directed verdicts and plaintiffs' motions for judgments notwithstanding verdicts.

17. Trial ⇐177

Rule that, where both parties request directed verdict and neither asks determination of any fact issue by jury, they will be presumed to have waived right to jury trial, cannot be invoked under California Constitution, procedure, and practice (Code Civ. Proc. §§ 592, 631; Const. art. 1, § 7).

18. Jury ⇐28(5)

Trial by jury may be waived only in manner designated by statute, which does not include requests by both parties for directed verdicts (Code Civ.Proc. §§ 592, 631; Const. art. 1, § 7).

19. Trial ⇐168

Motion for directed verdict is, in effect, demurrer to evidence favoring adversary.

In Bank.

Appeals from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action by Thomas H. Parker and others against James E. Granger, Inc., and others, and seven consolidated cases. From judgments for defendants and from orders denying plaintiffs' motions for judgments notwithstanding the verdicts, plaintiffs appeal.

Affirmed.

Prior opinion, 39 P.(2d) 833.

Lasher B. Gallagher, Burnett Wolfson, Chotiner, Recht & Chotiner, Ford & Coles, Frank M. Benedict, Philip Cohen, A. A. Rotberg, and W. Joseph Ford, all of Los Angeles, for appellants.

Arthur W. Eckman, Wm. B. Himrod, Kidd, Schell & Delamer and Allen G. Mitchell, all of Los Angeles, for respondents.

Hadsell, Sweet, Ingalls & Lamb and Francis Carroll, all of San Francisco, and Freston & Files and Ralph E. Lewis, all of Los Angeles, amici curiæ.

CONREY, Justice.

These appeals are before this court pursuant to an order granting a petition for hearing after decision by the Second District Court of Appeal, Division Two. The following statement, as we find it in the

opinion written by the Court of Appeal, appears to be correct as a general statement of the facts:

"Eight separate actions were commenced by the heirs or personal representatives of persons who lost their lives in a collision between two airplanes. The cases were consolidated and tried together, and from judgments in favor of defendants these appeals are taken.

"On January 2, 1930, Fox Film Company, engaged in the business of producing motion pictures, entered into a written contract with respondent James E. Granger, Inc., to furnish one Lockheed Vega cabin plane and two 'Whirlwind planes' as camera planes, at stated prices per day, in first-class condition and with licensed pilots to operate the same, to be used under direction of Kenneth Hawks as director and Max Gold as assistant director of the Fox Film Company in the filming of a picture showing a parachute jump over the Pacific Ocean. James E. Granger, Inc., obtained and furnished the services of a Lockheed Vega plane with Captain Roscoe Turner as lawfully licensed pilot thereof, and made arrangements to hire from Tanner Motor Livery, a corporation, also a respondent herein, two Stinson planes for use as camera planes, with licensed pilots to operate the same, agreeing to pay therefor a hire fixed in terms of dollars per hour. These planes and pilots were offered by James E. Granger, Inc., to Fox Film Company and by it approved and accepted for use in making the picture. After dual controls were installed in the Stinson planes and cameras mounted therein, and Hawks had given detailed directions as to the course of the flight and the positions of the planes when photographing was to be done, the flight of the three planes commenced. Captain Turner was pilot of the Lockheed Vega, carrying the parachute jumper; Hallock Rouse, a regular employee of Tanner Motor Livery and a lawfully licensed pilot, was pilot of one Stinson plane, with Max Gold sitting beside him at the dual control, and Ross Cook, also a regular employee of Tanner Motor Livery and a lawfully licensed pilot, was pilot of the other Stinson plane, with Hawks sitting beside him at the dual control. Neither Hawks nor Gold was a licensed pilot. Six other employees of Fox Film Company, participating in the picture making, were divided between the two Stinson planes. While fly-

ing out over the bay in a general southwesterly direction on a designated course to be followed for a distance with return thereon, the Lockheed Vega was in the lead, one Stinson to its left and rear, the other to the left and somewhat to the rear and below the first Stinson. The Lockheed Vega allowed the two Stinsons to pass and then made a left turn to follow the return course. Thereupon the two Stinsons commenced to make a left turn, when the leading one appeared to slide sideways, the tips of the wings on the two planes touched, then their noses came together, there was an explosion, and both planes fell into the ocean carrying to their death all the occupants thereof. The foregoing is but a brief sketch of the occurrence, no effort being made to state details which are embodied in over 1,000 pages of testimony and other evidence. On the evidence and under the instructions given, the jury found for defendants, respondents herein."

The appeals are from the several judgments and from orders denying motions of the plaintiffs for judgments notwithstanding the verdicts. By its decision the District Court of Appeal held that the judgments should be reversed and that the said orders should be affirmed. In the petition of respondents for a hearing in this court they stated that the question presented by their petition related to "applicability of the doctrine of *res ipsa loquitur* in the absence of better knowledge or means of knowledge on the part of the defendant as to how the accident occurred." The petition was thus limited by reason of the fact that reversal of the judgments had been ordered solely on the ground that the trial court erroneously instructed the jury on the doctrine of *res ipsa loquitur*. But the appellants also petitioned for a hearing by this court, their petition being caused by their dissatisfaction with the opinion of the Court of Appeal, wherein it sustained an order of the trial court refusing to admit in evidence a document issued by the department of commerce of the United States containing air commerce regulations relating to the licensing of aircraft and rules of air traffic. The hearing was granted by this court primarily for the purpose of giving further consideration to the subjects thus indicated.

Quoting again from the opinion of the District Court of Appeal: "Plaintiffs herein charged defendants with negligence in

general terms, and introduced proofs tending to show that the two planes which came into collision were owned by defendant Tanner Motor Livery, which was engaged in the business of renting planes with licensed pilots as a private carrier, and that through James E. Granger, Inc., the Tanner Motor Livery had hired the two planes with pilots to the Fox Film Company, employer of the deceased persons represented herein by plaintiffs, to carry such persons as passengers for hire on a picture-making trip over the Pacific ocean and return; that the planes collided in flight, resulting in the death of all the occupants thereof; and that the planes and pilots were at the time under the control of defendants. No explanation of the cause of the collision was furnished by plaintiffs' evidence, but such evidence clearly left it doubtful as to whether or not the ultimate cause of the collision was the negligence of the defendants. Under such state of the cases it was proper to instruct the jury as to the doctrine of *res ipsa loquitur*. *Connor v. Atchison, etc., R. Co.*, 189 Cal. 1, 207 P. 378, 26 A.L.R. 1462; *Damgaard v. Oakland High School Dist.*, 212 Cal. 316, 298 P. 983. At plaintiffs' request it gave the usual and approved form of such instructions setting forth the doctrine as defined and used in this state."

[1] Following such instructions, at the request of defendant Tanner Motor Livery, the court gave the following instructions: (R4) "In order that the doctrine of *res ipsa loquitur* should apply to a given case the plaintiff must have first shown by a preponderance of the evidence that certain conditions existed, amongst these conditions are the following: 1. That the general experience of mankind shows that the accident was such that it does not usually occur in the ordinary course of events without negligence upon the part of those in control, and 2. The person against whom the doctrine is sought to be invoked must have been in control of that instrumentality, and 3. The person invoking the doctrine must not be in a position to know the cause of the accident, and 4. The person against whom the doctrine is invoked must possess or have possessed superior knowledge as to the cause of the accident or must be or have been in a better position to obtain that knowledge, so that the duty of explaining the accident should, in fairness, rest upon him on account of that greater knowledge or greater means of knowledge."

(R8, in part) "The doctrine of 'res ipsa loquitur' does not apply to any of the following situations: * * * 5. Where the defendant or his agent has not now nor has had superior knowledge or means of knowledge of the cause of the accident. In any one or all of the above cases the doctrine does not apply, and the happening of the accident raises no inference whatsoever of negligence on the part of any person, with the result that a plaintiff, to recover against a defendant, must prove by a preponderance of the evidence the actual cause of the accident and that said accident was caused by the negligence of that defendant."

In appellants' opening brief, and appendix thereto, they referred to and copied an "instruction R3," in the same series as those above quoted, and they claim error in the giving of that instruction to the jury. A part of that instruction was quoted in the opinion of the Court of Appeal and used as one of the reasons for reversal of the judgments. Respondents did not question the statement that such instruction was given and the Court of Appeal, as well as this court on petition for hearing, assumed the same fact. But now on referring to the page of the transcript where the instruction, R3, should be found, we discover that there is no such instruction at that page or anywhere else among the instructions given by the court to the jury. Our further discussion of the instructions given concerning the doctrine in question must therefore be understood to exclude any reference to said instruction R3.

It is suggested by appellants (opening brief, p. 105) that in the foregoing instructions the court gave to the jury the right to determine for itself whether the doctrine *res ipsa loquitur* applied to the facts. And appellants contend that in so instructing the court committed prejudicial error. For they say that it is established by the decisions that "it is a question of law for the court to determine whether the doctrine *res ipsa loquitur* is applicable to the facts, and if it is the court must instruct the jury to apply the doctrine." We are of the opinion, however, that the court in its instructions went no further than to submit to the jury questions of fact and instruct upon the law which should apply to the facts as they might be proved and found. It may be that the court erred in saying to the jury that before the doctrine could apply to the case "the plaintiff must

first have shown" that the defendant must possess or have possessed superior knowledge as to the cause of the accident or must be or have been in a better position to obtain that knowledge. But even so, in view of the fact that, as hereinafter shown, the respondent Tanner Motor Livery was not in exclusive control of the Stinson planes, it follows that there was no prejudicial error, since the doctrine *res ipsa loquitur* could not be applied without first establishing the fact of exclusive control.

[2] Another phase of this matter is worthy of notice. The Stinson planes, on the morning of the accident, had been thoroughly inspected and found to be in good condition. (Rep.Tr., pp. 513-515.) This is an undisputed fact, sufficient to reduce the question of negligence to one of negligence in the operation of the planes, or of one of them. The evidence further showed not only that the Stinson planes were to be used under direction of Hawks, as director, and Gold, as assistant director, of the film company, but also that in furtherance of this plan, dual controls were installed, so that each director could sit beside one of the pilots. From these facts the jury might find, and scarcely could fail to find, that the directors were to share, directly or indirectly, in the operation of the planes. Before the flight began, Hawks gave numerous directions to the pilots. In reply to the question, inquiring what sign was to be given when the planes were to turn, Hawks said that he would give the signal, that is, he would wiggle the wings of the plane he was in. This is done by rocking the wheel back and forth. (Rep.Tr., 455, 458, 718, 719.) It is done by the pilot who is actually flying the plane. (Rep.Tr., 792.) On the trip during which the accident occurred, when the planes left the airport Hawks and Gold were in the seats in front of which the dual controls had been installed. (Rep.Tr., 490, 491, 497, 498.) When the Stinson planes turned to the left, just before the accident, the higher plane side-slipped, so that they came into contact, with resulting disaster. The crucial question of fact relates to the cause of the side-slip. This question no occupant of the planes was left alive to answer, if indeed any could have answered. There is evidence that such slipping or dropping of a plane can occur through external causes and without negligence in the operation of the plane. (Rep.Tr., 120, 841, 861, 870-873.)

From the foregoing evidence, the jury almost inevitably must have found that at the moment of the accident and immediately preceding that time, these planes were not in the exclusive control of respondents. In that event, the doctrine *res ipsa loquitur* could not be invoked against respondents. In effect the jury was so instructed, and was correctly so instructed.

The following paragraphs of the opinion of the District Court of Appeal are hereby approved and adopted:

[3] "After the jury was sworn and before any evidence was offered, a juror voluntarily stated from the jury box that he had certain views as to the status of persons going up in airplanes in respect to right to protection, depending on whether they went up as passengers or as one who is being paid a big salary and knew what he was 'going up against.' Appellants requested leave to interpose a challenge for cause. This the court denied after interrogating the juror, who announced that notwithstanding his views of the law he would follow the instructions of the court. We find no abuse of discretion in this ruling.

[4-8] "During presentation of their cases plaintiffs offered in evidence a document issued by the Department of Commerce of the United States containing air commerce regulations relating to the licensing of aircraft and rules of air traffic. The court sustained an objection to its introduction into evidence made on the grounds that the same was incompetent, irrelevant, and immaterial. The ruling of the court was correct. The document offered purported to contain copies of official acts and regulations of a department of the United States. Of these the court takes judicial knowledge (section 1875, subd. 3, Code Civ.Proc.) and proof thereof by evidence is not required. *Varcoe v. Lee*, 180 Cal. 338, 181 P. 223. All questions of law and the construction of statutes and other writings are to be decided by the court; and whenever the knowledge of the court is made evidence of a fact, the court is to declare such knowledge to the jury. Section 2102, Code Civ.Proc. In charging the jury the court may state to them all matters of law which it thinks necessary (section 608, Code Civ.Proc.), and either party may request special instructions to be given covering any law pertinent and applicable to the case. Section 609. If the regulations offered in evidence contained law

pertinent to and controlling in the case, appellants were privileged to request special instructions thereon; but no such request was made. We have examined the regulations offered and find nothing therein of which the court was charged with judicial knowledge and which the court was called upon to declare to the jury. The flight of the planes herein mentioned was intrastate, and under the Federal Constitution and the California Aircraft Act enacted in 1929 (St. 1929, p. 1874), the state of California was vested with exclusive power to prescribe air traffic rules to govern the operation of aircraft in flying in purely intrastate flights. No such rules had been made by the Legislature when the accident herein occurred, and the conduct of the pilots and others involved in the accident would be measured and judged only under the general law and rules of negligence pertinent and applicable to the case.

[9, 10] "During the trial expert witnesses were called by respondents and objections by appellants to certain questions propounded to them were overruled. The first two sought to elicit definitions of aeronautic terms and were clearly proper. The others to which objections were made were of a hypothetical nature, and appellants contend they were not based in whole on facts in evidence and called for guess or conjecture rather than opinion. We have examined the same and find no error in the court's rulings which could in any decree be deemed prejudicial to appellants. The questions were predicated on assumption of facts, concerning which there was evidence, possessing supporting tendency, and were framed in accordance with respondents' theory of defense; and the questions and answers thereto were clearly in line with respondents' defenses.

[11] "Appellants also claim error in the admission in evidence over their objection of conversations between the director, Hawks, and James Granger, president of James E. Granger, Inc. We find no error in the court's rulings. The evidence elicited was clearly relevant and material to a clearer exposition of the facts touching the question of performance of the contract between the Fox Film Company and James E. Granger, Inc., and the acceptance and approval by the Fox Film Company of the arrangements for the hiring and use of the two planes and pilots made with Tanner Motor Livery.

[12-16] "At the close of the evidence and after all parties had rested, appellants each moved for a directed verdict in their favor, respectively, and all such motions were denied. Such motion may be made by a plaintiff where, upon the whole evidence, the cause of action alleged in the complaint is supported and no support is given to the defense or any of the defenses alleged by defendant. But such motion may not be granted where there is a conflict in the evidence of a substantial kind, relating either to the basis of plaintiff's cause of action or any defense thereto. *Kohn v. National Film Corporation*, 60 Cal.App. 112, 212 P. 207. To authorize the granting of such a motion the evidence must be undisputed or of such conclusive character that the court, in the exercise of a sound discretion, would be compelled to set aside a verdict returned in opposition to it. The rule is established in this state that the ruling of a trial court as to whether a given state of facts presented before it does or does not amount to negligence as a matter of law will not be disturbed on appeal in the absence of a clear showing of an abuse of discretion. *Burgesser v. Bullock's*, 190 Cal. 673, 214 P. 649. The same rule of course attaches to the question of whether facts presented in support of a defense do or do not sustain the same. Under this rule, and after examination of the record herein, we cannot disturb the discretionary ruling of the court on the motions for directed verdicts. And for the same reasons, and based on the same foundation, we cannot disturb the court's ruling denying the subsequent motions for judgments in favor of plaintiffs notwithstanding the verdicts in favor of defendants. The foregoing conclusions apply with equal force to many specifications of insufficiency of the evidence to support various issues and defenses in the case, all of which were submitted to the jury on the evidence, which was either in conflict or of such character as to support different inferences reasonably to be based thereon.

[17,18] "Respondents also made a motion for a directed verdict in each case, which was likewise denied. In their reply brief herein appellants contend that it is the law that when both parties move for a directed verdict the trial court is under the duty of taking the case from the jury. In support of this contention appellants cite a note in *Ann.Cas.* 1913C, page 1342, wherein the following appears: 'The general rule seems to be that where both par-

ties have requested the court to direct a verdict, and neither has asked to have any fact in issue determined by a jury, the parties will be presumed to have waived the right to a trial by jury, and to have constituted the judge a trier of questions both of law and of fact.' A rather formidable list of authorities from other jurisdictions are therein cited in support of such statement of the rule. We are of the opinion that such rule cannot be invoked and applied under the Constitution and procedure and practice in California. Trial by jury may be waived only in the manner designated in section 631 of the Code of Civil Procedure, in which request by both parties for a directed verdict is not included. It has been held in this state that a jury trial cannot be waived by implication. *Smith v. Pollock*, 2 Cal. 92; *Platt v. Havens*, 119 Cal. 244, 51 P. 342; *People v. Metropolitan Surety Co.*, 164 Cal. 174, 128 P. 324, *Ann.Cas.* 1914B, 1181. In *Swasey v. Adair*, 88 Cal. 179, 25 P. 1119, it was held that the right to a jury trial secured to a party under the provisions of section 592 of the Code of Civil Procedure could be waived only by such party in one of the modes prescribed in section 631 of that code. Section 7 of article 1 of the Constitution of this state provides that: 'The right of trial by jury shall be secured to all, and remain inviolate. * * * A trial by jury may be waived * * * in civil actions by the consent of the parties, signified in such manner as may be prescribed by law.' The manner prescribed by law is that contained in section 631 of the Code of Civil Procedure. Under a practice similar to that of California, the Supreme Court of Illinois in *Wolf v. Chicago Sign Printing Co.*, 233 Ill. 501, 84 N.E. 614, 13 *Ann.Cas.* 369, held that waiver of jury trial could not be had by implication, that motions for directed verdicts by both parties did not operate as a waiver of jury trial, and that the rule above quoted was inapplicable to the practice in Illinois. Clearly the rule quoted is not applicable under the law and practice in California."

[19] Concerning the suggested point that where both of the opposing parties have requested a directed verdict they are presumed to have waived the right to have the case submitted to the jury, some additional observations may be appropriate. The several motions of plaintiffs requesting a directed verdict are in effect a demurrer to the evidence favorable to the opposing party. As was said in *Hunt v. United*

Bank & Trust Co., 210 Cal. 108, 117, 291 P. 184, 188: "Such a motion is in the nature of a demurrer to the evidence, and is governed by practically the same rules, and concedes as true the evidence on behalf of the adverse party, with all fair and reasonable inferences to be deduced therefrom. *Butler-Veitch, Inc., v. Barnard*, 77 Cal. App. 709, 247 P. 597."

In like manner the motion of the respondents for a directed verdict was an admission of the truth of the evidence on behalf of plaintiffs. Where such separate motions are made by the adverse parties, their respective positions continue to be adverse and antagonistic. The position of each party is predicated upon the asserted absence either of conflicting evidence or of any evidence adverse to him and this is not because of the consensus, but because of the disparity of their views in which they are diametrically opposed. The plaintiffs' assertion of the strength of their evidence cannot be construed as a confession of its weakness. Neither party concedes that if he is in error in his view as to the want of adverse evidence or of the conclusiveness of the evidence in his favor, there is no conflict therein. The contrary is the only natural inference. *Stevens v. Mutual Protection Fire Ins. Co.*, 84 N.H. 275, 149 A. 498, 69 A.L.R. 624.

The orders denying the motions for judgments notwithstanding the verdicts are affirmed. The judgments are affirmed.

We concur: WASTE, C. J.; THOMPSON, J.; CURTIS, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.



**WALTERS v. BANK OF AMERICA NAT.
TRUST & SAVINGS ASS'N.***
L. A. 15359.

Supreme Court of California.
Nov. 29, 1935.

Rehearing Granted Dec. 26, 1935.

1. Appeal and error ⇨1035

Error, if any, in holding jury trial *held* harmless to defendant, where court directed verdict for plaintiff.

2. Evidence ⇨75

Successor bank's failure to produce evidence that predecessor bank's assistant cashier on whom attachment was served was not an officer raised presumption that such evidence, if produced, would have prejudiced bank (Code Civ.Proc. § 542).

3. Banks and banking ⇨224

Evidence that assistant cashier was junior officer whose appointment was confirmed by directors along with all other officers, and that other officers usually sent process servers to assistant cashier, who had duty of notifying all departments regarding attachments, *held* to show that assistant cashier was "officer," and hence levy on bank by delivering copy of attachment to assistant cashier was valid (Code Civ.Proc. § 542).

[Ed. Note.—For other definitions of "Officer," see Words & Phrases.]

4. Banks and banking ⇨224

In action by attachment creditor, successor bank *held* estopped to deny validity of attachment levied on predecessor bank by delivering copy of writ to assistant cashier, where predecessor bank had designated assistant cashier as proper person for service and had made notation that deposit was attached and informed depositor thereof and took steps to protect itself (Code Civ.Proc. § 542).

5. Mortgages ⇨32(1)

Deeds conveying realty as security for indebtedness may be construed as mortgages.

6. Banks and banking ⇨134(1)

Right, if any, of bank to set off deposit against depositor's secured note owned by bank *held* waived by vice president's antecedent agreement with depositor that funds, if deposited, would not be so applied, and hence deposit was subject to attachment (Code Civ.Proc. § 544).

7. Attachment ⇨175

Attachment creditor steps into shoes of debtor, and, as regards debtor's credits or personalty in third person's possession, creditor acquires whatever right debtor had at time of levy on such third person (Code Civ. Proc. § 544).

8. Garnishment ⇨164

In attachment creditor's action against bank to recover attached deposit, third person with whom depositor had some business connection *held* not shown to be real owner of deposit, where such third person made no claim thereto, and where no attempt was made to show that deposit, which was paid out on depositor's checks, was expended for third person's benefit.

9. Banks and banking Ⓒ224

Bank's liability to attachment creditor under levy of attachment covering deposit *held* not affected by subsequent failure to levy execution on bank (Code Civ.Proc. § 544).

10. Garnishment Ⓒ115

Attachment creditor bringing action against bank to recover attached deposit, *held* entitled to interest only from date of judgment against attachment debtor, and was not entitled to interest from levy of attachment.

In Bank.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by Esther A. Walters against the Bank of America National Trust & Savings Association. From a judgment on a directed verdict for plaintiff, defendant appeals.

Modified and affirmed.

Prior opinion 44 P.(2d) 601.

G. L. Berrey and John Walters, both of Los Angeles, Louis Ferrari, of San Francisco, and Edmund Nelson, O'Melveny, Tuller & Myers, Pierce Works and Louis W. Myers, all of Los Angeles, for appellant.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, amici curiæ.

Archie A. Smith and Manley C. Davidson, both of Los Angeles, for respondent.

CURTIS, Justice.

On May 10, 1930, the plaintiff herein, Esther A. Walters, commenced an action in the superior court of the county of Los Angeles against the Republic Securities Corporation to recover the sum of \$8,505.25, and interest, on the promissory note of said corporation. On the same day a writ of attachment was issued out of said court in said action and placed in the hands of the sheriff of said county who levied the same on the Bank of America of California by delivering to and leaving with R. C. Elliott, the assistant cashier of the said bank, a copy of said writ of attachment, together with a notice that all moneys, goods, credits, and debts due or owing or any personal property in the possession or under the control of said bank belonging to the Republic Securities Corporation was attached by virtue of said writ. At the time of the service of said

writ of attachment the Republic Securities Corporation had on deposit in its checking account with said Bank of America of California, and at the office or branch of said bank at which said writ of attachment was served, the sum of \$8,086.16. At that time the Republic Securities Corporation was indebted to the Bank of America of California in the sum of over \$50,000 on a past-due promissory note which was secured by pledge of shares of corporate stock, promissory notes, and three grant deeds of real property. The notes were executed in favor of Wright, Alexander & Co. and assigned to the Merchants' National Trust & Savings Bank, and the grant deeds were executed by Wright, Alexander & Co. in favor of the Merchants' National Trust & Savings Bank, and covered certain parcels of real property particularly described in said deeds respectively. Wright, Alexander & Co. were the predecessors in interest of the Republic Securities Corporation. Thereafter the defendant bank, the Bank of America National Trust & Savings Association, succeeded to all the rights and assumed all the obligations of the Bank of America of California and of the Merchants' National Trust & Savings Bank. At the time of the levy of said attachment, the Bank of America of California was the owner of said note, and was the holder of all said securities. For convenience we will refer to the note as the \$50,000 note. The Bank of America of California, while it made no answer to the writ, at the time of the service thereof made the following notation on the account of the Republic Securities Corporation: "Hold all. A/c attached. 5/10/30." Subsequently a return and answer signed, "Bank of America of California, by Irene Camp," was delivered to the sheriff. This return and answer was dated May 15, 1930, and stated, "Defendant indebted to bank." On the day of the service of said writ of attachment, Mr. Brown, the vice president of said Bank of America of California, and the manager of the branch of said bank at which the deposit of \$8,086.16 was carried, called Mr. Wright, the president of the Republic Securities Corporation, to the bank and informed him of the service of said writ of attachment upon said bank, and told him, according to the testimony of Mr. Wright, "that it would be necessary to debit our balance with the amount

that was to our credit, and to apply the same on the note." Mr. Wright informed Mr. Brown that there had been a number of checks issued by his company against said bank. Mr. Brown agreed to take care of and pay said checks as they were presented for payment, and stated "that the amount so transferred to the note would be immediately recredited to our account." As a result of this conversation, and on May 11, 1930, an entry on the \$50,000 note was made purporting to show a payment thereon of \$8,086.16. The bank thereafter paid a number of outstanding checks drawn on said account, and on May 27, 1930, credited the account of the Republic Securities Corporation with said sum of \$8,086.16, and on the same day debited said promissory note in the same amount of \$8,086.16. On July 14, 1930, plaintiff in her action against the Republic Securities Corporation recovered judgment in the sum of \$9,408.47 besides costs. Subsequently thereto a writ of execution was issued on said judgment and placed in the hands of the sheriff of said county for service, who returned the same wholly unsatisfied. Thereupon plaintiff instituted this action to recover from the defendant bank the sum which the Republic Securities Corporation had on deposit at the time of the levy of said attachment.

On demand of plaintiff, a jury was impaneled to try the issue presented by the pleadings. At the conclusion of the evidence, the trial court directed the jury to render a verdict in plaintiff's favor, and in compliance with such direction a verdict was returned upon which a judgment was subsequently entered in favor of the plaintiff for the sum of \$8,086.16, together with interest from May 10, 1930, the date of the levy of said attachment. From this judgment the defendant has appealed.

In support of its appeal, the defendant contends:

(1) That the levy of the writ of attachment was of no validity, for the reason that it was served only upon R. C. Elliott, assistant cashier of the Bank of America of California, who was not then an officer of said bank.

(2) That said bank had a right of set-off as against the said deposit of \$8,086.16, by reason of the \$50,000 note held by it against the Republic Securities Corporation, and therefore it was not indebted to said corporation in any amount at the date of said levy.

(3) Were the three grant deeds held by the bank mortgages?

[1] (4) That the court erred in requiring the defendant to go to trial before a jury. Regarding this fourth contention, we think it apparent that defendant sustained no injury by reason of the presence of the jury at the trial of this action. As the verdict in favor of the plaintiff was rendered in pursuance of the direction of the trial judge, the judgment based upon this verdict was in reality the action of the trial judge rather than that of the jury. Had there been no jury, upon the evidence before him, the trial judge would undoubtedly have rendered a judgment in favor of the plaintiff upon the merits of the action. The defendant would then have been in a less advantageous position than that in which it now finds itself, with only a directed verdict against it. Conceding that plaintiff, by failure to deposit the fees in time, waived her right to a jury trial as claimed by appellant, it is apparent that appellant has not sustained any injury by the order of the court directing a jury trial for the action. The other points we will take up in the order named above.

[2-4] The Bank of America of California at the time of the levy of said writ of attachment had several branches throughout the state of California at which its business was transacted. One of these branches was located at the corner of Seventh and Spring streets in the city of Los Angeles, in which branch bank the Republic Securities Corporation had on deposit said sum of \$8,086.16, the amount in controversy in this action. R. C. Elliott was assistant cashier of this branch of said bank at the time the writ of attachment in the action brought by plaintiff herein against the Republic Securities Corporation was served upon said bank. It is contended by the defendant that said levy was illegal and of no validity, as Elliott was neither the manager nor an officer of said bank at the office and branch thereof where said money was deposited. Section 542 of the Code of Civil Procedure at the time of said levy provided that debts and credits of a debtor in the possession or control of a banking corporation maintaining branch offices "must be attached by leaving a copy of the writ and the notice with the manager or any other officer of said banking corporation * * * at the office or any branch thereof." No claim is

made that R. C. Elliott was the manager of said branch of the Bank of America of California. As to the official status of R. C. Elliott in said bank at the time of said levy, he testified that he was a junior officer, and that, regardless of who in the bank accepted service of a writ of attachment, he was the one to whom the process would automatically come in order to see that the proper notice of such attachment was carried through the bank, and that, when writs of attachments were served upon him, he made a search of the record of the bank to see if it had anything to be attached, and that he would start the attachment on its way by giving notice thereof to all departments. Marco Hellman, superintendent and chairman of the executive committee of the Bank of America of California at the time of the levy of said attachment, testified that Mr. Elliott's appointment as assistant cashier was confirmed along with all other officers by the board of directors of the bank, and that, when attachment papers were to be served upon the bank the other officers usually sent the process server to Mr. Elliott to have the papers served upon him. This is substantially all the evidence before the court regarding Mr. Elliott's official connection with the bank. The defendant made no attempt to show that Mr. Elliott was not an officer. If he was not such officer, the evidence of that fact was in the possession of the defendant, and it alone was in a position to produce direct evidence of the true connection of Mr. Elliott with the bank in which he was then employed. Its failure to produce the evidence in its possession raises a presumption that such evidence, if produced, would have operated to its prejudice and would have supported the case of the plaintiff. *Bone v. Hayes*, 154 Cal. 759, 765, 99 P. 172; *Wantz v. Union Bank & Trust Co.*, 137 Cal.App. 98, 105, 29 P.(2d) 882, 31 P.(2d) 826. The evidence, though not of the strongest character, was sufficient to show that Elliott was acting as an officer of the bank at the time of the service of said writ of attachment. In fact, any other inference from the facts proven would not be justified. We think further that the defendant bank is in no position to question the service of said writ. Its predecessor, the Bank of America of California, had not only designated Elliott as the proper person upon whom writs of attachment should be served, but it directed process servers to Mr. Elliott as such person or officer. The only rea-

sonable inference to be derived from the evidence is that in the present instance the deputy sheriff who served the writ upon Mr. Elliott was directed by an officer of the bank to serve the same on Mr. Elliott. That the service upon Mr. Elliott was recognized as a valid and legal service upon the bank is clearly shown by the evidence. Not only was a notation made in the account of the Republic Securities Corporation that the account was attached, but the executive head of this branch of the bank took up the matter of the attachment with the president of the corporation and informed him of the fact that the corporation's account had been attached. "Every object of the service is obtained when the agent served is of sufficient character and rank to make it reasonably certain that the defendant will be apprised of the service made." *Roehl v. Texas Co.*, 107 Cal.App. 691, 704, 291 P. 255; *Milbank v. Standard Motor Const. Co.*, 132 Cal.App. 67, 71, 22 P.(2d) 271. As the evidence shows that the bank designated Mr. Elliott as the person upon whom writs of the character here involved were to be served, that it advised process servers of that rule, and in this very instance apparently directed the writ to be served upon its assistant cashier, that it thereafter recognized said service by making a notation upon the Republic Securities Corporation's account, advised the president of that corporation of said attachment, and took steps to protect itself from any liability by reason of said service, the defendant is now in no position to question said service and is estopped from denying the validity or binding effect thereof. *Roehl v. Texas Co.* 107 Cal.App. 691, 707, 291 P. 255; *Carpy v. Dowdell*, 115 Cal. 677, 682, 47 P. 695; *Nicholson v. Randall Banking Co.*, 130 Cal. 533, 538, 539, 62 P. 930.

[5-7] We will now consider the defendant's contention that it had the right to set off as against said deposit the liability of the Republic Securities Corporation on said \$50,000 note. The note was past due at the date of the levy, and, as we have seen, it was secured by pledge of certain personal property and three deeds to real property. As these deeds were given as security for the payment of an indebtedness, they might be construed as mortgages. In the case of *McKean v. German-American Savings Bank*, 118 Cal. 334, 50 P. 656, it was held that, in an action to recover

a bank deposit, the bank is not entitled under section 438 of the Code of Civil Procedure to set off the amount due on a promissory note secured by a mortgage. Since the date of said note and in the year 1927 (St. 1927, p. 1620), section 438 of the Code of Civil Procedure has been amended, and defendant contends that in its amended form said section of the Code permits a bank to set off as against a deposit in said bank the indebtedness of the depositor to the bank, even if the latter indebtedness is secured by a mortgage on real property. We do not consider it necessary to decide this question, as we are satisfied that, if the bank had such right of set-off, it waived said right by agreement with said depositor prior to the levy of said attachment. Prior to the deposit in said bank of any of the funds which went to make up said sum of \$8,086.16 on deposit at the date of said levy, Mr. Brown, the vice president and manager of the bank where said deposit was carried, expressly agreed with the president of the Republic Securities Corporation that no part of said funds if deposited in said bank, would be applied in payment of said \$50,000 note, nor would the bank set off the amount due on said note against the funds deposited with it by said corporation. In pursuance of this agreement, said funds were deposited in said bank and were so held by said bank at the date of said levy. Such an agreement is binding upon the bank. *American Surety Co. v. Bank of Italy*, 63 Cal.App. 149, 218 P. 466; *Lucey Mfg. Corporation v. Morlan* (C.C.A.) 14 F.(2d) 920, 923; *Ballard v. Home Nat. Bank*, 91 Kan. 91, 136 P. 935, L.R.A.1916C, 161; *Drumm-Standish, etc., Co. v. Farmers' State Bank*, 132 Kan. 736, 297 P. 725; *Joy v. Grasse*, 173 Minn. 289, 217 N.W. 365, and *Gillen v. Wakefield State Bank*, 246 Mich. 158, 224 N.W. 761, 765. As the bank, under its agreement with the depositor, had no right to apply the amount of the deposit to the payment of said note, the deposit at the time of the levy constituted simply a debt due from the bank to the depositor, and as such was subject to attachment by suit of a creditor. An attaching creditor acquires the right, and may be said to step into the shoes, of the attached debtor, and, in the case of credits or personal property belonging to the debtor and in the possession or control of a third person, the attaching creditor by the levy of the writ of attachment upon the said third person acquires whatever right the debtor had in

said money or personal property at the time of said levy. *Marble Co. v. Merchants' National Bank*, 15 Cal.App. 347, 115 P. 59; *Carter v. L. A. National Bank*, 116 Cal. 370, 372, 48 P. 332; section 544, Code Civ.Proc. As between the bank and its depositor, the deposit was simply a debt due from the bank to the depositor, or, in other words, a credit due the depositor. The bank waived any right it may have had to apply the amount of this deposit to the indebtedness of the depositor upon its promissory note held by the bank. The levy of the attachment upon the bank rendered the latter liable to the attaching creditor the plaintiff herein, for the amount of the deposit, "until the attachment be discharged or any judgment recovered by him be satisfied." Section 544, Code Civ.Proc. As the attachment was never discharged and plaintiff's judgment against the original debtor is wholly unsatisfied, this liability of the bank, the defendant herein, to the plaintiff became absolute to the full amount of the funds on deposit in the bank at the time of the levy.

The further contention is made that, even conceding that the bank had a right of set-off, it never exercised such right. In view of our holding that the bank had waived any right of set-off it may have had, it is not necessary for us to pass upon this contention, and we expressly refrain from expressing any opinion thereon.

The same observation may be made regarding appellant's third contention, which is that the deeds held by the bank as security for the payment of the \$50,000 note were not in legal effect mortgages. Whether the bank's claim against the depositor was secured by a mortgage upon real property would not in any way affect or change the legal aspect of its agreement not to exercise its right of set-off entered into with the depositor before any of the funds were deposited with said bank. We have held that such an agreement was made, and that the bank was concluded thereby from exercising any right to set off its indebtedness against said deposit.

Besides the questions already passed upon, there are two others, perhaps of minor importance, but, as they are discussed in the briefs and oral argument, they should have our attention.

[8] The first of these questions relates to the real ownership of said sum of \$8,086.-

16 deposited with the bank at the date of the levy. It is claimed on the part of the defendant that the actual ownership of this fund was in the Sparr Realty Corporation and that the Republic Securities Corporation was simply the fiscal agent of the Sparr corporation; that the funds in said deposit were actually the property of the latter company, and that, as the attachment reached only property in the possession or control of the bank belonging to the Republic Securities Corporation, no lien attached to said deposit, as the funds thereof were the property of a third person, the Sparr Realty Corporation. The evidence in the case shows that there was some business connection between these two companies, but fails to go to the extent claimed for it by the defendant. The Sparr Realty Corporation made no claim to said deposit either by serving a third party claim or by petition in intervention herein or, so far as the record shows, in any other manner. It appears to be content to let the parties hereto settle between themselves the true ownership of said fund, without either objection or interference on its part. Furthermore, as we have seen, this fund as originally deposited in said bank was paid out on the checks of the Republic Securities Corporation, and no attempt was made to show that any part of it was expended for the benefit of the Sparr Realty Corporation. In these circumstances we are not disposed to give serious consideration to the contention of the defendant that those funds belonged to the Sparr Realty Corporation at the time of the levy.

[9, 10] The second of these minor questions involves the failure of the plaintiff to have execution levied upon the bank on its judgment against the Republic Securities Corporation. As we have seen, an execution was issued on said judgment, but it is conceded that it was not levied or served on the bank. The liability of the bank under said levy is not affected by the subsequent failure to serve upon it a writ of execution. Section 544, Code of Civil Procedure, fixes the liability of the bank under the facts here shown, and makes it liable to the plaintiff for the amount of credits, debits, or property in its possession at the time of the levy until the judgment recovered by the plaintiff in the attachment action is satisfied. However, this liability of the bank to the plaintiff was

contingent upon the latter recovering judgment in the attachment suit. Upon the recovery of such judgment, this liability became absolute, and the plaintiff was then entitled to recover the amount sequestered by the levy of the attachment. The plaintiff would also be entitled to recover interest upon the amount due from the date of its judgment in the attachment suit, but not before that date. As the trial court allowed interest from May 10, 1930, the date of the levy of the attachment, and not from the date of judgment, which was July 14, 1930, the judgment should be modified to correct this error.

The judgment is accordingly modified by striking therefrom the provision awarding plaintiff interest from May 10, 1930, and by substituting the date July 14, 1930, and as so modified the judgment is affirmed; respondent to recover costs on appeal.

We concur: WASTE, C. J.; THOMPSON, J.; SHENK, J.



4 Cal.2d 637

DABNEY-JOHNSTON OIL CORPORATION
v. WALDEN et al.
L. A. 13559.

Supreme Court of California.
Nov. 29, 1935.

Rehearing Denied Dec. 26, 1935.

1. Corporations ⌘428(6)

Notice to person who was sole stockholder, president, and manager of one oil company, and who was majority stockholder, president, and manager of another oil company, constituted notice to such oil companies.

2. Mines and minerals ⌘79(1)

Reformation of assignments of oil royalties to more completely express intention of parties to create permanent oil interests which survived existing oil and gas lease held binding on purchaser which took land with notice of intention of parties to create such permanent oil interests.

3. Mines and minerals ⌘58

Landowner has exclusive right, which he can transfer, to drill for and produce oil.

4. Mines and minerals ⇨58

Grant of right to drill for and produce oil is "profit à prendre," or right to remove part of substance of land, which is an estate in realty in nature of incorporeal hereditament, whether unlimited as to duration or limited to term of years.

[Ed. Note.—For other definitions of "Profit à Prendre," see Words & Phrases.]

5. Mines and minerals ⇨73

"Profit à prendre" of oil and gas lessee under lease for years is a "chattel real," which is estate in realty, although it is not realty, and "profit à prendre" of oil and gas lessee under lease of unlimited duration is freehold interest, estate in fee, or realty.

[Ed. Note.—For other definitions of "Chattels Real," see Words & Phrases.]

6. Mines and minerals ⇨55(1)

Interest in oil rights which are estates in realty can be granted apart from grant of surface title, notwithstanding rejection of oil and gas in place doctrine.

7. Mines and minerals ⇨55(4)

Grantee of profit à prendre in oil has right to such possession of surface as is necessary and convenient for exercise of profit, but has no general estate in surface.

8. Mines and minerals ⇨55(2)

Right of entry to drill for and produce oil is incident to deed of mineral fee, and need not be expressed therein, since one who grants thing is presumed to grant also whatever is essential to its use.

9. Mines and minerals ⇨55(2)

Instruments dealing with oil and gas rights must be construed as a whole in light of circumstances under which they were executed and expressed intent of parties at that time.

10. Mines and minerals ⇨79(1)

Royalty return which oil and gas lessee renders to his lessor is "rent," and right to receive future rents or royalties is an "interest in land" in nature of incorporeal hereditament which can be subject of grant (Civ.Code, § 802, subd. 4).

[Ed. Note.—For other definitions of "Interest (In Property)" and "Rent," see Words & Phrases.]

11. Mines and minerals ⇨74

Oil and gas lessor has reversionary interest in right to drill for and produce oil dependent upon termination of existing leasehold, which right is subject of grant (Civ. Code, § 802, subd. 4).

12. Mines and minerals ⇨79(1)

Assignment of percentage of oil, gas, and other hydrocarbon substances produced and saved from described lands so long as they should be used for such purposes and until such lands should be abandoned as a producer of such substances held not to limit assignee's rights to fractional interests in rental or royalties to accrue under the existing lease or subsequent leases, but to manifest intent to create permanent oil rights.

13. Mines and minerals ⇨55(2)

Language of grant of oil and gas rights is to be construed most strongly against grantor.

14. Mines and minerals ⇨79(1)

Intention to limit assignment of oil royalties to particular lease must be clearly and unequivocally indicated.

15. Mines and minerals ⇨79(1)

Term "oil royalty" is applied, generally to assignments of undivided interests in oil to be produced or in the proceeds from the sale thereof without regard to whether oil is produced under lease.

[Ed. Note.—For other definitions of "Royalty," see Words & Phrases.]

16. Tenancy in common ⇨3

Where assignments conveyed percentage of royalty reserved to lessor under oil and gas lease, assignees became tenants in common with owner in the oil rights.

17. Tenancy in common ⇨26

"Tenancy in common" being characterized by unity of possession, production of oil by cotenant is not waste, since single cotenant cannot prevent utilization of mineral estate by other cotenants.

[Ed. Note.—For other definitions of "Tenancy in Common," see Words & Phrases.]

18. Tenancy in common ⇨37

Cotenant who enters upon land and produces oil must account to the other cotenants for their percentages of oil produced, subject to proportionate deduction for drilling and operating expenses, except where cotenancy interests are sold with the understanding that they shall not be subject to such expenses.

19. Tenancy in common ⇨32

Cotenants purchasing oil lands with actual or constructive notice of agreement freeing other cotenants of expense of producing oil are bound by such agreement.

20. Tenancy in common ⇨32

Cotenants of oil rights in land held entitled to their respective percentages in oil produced by another cotenant without propor-

tionate deduction of expense of producing oil, where interests of cotenants originated under royalty assignment which did not provide for deduction of expense incurred in production of oil under existing lease, and made no provision for deduction of such expense upon termination of such lease, and most of cotenants owned interests of 1 per cent. or less.

In Bank.

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

Action to quiet title by the Dabney-Johnston Oil Corporation against E. A. Walden and others, in which the defendants filed cross-complaint. From a judgment for the defendants, plaintiff appeals.

Affirmed.

Lawler & Degnan, Robert M. Pease, and Roy P. Dolley, all of Los Angeles, for appellant.

R. F. Bailey, of Los Angeles, and Eugene C. Campbell, A. E. Garten, G. M. Spicer, and W. O. Wanzer, all of Long Beach (Meserve, Mumper, Hughes & Robertson and Hewlings Mumper, all of Los Angeles, of counsel), for respondents.

SEAWELL, Justice.

Plaintiff Dabney-Johnston Oil Corporation brought this action to quiet title to real property in the county of Los Angeles. Plaintiff's predecessor in the ownership of said land made assignments of oil royalties under which defendants claim a total of 26½ per cent. of all oil, gas, and other hydrocarbon substances produced from said real property by plaintiff. To quiet its title against these claims plaintiff brought the action herein. The well on the property commenced production after institution of the action herein. Pursuant to stipulation of the parties the court took an accounting of the production and proceeds from the sale thereof. From a judgment for defendants, plaintiff prosecutes this appeal.

The assignments under which defendants claim were executed in December, 1922, and in 1923 by Burton Benwell, then owner of the fee in the land. At the time of execution of said assignments the land was subject to an oil and gas lease providing for payment of royalty to the lessor. The lessees assigned said lease to one Noonan, who commenced drilling a well. In December, 1923, the derrick and equipment were destroyed by fire, and the lessee

abandoned the leasehold. Thereafter, no operations for the production of oil took place on said property until about July 7, 1928, when plaintiff commenced drilling a well. This well commenced production on December 27, 1928, and at the time of the action herein was producing oil in paying quantities. Benwell and wife, on June 23, 1927, by grant deed transferred the real property to Cecil S. Blinn and Ethel G. Blinn. Plaintiff Dabney-Johnston Oil Corporation has succeeded to the title of the Blinns through mesne conveyances. It contends that the assignments of oil royalties made by Benwell, under which defendants claim, transferred only interests in oil royalty due from the lessee under the lease which existed when said assignments were made, and that with the abandonment and forfeiture of said lease, all rights of defendants in oil to be produced from the land terminated. Plaintiff further contends that if the rights of the assignees survived the termination of said lease, in any event the court below committed error in refusing to charge the interests of said assignees with a proportion of the expenses incurred by plaintiff in developing the well and producing oil.

This appeal involves a construction of the royalty assignments under which defendants claim, as reformed by the court to conform to the mutual understanding of assignors and assignees. In making the assignments under which defendants claim, four different forms were used, designated in the briefs as the Donovan form, the Walden form, the Heiderman form, and the Hite form. The Donovan form was used in making a 10 per cent. assignment to J. B. Donovan, and a 1 per cent. assignment to J. K. Thompson. Said form is as follows:

"Assignment

"Whereas, on the 14th day of November, 1922, Burton Benwell, leased to H. H. Hitchcock and W. T. Casteel the following described lands:

"Lots Twelve (12), Thirteen (13), Fourteen (14) and Seventeen (17) of Atlantic Boulevard Tract No. 3, in the County of Los Angeles, State of California, as per map recorded in Book 11, page 92 of Maps, Records of Los Angeles County, California.

"And Whereas, said lease is what is commonly known and understood to be an Oil and Gas Lease and

"Whereas, said lease provides that the lessees shall pay, or cause to be paid, to the lessor, as rental or royalty for the use of said lands, thirty per cent. (30%) of all oil, gas or other hydrocarbon substances of value discovered, produced and saved by the lessees from said described lands; and

"Whereas, according to the terms of said lease the said lessor is entitled to take and receive thirty per cent. (30%) of all oil, gas and other hydrocarbon substances of value discovered, produced and saved by the lessees from said premises; and

"Whereas, the said Burton Benwell desires to sell, transfer, set over and convey unto J. B. Donovan ten per cent. (10%) of all oil, gas and other hydrocarbon substances produced and saved from said described lands;

"Now, Therefore, Burton Benwell, for and in consideration of the sum of Ten Dollars (\$10.00) lawful money of the United States of America, to him in hand paid by J. B. Donovan, the receipt whereof is hereby acknowledged, does hereby sell, assign, transfer, set over and convey unto the said J. B. Donovan ten per cent. (10%) of all oil, gas and other hydrocarbon substances which may hereafter be produced and saved from said described real property.

"To Have and to Hold the same unto the said J. B. Donovan, his heirs and assigns.

"That the said J. B. Donovan, his beneficiaries, heirs, executors, administrators and assigns shall be, and are hereby entitled to take and receive said ten per cent. (10%) of all oil, gas and other hydrocarbon substances which may be produced and saved from said described lands during and for so long as said lands shall be used for the purpose of developing and producing oil, gas and other hydrocarbon substances, and until said land shall be abandoned as a producer of oil, gas and other hydrocarbon substances.

"That this assignment shall be and constitute sufficient authority unto the purchaser or purchasers, of the oil, gas and other hydrocarbon substances produced and saved from said premises to pay direct to the said J. B. Donovan, or to his beneficiaries, heirs, executors, administrators or assigns, the money proceeds derived from the sale of said ten per cent. (10%) of all oil, gas and other hydrocar-

bon substances produced and saved from said described premises."

The Donovan and Thompson assignments refer to a lease dated November 14, 1922, reserving a 30 per cent. royalty. This lease was canceled and a lease dated January 19, 1923, and providing for a 27½ per cent. royalty was substituted therefor. The Walden, Heiderman, and Hite forms refer to this later lease.

The Walden form is as follows:

"Assignment of Land Owners Royalty Interest

"Whereas, Burton Benwell and Maude F. Benwell, being owners of that certain parcel, lot or tract of land particularly described as follows, to-wit:

"Lots Twelve (12), Thirteen (13), Fourteen (14) and Seventeen (17) of the Atlantic Boulevard Tract #3, partly within and partly without the City of Long Beach, County of Los Angeles, State of California, as per map recorded in Book 11, Page 92 of Maps, in the office of the Recorder of said County.

"Whereas, said Burton Benwell and Maude F. Benwell reserved a certain twenty-seven and one-half per cent. (27½ %) royalty in a certain lease dated January 9th, 1923, from Burton Benwell and Maude F. Benwell to W. T. Casteel and H. H. Hitchcock on the above described real estate, subject to the terms and conditions provided for in said lease, recorded January 22nd, 1923, in Book 1750, Page 220 of Official Records.

"Whereas, the said Burton Benwell and Maude F. Benwell desire to sell a portion of the said 27½ % land owners royalty as reserved in said lease;

"Now, Therefore, in consideration of the sum of \$10.00 to them in hand paid, receipt of which is hereby acknowledged, the said Burton Benwell and Maude F. Benwell do hereby sell, assign and set over to E. A. Walden whose address is 35 American Avenue Street, Long Beach City, California State, a two per cent. in said land owners royalty of all gas, oil and other hydrocarbon substances to be produced and saved and sold from said described land, together with all of the rights and privileges granted to said Burton Benwell and Maude F. Benwell, in that certain lease above set out.

"Acceptance

"I accept the above assignment; and it is further understood, and I, the purchaser

of two per cent. land owners royalty in the said described real estate, do hereby appoint L. W. Klinker, of the Guaranty Title Company of Long Beach, as Trustee, and Escrow Officer for me, to receive and disburse any and all oil or gas profits or dividends to be derived from that certain land above described and hereby instruct him to sign any sale orders or other papers necessary that may be required when oil is being sold from the above premises."

The Heiderman form, used only for the assignment of a 1 per cent. interest to Heiderman, differs from the Walden form only in that the acceptance, as quoted above, is not annexed to the Heiderman form. The Hite form, used in five assignments transferring a total of $2\frac{1}{2}$ per cent., is the same as the Walden form, except that the Hite form contains the following recital: "Whereas, the said Burton Benwell and Maude F. Benwell desire to sell a portion of said $27\frac{1}{2}$ per cent. land owners royalty as reserved in said lease, *or any subsequent lease.*" (Italics supplied.) The words, "or any subsequent lease," are omitted in the corresponding recital in the Walden form.

Some of the defendants herein are not original assignees of Benwell, but purchasers from such assignees. The subsequent transfers did not in all cases follow the form of the original assignments. But the court below found, in accordance with the stipulation of the parties, that as to all reassignments it was the intent of the assignors to transfer whatever interest passed to them under the assignments from the Benwells. The plaintiff, named as defendants all original transferees of interests from Benwell, as well as the present holders of such interests, and such defendants either defaulted, filed disclaimers, or answered in cases where they had retained a portion of the interest assigned to them by the Benwells.

We have hitherto referred to the fact that the court below by its decree reformed the royalty assignments from Benwell and wife to conform to the understanding of assignors and assignees. The parties to the action herein entered into a stipulation of facts concerning this intent, and further stipulated that the defendants should be deemed to have filed a cross-complaint alleging as grounds for reformation the facts as to mutual intent set forth in the stipulation of facts. By said stipulation of facts it was pro-

vided that it was the intent of the Benwells, assignors, to transfer "the fractional part or percentage shown in each such instrument of all oil, gas and other hydrocarbon substances *in place* and/or existing *within or beneath* the surface of said land, as a *permanent fractional interest* in said land," and to transfer "the fractional part or percentage shown in each of said instruments of all oil, gas and other hydrocarbon substances which thereafter might be produced, saved and sold from said land"; that it was not the intention of the assignors nor assignees to restrict the interests to the taking of a percentage of oil and other substances produced under either of the leases to Hitchcock and Casteel, but said assignments were intended by all parties to be "a grant and conveyance of an interest in real property, and a right to and interest in said percentage of oil, which right, interest and property was unconditional, permanent and independent of all contingencies."

The court below made findings and conclusions of law in accord with this stipulation, and directed reformation of the assignments by addition of a clause following the language of said stipulation. The stipulation did not cover the question of whether plaintiff Dabney-Johnston Oil Corporation had notice of the intent of the parties to the Benwell assignments to create permanent oil interests. Unless plaintiff had such notice or was charged with notice, a reformation could not be had as against it. There is an abundance of evidence, both oral and documentary, which supports the court's finding that plaintiff was not a bona fide purchaser.

[1] Benwell and wife transferred the property to Cecil S. Blinn and wife by grant deed on June 23, 1927. On November 19, 1927, the Blinns executed an oil and gas lease to Joseph B. Dabney as lessee. No operations were had under this lease, but on January 3, 1928, Blinn and wife executed a quitclaim deed of the property to South Basin Oil Company. Joseph B. Dabney was the sole stockholder, president, and manager of the South Basin Oil Company. By deed dated February 3, 1928, and recorded March 5, 1928, the property was transferred by the South Basin Oil Company to Joseph B. Dabney and wife, who by deed dated January 1, 1928, and recorded April 17, 1928, transferred it to plaintiff herein, Dabney-

Johnston Oil Corporation. Joseph B. Dabney is the majority stockholder, the president, and the manager of plaintiff corporation. Notice to him was notice to the South Basin Oil Company and to plaintiff Dabney-Johnston Oil Corporation.

The royalty assignments made by Benwell were all recorded. Blinn, who had purchased the property three and a half years after abandonment of the Hitchcock-Casteel lease, had actual knowledge at all times of the situation pertaining to Benwell's assignments. He knew of claims being made by the assignees that their rights survived the termination of the lease, and after his purchase he had a conference with assignee Walden, acting for the other assignees, but they were unable to reach an agreement for operation of the property. Blinn testified that before the property was leased or granted to Dabney or the South Basin Oil Company, he gave Mr. Dabney full information as to the claims being made by the assignees. He also gave this information to Mr. Pease, who acted as Mr. Dabney's attorney in these transactions. Mr. Pease wrote Blinn a letter on November 17, 1927, in which he asked him to bring in a title report which Blinn had procured, a form of assignment used by Benwell, and to inform him as to the name of the man "who had data as to the percentages." This reference is to Mr. Walden, whom Blinn brought to see Pease and Dabney before the transfer of the property to the South Basin Oil Company. The title certificate or report set forth the royalty assignments. It was stipulated that at or before the execution of the deed to South Basin Oil Company, Joseph B. Dabney had before him and examined and knew the contents of said title report.

The terms of a contract of November 19, 1927, which was entered into contemporaneously with the lease from the Blinns to Dabney, are significant. By said contract Dabney agreed to clear the title of said royalty interests; Blinn to co-operate but to be at no expense. If title had not been cleared in ninety days, Blinn was to have the right to require Dabney to assign to parties holding said interests overriding royalties under the lease of November 19, 1927, in consideration for the cancellation of their interests under the Benwell assignments, provided that no more than 6% per cent. overriding royalties should be used to procure such cancellation. Blinn testified that the royal-

ty under the lease from him to Dabney was fixed at the low figure of 10 per cent. because of these outstanding interests. Ten per cent., plus 6% per cent., which the parties considered would be sufficient to secure a surrender of the outstanding landowners' royalties, is 16% per cent., at which figure oil lands are frequently leased. When Dabney determined to purchase the land in the name of the South Basin Oil Company, the Benwell assignments were taken into consideration in fixing the purchase price. The contract of November 19, 1927, provided that it should not be recorded, and the lease of the same date was not recorded, but only a notice of said lease was placed of record. The contract also referred to an action brought by Blinn on November 4, 1927, to quiet his title against claims of the Benwell assignees to permanent oil rights. Because of the claims of these assignees, Blinn insisted that the lease contain this provision: "Lessors do not warrant title to said real property in any way."

[2] The Dabney-Johnston Oil Corporation did not commence to drill a well until about July, 1928. In May, 1928, it had written to the royalty assignees that on the advice of its counsel it considered its title free of their interests by reason of the termination of the Hitchcock lease and the abandonment of the well drilled under said lease. The conclusion is inescapable that Dabney and the corporations which he represented acquired their interests with full knowledge that the royalty assignees claimed permanent interests in all oil and gas produced from the land. In this situation the reformation of said assignments to more completely express the intent of the parties thereto is binding on plaintiff Dabney-Johnston Oil Corporation.

As noted above, the instruments as reformed convey the stated percentage of oil, gas, and other hydrocarbon substances in place, and existing within and beneath the lands described, as a permanent fractional interest in the land. Plaintiff contends that by reason of the fact that we have rejected the oil and gas in place theory as applied to oil rights, the instruments as reformed will not support the judgment for defendants. Our recent decision in *Callahan v. Martin*, 43 P.(2d) 788, 791, contains a discussion of this theory. The use of "oil and gas in place" terminology, which describes an unlimited

grant of oil rights as a present transfer of a fee in definite corporeal real property is anomalous. It fails to take into account the fugacious and vagrant nature of oil and other hydrocarbon substances. Oil actually brought to the surface to which the grantee's right attaches may be not only the oil and gas in place beneath the surface of the assignor's land at the time of the assignment, but also oil drawn from beneath the surface of other lands. In our decision in *Callahan v. Martin*, we reject the oil and gas in place doctrine, as have many other courts, including the Supreme Court of the United States, *Ohio Oil Co. v. Indiana*, 177 U.S. 190, 20 S.Ct. 576, 44 L.Ed. 729, but we find that nevertheless oil rights may be recognized and transferred as interests in real property on other theories which give due recognition to the fugacious character of the substances involved.

[3-7] The owner of land has the exclusive right on his land to drill for and produce oil. This right inhering in the owner by virtue of his title to the land is a valuable right which he may transfer. The right when granted is a profit à prendre, a right to remove a part of the substance of the land. A profit à prendre is an interest in real property in the nature of an incorporeal hereditament. *Callahan v. Martin* (Cal.Sup.) 43 P.(2d) 788. Under the usual oil and gas lease the owner confers on the lessee for the term of the lease an exclusive right of profit to drill for and produce oil; the lessee usually returning to the lessor for the privilege granted a rent or royalty measured by a fraction of the oil produced. Or the owner may grant rights which make the grantees cotenants with him and with each other in the right to drill for and produce oil and other hydrocarbon substances. The profit à prendre, whether it is unlimited as to duration or limited to a term of years, is an estate in real property. If it is for a term of years, it is a chattel real, which is nevertheless an estate in real property, although not real property, or real estate. *Callahan v. Martin*, supra, 43 P.(2d) 788, 793. Where it is unlimited in duration, it is a freehold interest, an estate in fee, and real property or real estate. Thus, although the oil and gas in place doctrine is rejected, interests in oil rights which are estates in real property may be granted separate and apart from a grant of surface title. The grantee of the profit has a right to such pos-

session of the surface as is necessary and convenient for the exercise of the profit, but he has no general estate in the surface.

In the instant case, the instruments as reformed to accord with the intention of the parties' purport to grant percentages in oil and gas in place and existing within and beneath the land. Whether an assignment of the right to drill for and produce oil is characterized as a grant of oil and gas in place, or as a grant of a profit à prendre, where it is unlimited in duration it has been described by judges and by text-writers as a deed of the mineral fee. Although the use of different terms of description may give rise to different legal incidents, as to many particulars the legal consequences are the same, whichever theory is adopted in a particular jurisdiction. Where it is plain, as it is from the terms of the instruments as reformed in the case herein, that the instruments were intended as deeds to the mineral fee, they should not be held to be inoperative because oil and gas in place terminology has been used in a jurisdiction which rejects that analysis of rights in oil and gas. The instruments as reformed also provide that they are intended as a conveyance of an interest in real property, "which right, interest and property is unconditioned, permanent and independent of all contingencies."

[8] Where it is apparent from the instrument as a whole that a deed of the mineral fee is intended, which in this state is a right of profit à prendre, it is not essential that it contain express provision for a right of entry to drill for and produce oil. One who grants a thing is presumed to grant also whatever is essential to its use. The right of entry is incident to the grant of the mineral fee, and exists without express mention in like manner as certain rights follow without express enumeration from an ordinary deed absolute of real property. *Callahan v. Martin* (Cal.Sup.) 43 P.(2d) 788. In the cited case, we reject the distinction made by the Oklahoma court in *Morgan v. McGee*, 117 Okl. 212, 245 P. 888, that upon a conveyance of land, reserving mineral rights, a right of entry will be implied in favor of the grantor, but upon a transfer of mineral rights by a grantor who reserves the surface estate, a right of entry will not be implied in favor of his grantee.

[9] The failure of those who are dealing in oil rights to precisely describe the nature of the interests granted is due in part to the recent development of the oil industry. The law pertaining thereto is still in a formative stage. An analysis of the nature of oil interests which may be created involves an application of the common-law rules which crystallized before there were extensive dealings in subsurface fugacious substances. In the several jurisdictions in this country there is a contrariety of description as to the nature of these interests, and in a single jurisdiction, as in this state, there are conflicting expressions as to the description of oil interests. See *Callahan v. Martin* (Cal.Sup.) 43 P.(2d) 788. It is not surprising, in view of the lack of a definite terminology descriptive of these interests, that those who are dealing in oil interests have difficulty in describing the interest transferred, and that ambiguous and uncertain instruments are presented to the courts for analysis. Such instruments must be construed as a whole in the light of the circumstances under which they were executed and the expressed intent of the parties at that time. In the instant case the court reformed the assignments by adding a clause to express more clearly the intent of the assignors and assignees, as to which there was a stipulation, to transfer an interest in real property, which should be unconditional, permanent, and independent of all contingencies.

[10, 11] At the time of execution of the several assignments, the land was subject to an oil and gas lease, which conferred on the lessees the exclusive right to drill for oil during the term of the lease, returning to the lessors a stated percentage of the oil produced. The royalty return which the lessee renders to his lessor is a rent. The right to receive future rents and oil royalties is an incorporeal hereditament, which is an interest in land, and may be the subject of a grant. *Callahan v. Martin* (Cal.Sup.) 43 P.(2d) 788; section 802, subd. 4, Civ.Code. In addition to the right to receive rent or royalty, the lessor has a reversionary interest in the right to drill for and produce oil, dependent upon the termination of the existing leasehold, which right is the subject of grant. It is appellant's contention that the instruments as written present a clear and unambiguous assignment limited to fractional interests in rental or royalties to

accrue under the existing lease, or in the case of the assignments which follow the Hite form, limited to royalties to accrue under the existing lease or under subsequent leases, and that as appellant is not a lessee, but an owner of the land, defendants have no rights in oil produced by it as such owner.

[12] The Donovan form is clearly not subject to a construction limiting the assignee's rights to oil produced under the lease in existence at the time of the assignment. It provided as follows: "That the said J. B. Donovan, his beneficiaries, heirs, executors, administrators and assigns shall be, and are hereby entitled to take and receive said ten per cent. (10%) of all oil, gas and other hydrocarbon substances which may be produced and saved from said described lands *during and for so long as said lands shall be used for the purpose of developing and producing oil*, gas and other hydrocarbon substances, and until said land shall be abandoned as a producer of oil, gas and other hydrocarbon substances." The land is now being used "for the purpose of developing and producing" oil and gas. The reference in this assignment to the oil lease does not limit the grant to oil royalties produced under said lease, but makes the interest granted to Donovan subject to the lease, and indicates the intent of the assignor to transfer an interest in royalties under said lease, as well as an interest in the reversionary rights dependent on the termination of said lease. As noted above, the Walden and Heiderman forms are identical, except that the Heiderman form omits an acceptance of the assignment by the assignee. The granting clause in these assignments, and also in the Hite form, is as follows: "Now, therefore, in consideration of the sum of \$10.00 to them in hand paid, receipt of which is hereby acknowledged, the said Burton Benwell and Maude F. Benwell do hereby sell, assign and set over to ——— whose address is ———, a ——— per cent. in said land owners royalty of all gas, oil and other hydrocarbon substances to be produced and saved and sold from said described land, together with all of the rights and privileges granted to said Burton Benwell and Maude F. Benwell in that certain lease above set out."

[13] The Walden and Heiderman forms set forth the existence of the lease and contain this recital: "Whereas the said

Burton Benwell and Maude F. Benwell desire to sell a portion of said 27½% landowners royalty as reserved in said lease." The Hite form differs from the Walden and Heiderman forms in that the recital is as follows: "Whereas the said Burton Benwell and Maude F. Benwell desire to sell a portion of said 27½% land owners royalty as reserved in said lease or any subsequent lease." (Italics supplied.) This recital is a clear statement of intent that the rights of assignees holding under the Hite form should survive the existing lease. As to the assignees holding under the Walden and Heiderman forms, as well as those holding under the Donovan and Hite forms, the court, in decreeing that the instruments be reformed by adding a clause thereto, found, in accordance with the stipulation of the parties, that it was the intent of assignors and assignees to create permanent oil rights which were not dependent on the continuance of the existing lease or the making of a new lease, but were unconditional, permanent, and independent of all contingencies. In making this finding the court considered not only the stipulation, but the abundance of evidence offered to show that the term "landowner's royalty," unless clearly and unequivocally limited to royalty payable under a particular lease, was generally regarded in Southern California as an unlimited, permanent interest, in contrast with interests created by lessees, which by necessity must fall with the lease. The Walden, Heiderman, and Hite forms are all entitled "Assignments of Land; Owners Royalty Interest." The assignee's acceptance attached to the Walden and Hite forms describes the assignee as "a purchaser of — per cent. landowners royalty in said described real estate," without limiting it to oil produced under the existing lease.

[14, 15] Language of a grant is to be construed most strongly against the grantor. An assignment of oil royalty limited to a particular lease is precarious. Not only may the assignee's rights be terminated where the lessee wrongfully abandons the lease, but oil leases frequently contain rather broad provisions giving the lessee the right to terminate lawfully in specified contingencies. An intent to thus limit the rights of the assignee should be clearly and unequivocally indicated. In the instant case the presence of the term "landowner's royalty" in the title and body

of the instruments, the form of the acceptance, and the circumstances that the granting clause does not expressly limit the interest conveyed to the duration of the existing lease, may be sufficient to create an ambiguity as to whether it was intended to limit the interest to the duration of the lease which could be resolved by parol evidence of the circumstances attending the execution of the instruments without reference to principles of reformation of contracts. However this may be, the court decreed reformation in the case herein, upon the stipulation of the parties that defendants should be deemed to have filed a cross-complaint setting forth as grounds for reformation the stipulated facts as to mutual intent of the parties to the instruments to create a permanent interest.

[15] Plaintiff contends that even though the assignments be construed as giving to the assignees rights which survive the existing lease, nevertheless it is of the essential nature of an assignment of oil royalty that it creates rights only in oil produced under lease, an assignment of oil royalty being a transfer of an interest in the rent or royalty returned to the lessor in consideration for privileges granted the lessee. Thus, plaintiff would deprive the Benwell assignees of rights in oil produced by it, since it is not operating under any lease, but has succeeded to the title in fee of Benwell in surface rights and unconveyed oil rights. The term "oil royalty" has this connotation. Callahan v. Martin (Cal.Sup.) 43 P.(2d) 788; Standard Oil Co. of California v. John P. Mills Organization (Cal.Sup.) 43 P.(2d) 797. But it has a broader meaning, as appears from testimony in the case herein, and is applied generally to assignments of undivided interests in oil to be produced, or in the proceeds from the sale thereof, without regard to whether the oil is produced under lease. There is evidence that J. B. Dabney, president of plaintiff Dabney-Johnston Oil Corporation, himself had caused to be made on his behalf a number of assignments of percentage interests in "all the oil, gas and/or other hydrocarbon substances produced, saved and sold from, or contained in or under" described real property in Huntington Beach. These assignments were entitled "Landowner's Royalty Assignment," and made no reference to any lease. The rights of the assignees clearly were not limited to oil to be produced under lease.

[16] We hold that upon the termination of the Hitchcock-Casteel lease the assignees under the royalty assignments became tenants in common with Benwell in oil rights in the land. Plaintiff Dabney-Johnston Oil Corporation has succeeded to the rights of Benwell. It contends that even though it is a cotenant with the Benwell assignees, as such cotenant it had coequal rights in the mineral estate, and is entitled to all oil produced through its own efforts, and that in any event, if it must account to defendants, the sums payable are subject to a proportionate reduction on account of expenses incurred by plaintiff in drilling the well and producing oil. The court below held that defendants' interests were in the gross amount of oil and other substances produced, and in the gross proceeds from the sale thereof, without deduction for drilling or maintenance costs. The court made certain deductions on account of city and county taxes assessed against the mineral rights and on account of an assessment levied by the state of California for the oil protection fund, and paid by plaintiff, which taxes were on the interests of defendants. They make no objection to these deductions.

[17-19] The rights of those who are tenants in common in oil rights in land are the subject of annotation in 40 A.L.R. 1400, note appended to *Prairie Oil & Gas Co. v. Allen* (C.C.A.) 2 F.(2d) 566, 40 A.L.R. 1389, and 91 A.L.R. 205, note appended to *Earp v. Mid-Continent Petroleum Corporation*, 167 Okl. 86, 27 P.(2d) 855, 91 A.L.R. 188. It is there pointed out that in some jurisdictions it is waste for one tenant in common to go upon the land and produce oil without the consent of the other cotenants. But the more generally prevailing rule, as announced in the cases to which the notes are appended, is to the effect that a tenant in common has the right to go upon the lands and produce oil, provided he does not exclude other cotenants, but must account to cotenants for their respective percentages. A tenancy in common is characterized by a single unity, that of possession, or of the right to possession. In view of the fact that no enjoyment can be had of an estate in oil rights except through removal of the oil and other substances, it is held that it is not waste for a cotenant to go upon the land and produce oil. This rule has been announced in this state as to min-

erals which are nonfugacious in *McCord v. Oakland Q. M. Co.*, 64 Cal. 134, 27 P. 863, 19 Am.Rep. 686. It is there said, 64 Cal. 134, at page 142, 27 P. 863, 865, 49 Am.Rep. 686: "The taking of ore from the mine is rather the use than the destruction of the estate, within the meaning of the general rule. The results of the tenant's labor and capital are in the nature of proceeds or profits, the partial exhaustion being but the incidental consequence of the use." This principle, applicable to minerals in general, is of special importance in regard to fugacious substances, which may be lost entirely through drilling operations on other lands if the owners do not diligently seek to reduce them to possession. A single cotenant should not be in a position to prevent beneficial utilization of the mineral estate by the other cotenants.

Those jurisdictions which hold that it is not waste for a single cotenant to enter upon the land and produce oil, nevertheless are in accord in their view that the tenant producing must account to the other cotenants for their percentages of the oil produced. In recognizing the right of the nonproducing cotenants to share in the oil produced, the courts may seem to be making a departure from the common-law rule relating to ordinary cotenancy in surface rights. As to the ordinary tenancy in common in surface rights, it is the rule that where one of several cotenants has been in sole possession of the land and has produced crops thereon, he is entitled to retain the products of his labor, but where he receives rents from third persons for the use of the land, he must account to his cotenants for their share. *Pico v. Columbet*, 12 Cal. 414, 73 Am.Dec. 550; *McWhorter v. McWhorter*, 99 Cal. App. 293, 278 P. 454; *Plass v. Plass*, 122 Cal. 3, 11, 54 P. 372; *Howard v. Throckmorton*, 59 Cal. 79; *Wood v. Henley*, 88 Cal.App. 441, 263 P. 870. The rule permitting nonproducing cotenants to share in oil produced by a single cotenant is justified by the difference in a cotenancy in mineral rights and such a tenancy in the surface estate. This rule has become well established, as indicated in the annotations to which we have referred. The propriety of the principle was recognized by this court in the early case of *McCord v. Oakland Q. M. Co.*, supra, where the court said, 64 Cal. 134, at page 148, 27 P. 863, 868, 49 Am.Rep. 686: "But it may be conceded, for the purposes of this deci-

sion, that the relation of the tenants in common, under the circumstances disclosed, is *sui generis*, and their rights peculiar; that while the extraction of ore from the mine by one tenant, who does not exclude his co-tenants, is not waste, and the neglect of the latter to enter should be held an assent on their part to the exclusive occupation by the former, yet, because of the effect of the exclusive working by one may be to exhaust the mineral, and the uncertainty of the prospective value of the property may render it impossible to make a just partition of it, a court of equity should order an accounting; holding that, while it must have been contemplated by the parties that the tenant in occupation should not be held for waste, or prohibited from proceeding with his work by the co-tenants who do not seek to enter, yet it must also have been contemplated that the tenant in occupation should not appropriate to himself the entire profits."

That the parties in the instant case did not contemplate that a single producing tenant should retain the entire output is indicated by the stipulation of facts and the reforming clause added to the assignments, which expressly provide that the rights of the assignees extend not only to oil within and beneath the land, but to all oil and other hydrocarbon substances produced and saved from said land, however said substances should be produced.

There can be no question but that under the line of cases which sustains the right of a single cotenant to produce oil, with the duty to account to the nonproducing cotenants for their fractional interests, it is held that the interests of the nonproducing cotenants are generally subject to a charge or deduction for their proportion of drilling and operation expenses. The justice of this charge is apparent in the cases where it has been applied. But where cotenancy interests have been sold with the understanding and agreement that they shall not be subject to such charge, but that other units shall bear the full expense of production, the general rule is controlled by such agreement of the parties, express or necessarily implied. Cotenants who purchase the expense-bearing units with notice, actual or constructive, of the agreement freeing other units from expense are bound thereby. The expense-bearing units must recognize this charge or burden, in like manner as the purchaser of property subject to the bur-

den of a mortgage must recognize the mortgage as a lien on the land.

[20] In the instant case, the court found that defendants were entitled to receive their respective percentages of the gross amount of all oil, gas, and other substances, and of the gross sum for which such substances were sold, without deduction for expenses. At the time the Benwell assignments were issued the land was subject to an oil lease providing for royalty of $27\frac{1}{2}$ per cent. to the lessor. The lessor, under the lease, was entitled to this percentage without deduction for expenses. The remaining $72\frac{1}{2}$ per cent. constituted the working interest and bore all expenses during the lease. The royalty assignments transferred fractional interests in this royalty during the term of the lease. Under the instruments the holder of a 1 per cent. assignment was entitled during the lease to receive this per cent. (payable from the lessor's $27\frac{1}{2}$ per cent.) without any deduction for expenses incurred in the production of oil. The instruments contain no provision making the percentages subject to expenses in the event of a termination of the lease, and we are of the view that considering the instruments as a whole, in the light of the circumstances under which they were executed, they are not subject to such a deduction. The $72\frac{1}{2}$ per cent. remains subject to production expenses, after termination of the lease, as before. The court found that plaintiff succeeded to this $72\frac{1}{2}$ per cent. interest with notice that defendants were claiming permanent interests in the gross proceeds without deduction. Upon the evidence the court could have reached no other reasonable conclusion but that the plaintiff had notice of the claims of defendants.

We do not mean to hold that under all circumstances, unless the deeds creating a cotenancy in oil rights expressly make the interests subject to expenses, they are free therefrom. In the instant case, the bulk of the defendants own interests of 1 per cent. or less. If said interests, originally small, are reduced by the termination of the lease, there will be little left to the assignees. Of course, the conclusion we here reach does not depend on the size of the interests alone. Doubts as to whether cotenancy interests are subject to charge or free therefrom will generally yield to a construction of the instruments as a whole, considered in the light of the circumstances under which they were ex-

ecuted. The court's finding in the case herein that defendants' interests are not subject to charge must be upheld.

The judgment is affirmed.

We concur: WASTE, C. J.; THOMPSON, J.; CURTIS, J.; LANGDON, J.



10 Cal.App.2d 323

In re MATTHIESSEN'S ESTATE.

CHAPMAN v. JONES et al.

Civ. 10652.

District Court of Appeal, Second District,
Division 2, California.

Nov. 22, 1935.

Hearing Denied by Supreme Court
Jan. 20, 1936.

1. Wills ☞307

Contestant was not entitled as matter of right to dismiss will contest without prejudice during trial thereof, but application for dismissal without prejudice was addressed to trial court's discretion (Code Civ.Proc. § 581, as amended by St. 1933, p. 1868, § 88; Probate Code, § 373).

2. Dismissal and nonsuit ☞15

Word "may," in statute enumerating cases in which action may be dismissed, is not mandatory on court when plaintiff abandons case upon trial and before final submission, but dismissal in that event is within trial court's discretion (Code Civ.Proc. § 581, as amended by St. 1933, p. 1868, § 88).

[Ed. Note.—For other definitions of "May," see Words & Phrases.]

3. Executors and administrators ☞1

Representatives of estate should not be exposed to unnecessary litigation, and dilatory procedure should not be permitted or encouraged in administration and settlement of estates.

4. Wills ☞307

Order refusing contestant's motion to dismiss will contest without prejudice on third day of trial held not abuse of discretion, in view of delay in probate proceedings incident to granting motion (Code Civ.Proc. § 581, as amended by St. 1933, p. 1868, § 88; Probate Code, §§ 372, 373).

5. Wills ☞218

Filing of contest suspends action on admission of will, and probate cannot be decreed until contest is determined.

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Proceedings by Wilson Chapman to contest the will of Maude C. Bush Matthiessen, deceased, opposed by Mabel Chapman Jones, administratrix, and another, proponents. From a judgment for proponents, contestant appeals.

Affirmed.

Lynden Bowring, of Los Angeles, for appellant.

Hawkins & Hawkins (by Eugene A. Hawkins, Jr.), of Los Angeles (Neil S. McCarthy and Earl L. Banta, both of Los Angeles, of counsel), for respondent Frank Matthiessen.

CRAIL, Presiding Justice.

This is an appeal from a judgment on the merits in favor of the proponents of a will and against the contestant. Before the trial of the contest was ended, the contestant moved the court to dismiss without prejudice and he also announced in open court that he had dismissed the contest and had abandoned it. His contention on appeal is that the trial court should have treated the contest as dismissed and therefore the judgment on the merits was erroneous.

A petition was filed in the superior court to probate the will of the deceased, and proper notice of the hearing of said petition and the time and place thereof was given as required by law. Prior to the hearing of said petition the contestant herein filed his written contest objecting to the probate of the will upon several grounds. The answer of the surviving husband, Frank Matthiessen, in addition to denying the allegations of the contest, set forth an additional ground for the admission of the will to probate to the effect that the decedent had entered into a written contract with him to make the will, and asked as affirmative relief that the will be admitted to probate as the last will and testament of deceased, and for costs.

The trial of the contest came on for hearing. The contestant proceeded to introduce evidence in support of the contest. Two days and a portion of the third day were consumed by the cross-examination of the surviving husband. Another witness called by the contestant was an attorney for the proponents of the will. There is considerable dispute between the parties as to the legal effect of what took place in open court while this witness was still on the stand and before

the case was submitted for decision, and for that reason we deem it necessary to set it out as briefly as we may:

"Mr. Bowring: If the court please, at this time, * * * the contestant is dismissing this contest without prejudice. * * * Although I regret consuming the time of the court and the time of counsel and witnesses, these are the instructions that I have received; so I make that motion at this time, that the contest be dismissed without prejudice. * * *

"The court: * * * I feel that, inasmuch as the motion is made to the court, and because the court is firmly of the opinion that the contest is being dismissed because the contestant feels that his case thus far has shown no bottom in law or in fact, that the motion made is *an imposition on the court*. I am going to deny it. * * *

"Mr. Bowring: I might state to the court that the principal reason, of course, that my client has come to the conclusion that he has, is that he feels that his case has been prejudged, and that before he has had an opportunity to present his case this court has taken the position that amounts to a determination more or less in advance that upon his theory of the case that he cannot prevail. Now, under these circumstances I think that the actor in any case has a right to abandon the case, either permanently or to abandon it with the idea that if upon further investigation and further preparation, he feels and is advised, that he can present a stronger case, that he may wish to resubmit it to the court. * * *

"The Court: * * * I hold the statements are unwarranted, and are a slander on the court. The only possible basis in fact for such statements would be the remarks which the court made to both counsel, when both counsel were called to the bench yesterday, and the reporter was asked to step up to the bench. At that time the court informed you, Mr. Bowring, if I recollect correctly, that we were getting no place fast. * * * Now, you have wasted, if this motion were granted, two days of this court's time, and the court is not going to allow it. You may proceed with the case."

The court proceeded with the trial and entered judgment on the merits as heretofore set forth.

[1, 2] The contention of the contestant is that a will contest is, in effect, a civil action wherein the contestant is plaintiff; that a

plaintiff has an absolute right to dismiss *without prejudice* at any stage of the proceedings prior to submission and the word "may" in the first sentence of section 581 of the Code of Civil Procedure (as amended by St. 1933, p. 1868, § 88) is mandatory and does not make the right to dismiss discretionary with the court; that the action taken by contestant's counsel at the trial amounted to an actual dismissal, not merely a motion to dismiss; that even granting there was no actual dismissal, but merely a motion to dismiss, it was not a matter of discretion and the dismissal should have been entered as a matter of course; and that even conceding that the matter was one for the exercise of legal discretion, such discretion was grossly abused under the circumstances shown by the record.

Section 581 of the Code of Civil Procedure in so far as it is germane to the questions here presented provides as follows: An action may be dismissed, or a judgment of nonsuit entered, in the following cases: (1) By the plaintiff, by written request to the clerk, filed with the papers in the case, at any time before the trial, upon payment of the costs, provided that affirmative relief has not been sought by the cross-complaint or answer of the defendant. Such dismissal must be made by entry in the clerk's register and is effective for all purposes when so entered. No such dismissal shall be granted unless upon the *written* consent of the attorney of record of the plaintiff. (4) *By the court*, when upon the trial and before the final submission of the case, the plaintiff abandons it. Such dismissal must be made by order of the court entered upon the minutes thereof.

It has been said that the word "may" as used in the section must be construed as "must," leaving no discretion with the court; but this statement was made with reference to subdivision one of the section, which provides that the party may dismiss by written request to the clerk filed with the papers in the case and that when this request is entered *by the clerk* it is effective for all purposes. Obviously such a dismissal does not require an order of the court. The filing of the written request with the clerk and the entry thereof by him ipso facto constitutes a dismissal, and naturally there is no discretion left in the trial court. However, the subsection does require a written request to the clerk and an entry by the clerk, and the benefits of the section may not be

invoked if affirmative relief is sought in the answer of the defendant. Contestant insists that the proponent of the will had no legitimate right to seek affirmative relief in his answer, and yet the fact remains that by the very terms of the statute in such a contest "the court must render judgment, either admitting the will to probate or rejecting it" (Probate Code, § 373), and that a prayer that the will be admitted to probate is ordinary routine in the answer to a will contest, and that contestant himself saw no objection to it, made no objection to it, in the trial court. It is obvious, therefore, that the contestant may not claim relief under subdivision one of said section 581. In so far as subdivision four of the section is concerned, the dismissal contemplated therein must be *by the court*, and the word "may" as to said subdivision 4 does not mean "must"; the court having inherent power to exercise a legal discretion in the matter. *Chapman v. Superior Court*, 1 Cal.App.(2d) 512, 36 P. (2d) 1093.

[3-5] With regard to contestant's claim that the court grossly abused its discretion under the circumstances shown by the record, we make the following observations: The whole policy of the law in California favors speedy administration and settlement of estates and demands that administration shall be accompanied with reasonable dispatch and as soon as may be, and for this reason representatives should not be exposed to unnecessary litigation nor should dilatory procedure be permitted or encouraged. 11a Cal.Jur. 139, § 77, and cases cited. While it has been said that each step in a probate proceeding is separate, largely the import of what is meant is that the proper jurisdictional steps must be taken as to each and the orders entered in the separate steps of the administration may not be attacked collaterally but only directly. "* * * as to various proceedings it has been said that they are but steps in the administration of the state. * * * Thus the contest of a will is not a new action or proceeding, but receives all its vitality from and has its origin in the original petition to

probate the will and the statutory provisions governing the proceedings." 11a Cal. Jur. 134, and cases cited. Certainly a petition to probate a will and a contest thereof before probate are not separate in many respects. Upon the filing of the written grounds of opposition to probate, action in respect of the admission of the instrument is suspended, nor may probate be decreed until the contest is determined. 26 Cal. Jur. 1078. By statute also, where a will is contested the subscribing witnesses must be produced and examined or their absence must be accounted for. Probate Code, § 372. And, as already stated, upon the trial of the contest the court must render judgment either admitting the will to probate or rejecting it. Regardless of what has been heretofore loosely said in the cases with regard to each step in a probate proceeding being separate, it is patent that the petition to probate the will and the contest thereof before probate are inextricably bound together.

We hold that the trial court was entitled to exercise a legal discretion in the matter of dismissing the contest, and we hold also that under the circumstances set forth in this case the court did not abuse its discretion in denying the motion to dismiss.

After consuming three days of the court's time in the trial, the contestant was attempting to dismiss because he felt that under his theory of the case he could not prevail. If the motion to dismiss had been granted, he might have succeeded in starting a new contest before the will was admitted to probate. Even if the will had been admitted to probate, he might have waited until near the end of six months before starting a new contest and the contest might have taken a considerable time thereafter. The trial court apparently thought that under the circumstances the nuisance value of the contest was too great to grant the motion.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, Justice pro tem.

10 Cal.App.2d 443

**HILD v. JUSTICE'S COURT OF STOCKTON
TP., SAN JOAQUIN COUNTY, et al.***
Civ. 5533.

District Court of Appeal, Third District,
California.

Dec. 2, 1935.

Rehearing Denied Jan. 13, 1936.

1. Appeal and error ⇨781(4)

Issues presented on appeal, in mandamus proceeding to recall and quash writ of execution issued by justice's court to satisfy judgment, became moot by subsequent levying of execution and satisfaction of judgment, requiring dismissal of appeal.

2. Appeal and error ⇨781(1)

Appellate court will not review questions which are moot.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Petition for a writ of mandamus by M. William Hild, doing business under the firm name and style of Hild Electric & Manufacturing Company, against the Justice's Court of Stockton Township, County of San Joaquin, State of California, and others. From an order sustaining a demurrer to the petition without leave to amend, plaintiff appeals.

Appeal dismissed.

Lafayette J. Smallpage and Charles H. Epperson, all of Stockton, for appellant.

Nutter & Rutherford, D. R. Jacobs and Stephen Dietrich, all of Stockton, for respondents.

PER CURIAM.

The respondents have moved to dismiss this appeal on the ground that the issues which are presented thereby have become moot.

In a suit which was pending in the justice's court of Stockton township, entitled Rossi v. Hild, a judgment for the sum of \$350 and costs was rendered against this petitioner. On the theory that the judgment was void for lack of jurisdiction, a writ of mandamus was subsequently filed in the superior court of San Joaquin county, seeking to recall and quash a writ of execution which was issued in that case to satisfy the judgment. The respondents demurred to the petition for a writ of mandamus on the ground that it fails to state facts sufficient to state a cause of action.

The demurrer was sustained without leave to amend the petition. From the order sustaining the demurrer, the petitioner appealed to this court. Subsequent to the perfecting of an appeal to this court in the mandamus proceeding, the execution was levied and the judgment of the justice's court was fully satisfied.

[1] The respondents moved to dismiss this appeal on the ground that the issues have become moot, by virtue of the subsequent levying of the execution and complete satisfaction of the judgment in question. The motion is supported by affidavits to that effect. These affidavits are not controverted. The issues which are presented on appeal in this proceeding having become moot, it is evident that the motion to dismiss the appeal should be granted.

[2] An appellate court will not review or determine questions on appeal which are moot for the reason that the decision of such questions is idle and serves no useful purpose. Bley v. Board of Dental Examiners of State of California, 101 Cal.App. 666, 282 P. 19; 2 Cal.Jur. p. 803, § 472.

The appeal is dismissed.



10 Cal.App.2d 310

PEOPLE v. CAMPOS.
Cr. 314.

District Court of Appeal, Fourth District,
California.

Nov. 21, 1935.

1. Homicide ⇨347

Court of Appeal held empowered by statute to modify conviction of first-degree murder if evidence showed that defendant was not guilty thereof, but was guilty of lesser degree or of less serious crime included therein (Pen.Code, § 1181, subd. 6).

2. Homicide ⇨253(3)

Evidence that deceased applied vile name to defendant, who subsequently remonstrated with deceased for striking third person, and that parties then started outside to continue altercation, and that defendant, having proceeded about 5 feet beyond exit, turned and shot deceased, who was unarmed, held to sus-

tain conviction of first-degree murder (Pen. Code, §§ 187-189).

3. Homicide ⇨231

Malice as element of murder may always be inferred from circumstances (Pen.Code, §§ 187, 188).

4. Homicide ⇨231

Express evidence of deliberate purpose to kill is not required to warrant conviction of first-degree murder, since element of premeditation may be inferred (Pen.Code, § 189).

5. Witnesses ⇨388(10)

Cross-examiner, to discredit witness by his own admissions, may always ask him regarding prior inconsistent statements without calling attention to time, place, circumstances, or persons present.

6. Criminal law ⇨1172(3)

In first-degree murder prosecution, instruction that evidence of defendant's immediate flight from scene of homicide could be considered by jury as tending to show consciousness of guilt held not prejudicial.

7. Criminal law ⇨763, 764(6)

In first-degree murder prosecution, instruction that in determining guilt or innocence, jury could consider defendant's immediate flight from scene of homicide, held not objectionable as invading jury's province to determine weight of evidence (Pen.Code, § 1127c).

8. Criminal law ⇨338(4, 5)

In first-degree murder prosecution, evidence that district attorney informed defendant's attorney that unless defendant pleaded guilty death penalty would be asked, held properly excluded because improper, irrelevant, and immaterial.

9. Criminal law ⇨232

Committing magistrate need not appoint counsel for defendant as must be done on arraignment in superior court (Pen.Code, §§ 859, 987).

10. Indictment and Information ⇨137(5)

Insufficiency of evidence to justify magistrate in holding defendant for trial in superior court may be raised by application for habeas corpus, but is not ground for setting aside information (Pen.Code, § 1487, subd. 7).

Appeal from Superior Court, Riverside County; H. G. Ames and George R. Freeman, Judges.

Apolonio Campos was convicted of murder in the first degree, and he appeals.

Affirmed.

See, also (Cal.Sup.) 43 P.(2d) 274.

David C. Marcus, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen. and Earl Redwine, Dist. Atty., of Riverside, for the People.

JENNINGS, Justice.

The defendant, who was charged with the crime of murder, was convicted of murder in the first degree. The jury which returned the verdict of conviction recommended that the defendant be sentenced to life imprisonment. The trial court denied defendant's motion for a new trial, and pronounced judgment whereby defendant was sentenced to life imprisonment. From the judgment and from the court's order denying his motion for a new trial, defendant appeals.

[1] The first contention advanced is that the trial court erred in refusing to reduce the offense to one of less degree. In this connection it is urged that this court is empowered by the provisions of subdivision 6 of section 1181 of the Penal Code to modify the judgment on this appeal by reducing the offense to one of less degree. There can be no doubt that this court is authorized to modify the judgment. The above-mentioned statute so provides, and such a course has been followed in a number of instances, e. g., *People v. Kelley*, 208 Cal. 387, 281 P. 609; *People v. Howard*, 211 Cal. 322, 295 P. 333, 71 A.L.R. 1385; *People v. Peter*, 125 Cal. App. 657, 14 P.(2d) 166. The language of the statute is as follows: "When the verdict is contrary to law or evidence, but if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof or of a lesser crime included therein, the court may modify the judgment accordingly without granting or ordering a new trial, and this power shall extend to any court to which the cause may be appealed."

From the above-quoted language it is obvious that in order to sustain appellant's contention it must appear from the evidence which was produced during the trial that appellant is not guilty of the crime of first degree murder, but that he is guilty of some offense less in degree or of some less serious crime included within the offense of which he was convicted.

[2] Examination of the record impels the conclusion that appellant was properly

convicted of murder in the first degree, and that the trial court committed no error in refusing to reduce the offense to one of less degree. The transcript shows that evidence was submitted to the jury which tended to prove that shortly before the offense was committed appellant remonstrated with the deceased because the latter had struck down and kicked a third person, that the deceased then said to appellant, "If you don't like it, I have some for you, too," whereupon appellant replied, "All right, but come outside"; that appellant and deceased immediately proceeded towards the door, appellant walking ahead; that appellant passed through the doorway and had gone about 5 feet beyond the exit when the deceased was preparing to step out from the doorway; that appellant then drew from a pocket of his clothing a 32-caliber revolver and fired one shot therefrom; that the bullet struck the deceased about three inches below the left nipple, passed through the pericardium, touched the tip of the man's heart, and lodged in the body of the vertebræ; that the wound thus suffered caused practically instant death; that appellant immediately left the scene of the shooting and hid in the brush, where he remained for approximately 11 days, and was apprehended as he was attempting to escape from the section of the state in which the place where the shooting occurred is located; that appellant was asked by the arresting officer why he had killed the deceased, to which appellant replied that "he was mad at him." There was also evidence that appellant was not acquainted with the deceased, that both men had partaken of intoxicating liquor during the evening preceding the shooting, and that when appellant first arrived at the place where the shooting occurred the deceased called appellant a vile name which, as appellant testified, provoked him and hurt his feelings.

[3] The above recital of evidence which was produced during the trial demonstrates the futility of appellant's contention that the offense of which he was guilty was less serious than that of which he was convicted. It is argued that there was no proof of the necessary element of malice. Murder is defined in section 187 of the Penal Code as "the unlawful killing of a human being, with malice aforethought." Section 188 of the same Code declares that malice may be express or implied; that it is express when there is manifested a deliberate intention unlawfully to take away the

life of a fellow creature, and that it is implied when no considerable provocation appears or when the circumstances attending the killing show an abandoned and malignant heart. It is settled that "malice may always be inferred from the circumstances in the case—the evidence presented and considered by the jury." *People v. Glover*, 141 Cal. 233, 243, 74 P. 745, 749. It requires something more than optimism to argue that the jury was not warranted in drawing an inference of malice from the circumstances which surrounded the homicide in this case.

[4] Appellant cites section 189 of the Penal Code which specifies the two degrees of murder and defines murder in the first degree as murder which is perpetrated "by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing." It is urged that the evidence presented to the jury failed to show the essential requisite of premeditation. This contention is likewise devoid of merit. The principle is well established that express evidence of a deliberate purpose to kill is not required to warrant a verdict of conviction of murder in the first degree. The necessary element of premeditation may be inferred from proof of such facts and circumstances as will furnish a reasonable foundation for such an inference. *People v. Mahatch*, 148 Cal. 200, 202, 82 P. 779; *People v. Machuca*, 158 Cal. 62, 64, 109 P. 886; *People v. Bennett*, 161 Cal. 214, 218, 118 P. 710; *People v. Erno*, 195 Cal. 272, 278, 232 P. 710. It has often been said that: "There need be no appreciable space of time between the intention to kill and the act of killing; they may be as instantaneous as successive thoughts of the mind. It is only necessary that the act of killing be preceded by a concurrence of will, deliberation, and premeditation on the part of the slayer, and, if such is the case, the killing is murder in the first degree, no matter how rapidly these thoughts of the mind may succeed each other, or how quickly they may be followed by the act of killing." *People v. Bellon*, 180 Cal. 706, 710, 182 P. 420, 422. Appellant testified that the revolver from which the fatal shot was fired was accidentally discharged. The verdict of conviction indicates that the jury rejected appellant's explanation of the homicide and arrived at the conclusion that appellant, being armed, either provoked a quarrel with an unarmed man intending to kill him, or, when the quarrel arose, drew his

weapon and shot the victim with malicious deliberation. The circumstances that were shown to have surrounded the homicide, including the character of weapon used, the nature of the wound inflicted, the fact that the deceased displayed no weapon of any character and was unarmed, the acts and conduct of the accused, furnished ample justification for the indulgence by the jury in the inference that appellant entertained a deliberate purpose to kill the deceased. This properly supported inference warranted the return of a verdict convicting appellant of murder in the first degree. *People v. Mahatch*, supra; *People v. Bennett*, supra; *People v. Peete*, 54 Cal. App. 333, 342, 202 P. 51.

[5] Appellant's second contention is that the trial court erred in permitting the district attorney to inquire of appellant on cross-examination over his objection whether or not prior statements made by him which were inconsistent with his testimony given on direct examination were untrue. Appellant testified on direct examination that the revolver which he held in his hand at the time the fatal shot was fired was accidentally discharged. Prior to the time appellant thus testified in his own behalf, and as part of the respondent's case, statements made by appellant to the district attorney on the day following appellant's arrest and his testimony at the preliminary examination before the committing magistrate had been received in evidence. From the former it appeared that appellant stated that he shot the deceased because he was provoked with him on account of the deceased having struck and kicked a friend of appellant shortly before the shooting occurred. Appellant did not then pretend that the shooting was accidental, but, on the contrary, admitted that he knew he had no right to shoot and kill the deceased. From the latter it appeared that appellant testified at his preliminary examination that he shot and killed the deceased because he was angry with him on account of the fight that had occurred between the deceased and appellant's friend. Appellant did not then claim that the shooting was accidental.

Appellant objected to the inquiry as to whether or not the statements formerly made by him were untrue, first, because it assumed a state of facts not in evidence, and, second, because a proper foundation for the inquiry had not been laid. It is now urged that the trial court's ruling permitting the question to be answered was

erroneous because it amounted to impeachment of the witness without proper foundation therefor having been laid. The contention is entirely devoid of merit. It is always proper, for the purpose of discrediting a witness by his own admissions, to interrogate him, on cross-examination, as to prior inconsistent statements without calling attention to time, place, circumstances and persons present. 27 Cal. Jur., p. 159, § 133; *People v. Jones*, 160 Cal. 358, 117 P. 176; *People v. Ho Kim You*, 24 Cal.App. 451, 141 P. 950; *People v. Williams*, 43 Cal.App. 60, 184 P. 498.

Appellant's third contention is that the trial court committed reversible error in permitting the testimony given by appellant at the preliminary examination to be read in evidence over his objection. This contention appears to be based on the following propositions: First, that the transcript of the proceedings taken at the preliminary examination failed to show that the official interpreter who also reported the proceedings was sworn to act as interpreter; second, that the transcript failed to show that any one translated from English to Spanish the statements made by the magistrate to appellant, who was shown to have been unable to understand the English language and capable of understanding only the Spanish language; third, that it appeared that the interpreter in translating from English into Spanish the charging part of the complaint used the Spanish word "mato" which means to kill rather than the Spanish word which means to murder so that appellant was not informed that he was accused of having murdered the deceased, but, on the contrary, was told that he was accused of having killed the deceased. It is also observed that appellant did not have the benefit of counsel at the preliminary examination.

The above-stated objections are utterly unmeritorious. The record shows that the transcript of the proceedings taken at the preliminary examination was not introduced in evidence, but that the phonographic reporter testified from her notes, and that she testified that she was sworn to act as interpreter, and that she did translate the statements of the magistrate which were given in English into the Spanish language. It also appears that appellant was fully and fairly informed of his rights by the magistrate, including his right to counsel at any and all stages of the proceeding, his right to process to compel the attendance of witnesses in his behalf,

his right to refrain from making any statement at the preliminary examination, and a clearly stated warning that any statement which he should make that might be prejudicial to his interests might be used against him at any time. The record further shows that after having informed appellant of his rights the magistrate propounded the following question: "Does he admit the charge as stated?" To this question appellant gave the following answer: "That is true, because that is the way it happened." The record shows that appellant then took the stand and unhesitatingly replied to questions asked him by the district attorney and in the course of the examination thus conducted admitted that he killed the deceased because he was provoked with him on account of the beating which the deceased had administered to a friend of appellant.

[6, 7] The fourth contention advanced by appellant is that the trial court erred in giving two specified instructions. By one of them the jury was advised that if it found that appellant shot and killed the deceased and immediately thereafter fled from the scene of the homicide, the jury was entitled to consider and weigh such evidence as tending to show consciousness of guilt. By the second instruction the jury was informed that the fact of flight, if proven, although not sufficient of itself to establish guilt, was a circumstance which the jury was entitled to consider in arriving at a decision of appellant's guilt or innocence.

The first of the above-mentioned instructions is criticized because it is declared that the record shows that no evidence was introduced during the trial which tended to show that appellant fled from the scene of the homicide immediately after the killing and remained concealed in the brush until he was apprehended. Examination of the record fully demonstrates the incorrectness of this reclamation. Appellant himself testified at the preliminary examination that he left the scene of the killing after the shooting and ran into the brush to hide, and that with the exception of several hours during which he was at a friend's house he remained in the brush until a short time before he was apprehended. Appellant also testified during the trial of the action that when he saw the deceased fall he ran away to hide because he was afraid that if he remained at the scene of the shooting he might be killed; that he went into the

brush where he remained until a short time before he attempted to leave the locality in which the scene of the homicide is situated. In addition to the foregoing evidence, two witnesses for the prosecution testified that after the shot was fired appellant ran into the brush.

The second instruction is attacked because it is contended that it was an instruction which related principally to the evidence and in effect amounted to an invasion of the jury's exclusive province to determine the weight of evidence. In presenting this contention, appellant relies upon *People v. Jones*, 160 Cal. 358, 117 P. 176, wherein an instruction similar to the instruction now under consideration was criticized as constituting an invasion of the jury's prerogative of weighing the evidence. Section 1127c of the Penal Code, which was enacted in 1929, approximately 18 years after the above-cited case was decided, specifically authorizes the giving of an instruction of the character here being discussed in any criminal trial where reliance is placed on the fact of flight as tending to show guilt. In *People v. Erno*, 195 Cal. 272, 232 P. 710, the giving of a similar instruction was held not to be prejudicial error. In the very recent decision of *People v. Murguia* (Cal.Sup.) 48 P.(2d) 958, 960, the Supreme Court of this state characterized a complaint similar to that which is here presented by appellant as one having little merit and, in holding the giving of an instruction on flight not prejudicial, made the following pertinent comment: "Immediate flight, in the absence of any accusation—in advance, perhaps, of the probability of an accusation, formal or informal—may afford persuasive evidence of a consciousness of guilt."

The facts and circumstances of the instant case fully warrant the conclusion that the giving of the criticized instructions was not prejudicial to appellant.

[8] Appellant complains that the trial court erroneously refused to permit the witness Russell Waite to testify concerning conversations which he had with the district attorney and with appellant. The record shows that this witness is an attorney and that he was appointed by the superior court to represent the appellant upon his arraignment on the charge of murder. In particular it is urged that the trial court erred in sustaining respondent's objection to the following question propounded to the witness by appellant's coun-

sel: "Isn't it a fact that the District Attorney informed you that if the defendant did not plead guilty, he would ask the court that this defendant be given the death penalty?" In complaining that the court erred in sustaining the objection, appellant states that: "Certainly, the conversation that Mr. Waite had with the District Attorney would be relevant and material and proper." However, it is our conclusion, based on the record, that the conversation sought to be elicited was neither proper nor relevant nor material to the single issue presented, which was the guilt or innocence of appellant of the charge of murder made against him. We entertain no hesitancy, therefore, in declaring that the trial court properly sustained the objection to the aforementioned inquiry.

[9, 10] Appellant's final objection is that the trial court erred in denying his motion to set aside the information made prior to plea on the ground that he had not been afforded a preliminary examination as required by law. This claim of error appears to be based on the fact that the committing magistrate, perceiving that appellant was not represented by counsel, failed to appoint an attorney for him. Such a contention has no legal justification. Section 859 of the Penal Code provides that the magistrate, when a defendant is brought before him on a charge of having committed a public offense, must allow him a reasonable time to send for counsel, and may postpone the examination for not more than five days for that purpose, and must, upon the defendant's request, require a peace officer to take a message to any counsel whom the defendant may name in the township or city. The magistrate is not, however, required to appoint counsel to represent the accused as is the case upon his arraignment in the superior court as provided by section 987 of the Penal Code. *People v. Crowley*, 13 Cal.App. 322, 324, 109 P. 493. We do not understand that it is now contended that the evidence which was produced at the preliminary examination was insufficient to justify appellant being held for trial in the superior court. Such contention, if made, would be unavailing. The objection of evidentiary insufficiency to justify a committing magistrate in holding a defendant for trial in the superior court may be raised by application for a writ of habeas corpus. Subdivision 7, § 1487, Pen. Code. It is not a ground for setting aside

an information. *People v. Creeks*, 170 Cal. 368, 149 P. 821; *People v. Serrano*, 123 Cal.App. 339, 11 P.(2d) 81. As heretofore noted, the record herein shows that appellant was fully and fairly advised of his rights by the committing magistrate at the time of the preliminary examination, and elected to testify as a witness at such examination. His testimony afforded ample justification for the order holding him for trial on the charge of murder.

For the reasons stated, the judgment and order from which this appeal is presented are affirmed.

We concur: BARNARD, P. J.; MARKS, J.



10 Cal.App.2d 365

**BROWN et al. v. SUPERIOR COURT IN
AND FOR SIERRA COUNTY.**

Civ. 5469.

District Court of Appeal, Third District,
California.

Nov. 25, 1935.

1. New trial ☞117(2)

Motion for new trial after refusal to order judgment in accordance with stipulation for judgment held premature, since no decision had been announced by court (Code Civ. Proc. § 656).

2. Stipulations ☞13

Granting of motion to set aside stipulation rests in discretion of trial court.

3. Mandamus ☞51

Mandamus would not lie to compel court to enter judgment in accordance with stipulation, where court had denied motion to enter judgment.

4. Mandamus ☞51

Trial court's discretion in relieving party from stipulation would not be disturbed in mandamus proceeding to compel entry of judgment on stipulation, notwithstanding that point was presented as a reply to motion for judgment on stipulation.

5. Mandamus ☞164(4)

Where application for writ of mandamus is submitted on petition therefor, allegations in answer must be accepted as true.

Mandamus proceeding by N. N. Brown and another, against the Superior Court of the State of California, in and for the County of Sierra.

Writ discharged.

Siemon, Chafin & Maas, of Bakersfield, for petitioners.

Charles L. Gilmore, of Sacramento, and L. Nelson Hayhurst, of Fresno, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Petitioners herein seek by mandate to compel respondent to enter judgment in an action pending in the superior court of Sierra county, entitled Brown et al. v. Cleary et al., No. 1882, in the records of said court, pursuant to a stipulation for judgment entered into between respective counsel, and filed with the clerk of said court. The cause was partially tried before the Honorable Henry B. Neville, the judge presiding, but before the conclusion of the hearing a stipulation for judgment was signed by respective counsel and filed in the case. Before any action was taken upon the stipulation, however, Judge Neville died. Thereafter, Honorable J. M. McMahon was appointed his successor, and he became and now is the judge before whom these matters are pending.

Recently a motion was presented to respondent wherein petitioners formally moved that judgment be entered as provided in the stipulation. In response thereto, defendants appeared and opposed the motion, accompanied by affidavits and documentary evidence to the effect that certain witnesses who testified in the cause had given evidence that was untrue, and that said stipulation was entered into by counsel for defendants as the result of such untrue testimony; at the same time defendants moved for a new trial upon all of the statutory grounds. After a full hearing, respondent court refused to order judgment in accordance with the stipulation, upon the ground that the compromise was based upon misleading and untrue testimony and evidence, and the stipulation, if enforced, would amount to a deprivation of defendants of their rights and a miscarriage of justice, and, furthermore, that petitioners had not acted upon nor changed their position to their detriment, nor suffered any loss or damage through or by the stipulation, nor had acted upon nor relied

thereon, and that the stipulation was merely an executory agreement. In addition to refusing to order judgment on the stipulation, the court granted the motion for a new trial.

[1] As to the motion for a new trial, we believe the defendant was premature, and the order of the court granting the same cannot be sustained. A new trial is defined in section 656 of the Code of Civil Procedure as a re-examination of any issue of fact after a trial and decision by a jury, court, or referee. Here no decision had been announced by the court. In Reclamation District, etc., v. Thisby, 131 Cal. 572, 63 P. 918, certain issues had been determined by a jury and its verdict adopted by the court, and other issues were submitted to the court sitting without a jury. A notice of intention to move for a new trial was thereafter filed on November 1, 1897, whereas the decision of the court was not filed until some five months later. The Supreme Court held the notice premature, as the trial was not concluded until the court had rendered its decision upon all issues submitted to it.

[2] However, as to the motion to set aside the stipulation, we believe that a wide discretion is vested in the trial court. In Moffitt v. Jordan, 127 Cal. 628, 60 P. 175, where the court was considering a motion to be relieved from a stipulation, it was said: "Motions of this kind rest very much in the sound discretion of the court below. That discretion is usually exercised liberally and in furtherance of justice. The court, being made acquainted with all the reasons, will, if the inadvertence is wholly inexcusable, or if it arises from negligence, not look upon it kindly. Shearman v. Jorgensen, 106 Cal. [483], 485, 39 P. 863. This court will not interfere in doubtful cases, nor unless it is apparent that the court abused its discretion. Robinson v. Exempt Fire Co., 103 Cal. 6, 36 P. 955, 24 L.R.A. 715 [42 Am. St.Rep. 93]."

In Pacific Paving Co. v. Vizelich, 2 Cal. App. 515, 83 P. 459, this court held that although the facts did not there warrant the setting aside of the stipulation, yet it is not only inferred, but directly held, that such power was vested in the trial court.

In Bare v. Parker, 51 Cal.App. 106, 196 P. 280, 281, a stipulation was entered into which the court ignored. This was not error; the court saying: "Undoubtedly

assent was unwittingly given to this stipulation. It negatives the theory of plaintiff's case, and would have stipulated him out of court. The trial court appreciated the situation, and properly refused to permit an inadvertence or want of attention on the part of counsel to work what he conceived to be an injustice. 'A trial judge does not sit as a mere referee in a contest of wits between counsel in the case, but that it is not only within his province, but is his duty, to see that as nearly as possible the issues shall be disposed of on their merits. * * *' *Farrar v. Farrar* [41 Cal.App. 452], 182 P. 989."

[3] Under petitioners' theory of the present action, the stipulation involved amounted in effect to findings of fact and conclusions of law. In *Broder v. Superior Court*, 103 Cal. 121, 37 P. 143, the court denied a writ of mandate for judgment where findings and conclusions had been signed. There, as here, the thing asked is more than a ministerial duty and is mixed with an exercise of discretion, and therefore mandate will not lie. As had often been said, the court can be compelled to act, but, having acted, its act cannot be reviewed on mandamus. *Hilmer v. Superior Court*, 220 Cal. 71, 29 P.(2d) 175. The court here has acted upon the motion to enter judgment, and we cannot in this proceeding pass upon the merits of that act.

[4] Many cases are to be found where the action of the trial court has been upheld in relieving a party from a stipulation upon the ground that it was entered into through inadvertence, excusable neglect, and mistake of fact. *Moffitt v. Jordan*, supra. Such motions are addressed to the sound discretion of the trial court, and will not be interfered with in doubtful cases, nor unless it is apparent that the court has abused its discretion. Here the point was presented by respondent, not on its own motion, but as a reply to the motion of petitioners to have judgment entered in accordance therewith; but we can see no reason for a different rule on that account. The issue is here presented by the petition of Brown, the plaintiff in the trial below, and a demurrer and verified answer thereto by respondent setting forth the various reasons why the stipulation should not be accepted.

[5] The application for the writ having been submitted on the petition and the answer thereto, we must accept the allega-

tions in the answer as true. *Sherer v. Superior Court*, 3 Cal.Unrep. 680, 31 P. 565.

The writ is discharged.

We concur: PLUMMER, J.; THOMPSON, J.



HALTER v. MALONE et al. *

Civ. 10468.

District Court of Appeal, Second District,
Division 2, California.

Nov. 27, 1935.

Rehearing Granted Dec. 24, 1935.

1. Appeal and error ⇨1001(1)

Where record disclosed substantial evidence to sustain verdict as to each of two defendants, appellate court could not disturb implied findings of jury against each defendant.

2. Trial ⇨255(3)

In guest's action for injuries sustained in automobile collision, host's contention that guest must rest his case against host solely upon evidence presented by guest, without testimony presented by other defendant and his witnesses, could not be sustained where host did not request appropriate instructions thereon.

3. Appeal and error ⇨882(12)

Contention that court erred in submitting instruction involving territory traversed by avenue on which automobile collision occurred held unavailing, where appellant submitted instructions on subject and made no request to withdraw them and evidence clearly showed that territory in which collision occurred was outside of business or residential district as defined by Vehicle Act, concerning which court correctly instructed (St. 1929, p. 510, § 28½).

4. Appeal and error ⇨1067

Refusal of instruction that burden is upon plaintiff to establish that operation of vehicle at speed beyond speed limit constitutes negligence held not reversible error, where evidence established that highway at point of crash was not in business or residential district, and no instructions were given as to speed in outside territory (St. 1929, p. 510, § 28½; St. 1931, p. 2120, § 113 (d)).

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 53 P.2d 374.

5. Appeal and error ¶758(3)

Where appellant objected to certain instructions and a number of instructions were given on same subject, failure of appellant to print in full in his brief all other instructions given bearing upon the subject precluded appellant from presenting the question on appeal (District Court of Appeal Rules, rule 8).

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Carl A. Halter against L. B. Malone and others. From an adverse judgment, defendants L. B. Malone and Richard Starling appeal.

Judgment affirmed.

See, also, 53 P.(2d) 374.

Harry D. Parker and Raymond G. Stanbury, both of Los Angeles, for appellant Malone.

David D. Stuart, Finlayson, Bennett & Morrow and Henry L. Knoop, all of Los Angeles, for appellant Starling.

Elbert E. Hensley, of Los Angeles, for respondent.

WOOD, Justice.

Plaintiff recovered judgment after trial by jury against both defendants Malone and Starling, and from this judgment both defendants have appealed. The judgment is based upon the implied finding of the jury that defendant Malone was guilty of negligence and defendant Starling was guilty of willful misconduct.

[1] Plaintiff was one of three guests riding in the automobile of defendant Starling as it traveled south along Fremont avenue in the city of Alhambra about midday of March 31, 1934. Defendant Malone drove a truck from a private driveway onto Fremont avenue, and the Starling car passed behind the truck and crashed into an embankment, resulting in injuries to plaintiff. There was a sharp conflict in the testimony. Each defendant separately argues that the evidence is insufficient to sustain the verdict as to him. The jury returned its verdict after being fairly instructed by the court. The record discloses substantial evidence to sustain the verdict as to each defendant, and such being the case, the appellate court cannot disturb the implied findings of the jury. For the reasons given in *Koeberle v. Hotchkiss* (Cal.

App.) 48 P.(2d) 104, the evidence is not set forth in detail.

[2] Defendant Starling argues that as against him plaintiff must rest his case solely upon the evidence presented by plaintiff and that he may not take advantage of the testimony presented by defendant Malone and his witnesses in order to uphold the verdict. He points out part of the testimony of the plaintiff himself, particularly on the subject of the rate of speed of the Starling car, and argues that he is foreclosed from asking the jury to base a verdict upon the estimates of speed given by other witnesses. It is sufficient to say that he cannot avail himself of the point now, since he did not request the trial court to give to the jury appropriate instructions on the subject. Moreover, there is sufficient evidence in the record to sustain the verdict upon the testimony which is not subject to the criticism mentioned.

[3] Defendant Starling contends that the court erred in submitting to the jury instructions involving the kind of territory traversed by Fremont avenue. Starling is not in a position to avail himself of this alleged error, since he also submitted instructions to the court on the subject. He now seeks to extricate himself from this position by claiming that under the law as it now exists he was compelled to present his instructions to the court before he was aware of the nature of all the testimony. Since he made no request to withdraw the tendered instructions, he cannot now seek a reversal on the contention that the court should not have given instructions on the subject. Moreover, we cannot see how defendant Starling was injured by these instructions, for the reason that the evidence clearly establishes that the collision occurred in territory outside of a business or residential district as defined by the California Vehicle Act (St. 1923, p. 517, § 28½, as added by St. 1929, p. 510). Indeed, defendant Starling requested the court to so instruct the jury. The court did not give this instruction, but did instruct the jury as follows: "You are instructed that every public highway shall be conclusively presumed to be outside of a business or residential district unless its existence within a business or residential district shall be established by clear and competent evidence as to the nature of the district

and unless sign-posted when and as required by this act."

[4] Defendant Starling complains of the refusal of the trial court to give that portion of his requested instruction which embodies the provisions of section 113(d) of the California Vehicle Act (St. 1923, p. 553, § 113(d), as amended by St. 1931, p. 2120), and which is as follows: "In any civil action the driver of a vehicle who has operated such vehicle at a speed in excess of the miles per hour set forth in subdivision (b) applicable at the time and place shall not be deemed to have been negligent by reason thereof as a matter of law but in all such actions the burden shall be upon the opposing party to establish that the operation of such vehicle at such speed constituted negligence." No instructions were given to the jury on the subject of the legal rate of speed in territory outside of a business or residential district, and the jury was nowhere instructed that the operation of a vehicle in excess of the maximum lawful speed was negligence as a matter of law. Since the evidence conclusively established that the highway at the point in question was not in a business or residential district, and since no instructions were given as to speed in "outside" territory, it is evident that the failure to give the instruction requested did not result in a miscarriage of justice.

[5] Defendant Malone contends that the trial court erred in instructing the jury in the words of the statute that "the driver of a vehicle entering a public highway from a private road or drive shall yield to all vehicles approaching on such public highway," followed by the instruction that if Malone did not yield the right of way he was guilty of negligence as a matter of law. He argues that the court should have combined with this instruction the element that the statute should be given a reasonable construction and that Malone's duty was only to exercise ordinary care to obey the statute and to "behave as a reasonable man would behave

with the privilege of perhaps committing errors of judgment not amounting to negligence." The same criticism is made of another instruction in which the court instructed the jury in the language of the statute, "the driver of any vehicle upon a public highway, before starting, turning or stopping such vehicle, shall first see that such movement can be made in safety, and if it cannot be made in safety, shall wait until it can be made in safety," without adding to the instruction a similar instruction to the effect that Malone's duty was to use such precaution as would satisfy a reasonably prudent person acting under similar circumstances. Plaintiff, in answering this contention, calls attention to the fact that defendant Malone has not complied with rule 8 of this court, wherein it is provided that "where instructions given to a jury are attacked as erroneous, all other instructions given, bearing upon that subject, must be printed in full in appellant's brief." A number of instructions were given on the subject in question, most of them at the request of defendant Malone, in which the duty of Malone under the circumstances is clearly and properly stated. These instructions were not printed by Malone in his opening brief. In another instruction the court instructed the jury to consider all the instructions as a whole. Since defendant Malone failed to print in his brief "all other instructions given upon the subject," he cannot now present the point. *Coats v. Hathorn*, 121 Cal.App. 257, 8 P.(2d) 1038. However, we have examined all the instructions on the subject, for the reason that defendant Starling maintains that they were too favorable to Malone and therefore injurious to Starling. We find that the instructions as a whole fairly stated the law on these points and that neither of the defendants was injured thereby.

The judgment is affirmed as to both defendants.

We concur: CRAIN, P. J.; McCOMB, Justice pro tem.

10 Cal.App.2d 261

MORRISON v. WHITE et al.

Civ. 5385.

District Court of Appeal, Third District,
California.

Nov. 19, 1935.

1. Municipal corporations ⇨12(8)

Holding of special election to create municipal utility district on same day that August, 1934, primary election was held was not a "consolidation" within statute prohibiting consolidation of elections with state-wide August primary election held in even-numbered years, where elections were distinct and separate (Gen.Laws 1931, Act 2264, § 1; St. 1921, p. 245, as amended).

[Ed. Note.—For other definitions of "Consolidate; Consolidation," see Words & Phrases.]

2. Counties ⇨53

Purpose of signatures of chairman and clerk on records and minutes of board is to identify such records as minutes of board, and failure of clerk and chairman to so sign does not invalidate record as evidence of action of board (Pol.Code, § 4039, subd. 1).

3. Evidence ⇨387(5)

Elector suing to have declared void a special election to create municipal utility district on ground that election was not properly authorized by board of county supervisors in that minutes of resolution calling election were not entered in journal until after election was held, could not establish by parol evidence date of transcription of minutes into journal (Pol.Code, § 4039, subd. 1; St. 1921, p. 245, as amended).

4. Counties ⇨53

Where clerk of county board of supervisors kept rough minutes of resolution of board calling special election to create municipal utility district, clerk's entry of minutes into board's journal after election was held did not invalidate election, as against contention that election was called and held without authority of board, since time when entry was actually made in journal was merely clerical detail incidental to calling and holding of election (Pol.Code, § 4039, subd. 1; St. 1921, p. 245, as amended).

Appeal from Superior Court, Butte County; R. M. Rankin, Judge.

Action by Ira R. Morrison against Henry R. White, chairman of the Board of Supervisors of Butte County, and others. From the judgment, plaintiff appeals.

Affirmed.

J. Oscar Goldstein, of Chico, for appellant.

Charles A. Walker, Dist. Atty., of Oroville, Coyle E. Bybee, of Chico, and W. J. Locke, of San Francisco, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an action brought by plaintiff, a qualified elector of the city of Chico, against the county of Butte and its governing officials, to have declared null and void an election to create a municipal utility district under the provisions of an act generally known as the Municipal Utilities District Act of 1921 (chapter 77, Gen.Laws of 1921, St. 1921, p. 245, as amended).

The grounds which plaintiff and appellant urges for a nullification of the election are, first, that the special election called for the purpose of determining whether or not the utility district should be created was consolidated with the general August primary election held throughout the state on August 28, 1934, in violation of section 1 of Act 2264 of the General Laws of 1931 (Deering's Gen.Laws, Stats. 1931, p. 2197) pertaining to consolidation of elections; and, secondly, that the special election was called and held without the authority of the board of supervisors of the county of Butte.

[1] Section 1 of Act 2264 provides that no election shall be consolidated with the primary election held throughout the state in August of each even-numbered year. We do not believe that any consolidation of election was had in this case. It is true that the election officers, the polling places, the voting booths and the precincts were the same and were simultaneously employed in the two elections, but it requires more than that to create a consolidation. No action was taken by the board of supervisors which can be construed as consolidating the elections, and separate orders were made by the board calling the elections and appointing the officers thereof. A separate roster for the district election was provided at each polling place, and upon the signing of the roster, separate ballots of a distinctive color were given to the voter so signing the roster. A distinct and separate ballot box plainly marked was furnished

for the district election, and after each ballot was voted it was deposited by the proper officer in this special ballot box and a record made of the registered voter who had so voted, in a roster specially provided for the district election. After the polls were closed, the district election ballot boxes were opened and the ballots separately canvassed and separate tabulations and tallies kept thereof. Thereafter the board of supervisors canvassed the returns of the special election and declared the result.

In the case of *City and County of San Francisco v. Collins*, 216 Cal. 187, 13 P. (2d) 912, 914, a writ of mandate was sought to compel respondent as registrar of voters to place a certain municipal proposition upon the ballot. Proper steps had been taken by the board of supervisors therefor, and the election was called for August 30, 1932, on the same day as the August state-wide primary election. The objection raised by the registrar of voters was that the special election could not legally be consolidated with the August primary election. (Act 2264 of the Gen. Laws, *supra*.) Upon the hearing of the writ, it was there said: "A sufficient answer is that although the elections are to take place on the same date and in the same precincts, they have not been consolidated and are not confused. Separate provision is made for inspectors, judges of election, and clerks; ballots are to be used for the special election, as distinguished from voting machines at the primary election; and the returns are to be separately canvassed. The elections are obviously distinct and separate. See *Morgan v. City of Los Angeles*, 182 Cal. 301, 187 P. 1050; *Mead v. City of Los Angeles*, 185 Cal. 422, 197 P. 65."

A recent case, *Vela v. Huberty*, 1 Cal. (2d) 466, 35 P.(2d) 531, 532, was an application for a writ of mandate to compel respondent Huberty, as registrar of voters, to refrain from conducting a recall election. The election was called for August 28, 1934, on the same day the state August primary election was to be held. The court there said: "While the provision of the act (St. 1931, p. 2196) prohibiting the consolidation of other elections with primary elections appears to be mandatory, the question is in a somewhat hazy condition, in view of the decisions of this court as to circumstances and conditions determining what is and what is not a con-

solidated election. This case narrows itself to the proposition whether the two elections have been actually consolidated. * * * The case is of that class, each one of which must be determined by the particular facts involved."

From the facts and the law applicable thereto, we are satisfied that there was here no consolidation.

Respondent contends, further, that even if there were a consolidation, it was nevertheless permissible under the provisions of the Municipal Utilities District Act, which specific provisions they claim would govern rather than the general statutes pertaining to election matters, but we are not called upon here to determine that question, there being as a matter of fact no consolidation in the instant case.

[2-4] As to the claim that the special election was called and held without the authority of the board of supervisors, we also believe appellant is in error.

It is the contention of appellant that the election in question was not properly authorized by the board of supervisors in that the minutes authorizing the election fixing the date as of August 28th was not actually written into the journal of the board of supervisors until some time after September 1, 1934, and purported to show that on June 11, 1934, a resolution was passed by which an election was called on the matter of the proposed utility district. It appeared from testimony of the clerk of the board of supervisors that rough minutes of the board were kept by the clerk thereof and that from these rough minutes the entries in the journal of the board were thereafter made. The time the entries are actually made in the journal appears to us to be merely a clerical detail incidental to the calling and holding of the special election, and the transcribing of the minutes themselves were purely clerical and not jurisdictional.

Section 4039 of the Political Code, subdivision 1, provides: "The board must cause to be kept: * * * A 'minute-book' in which shall be entered the daily proceedings had at all regular and special meetings, and all orders and decisions made by them, except such as are required to be recorded in the 'ordinance' book."

There is nothing in this provision which specifies when the detailed proceedings shall be entered nor when the records and minutes of the board must be signed

by the chairman and clerk. The purpose of the signatures of the chairman and clerk is to identify such records as the minutes of the board, and the failure of the clerk and chairman to so sign does not invalidate a record as evidence of the action of the board. 7 Cal.Jur., p. 448, § 40.

The journal of the board of supervisors as presented contains a full, true, and complete record of all steps taken in calling, giving notice of, and holding the special election for the establishing of Bidwell Municipal Utility District.

Appellant attempts by parol evidence to establish the date of the transcription of the proceedings into the journal. In the case of *Ex parte Young*, 154 Cal. 317, 97 P. 822, 823, 22 L.R.A. (N.S.) 330, where certain members of the board of supervisors of the county submitted affidavits alleging facts contrary to the record of the proceedings of the board of supervisors, the court held that the record of the board could not be impeached in that manner, saying: "The attempt is by the affidavits to contradict that record—a record of a public body which is expressly required by the statute to be kept in writing and to show by parol evidence that its recitals are untrue. That may not, however, be done. This attack on the record, it is to be observed, is being made in a collateral proceeding, and extrinsic evidence is not admissible in such a proceeding to control or contradict the record."

The record discloses that the election was legally called and conducted pursuant to the provisions of law applicable thereto. In *East Bay, etc., v. Hadsell*, 196 Cal. 725, 239 P. 38, 45, the court said: "It is thus apparent that the election itself is the controlling feature and the ultimate objective of the statute. If the election has been honestly and fairly conducted, and no one has been injured by the manner in which the preliminary steps leading thereto have been taken, no reason exists for declaring it invalid. In the instant case there was no evidence offered on the part of the defendants tending to show that they had been prejudicially affected by the procedure which had been adopted and followed leading up to the election. As heretofore set forth, the findings by the court were to the effect that no error or irregularity or omission in the

proceedings affected any of the substantial rights of the defendants; that they had full notice that the proposition for the issuance of the bonds would be submitted to the electors of the district at an election to be held on the said 4th day of November, 1924; and that the vote at such election was a full and fair expression of the will of the electors of the district * * * upon said proposition."

The judgment is affirmed.

We concur: THOMPSON, J.; PLUMMER, J.



10 Cal.App.2d 266

MORRISON v. WHITE et al.

Civ. 5386.

District Court of Appeal, Third District,
California.

Nov. 19, 1935.

Hearing Denied by Supreme Court
Jan. 16, 1936.

1. Municipal corporations ⇨12(8)

Failure of election inspector to remove serial number in upper left-hand corner of ballot did not render ballot void.

2. Municipal corporations ⇨12(8)

Cross made of two intersecting pencil lines two inches long across right side of ballot in square labeled "Proposition" did not require rejection of ballot as a spoiled or canceled ballot where ballot was not found among unused or spoiled ballots, and legal requirements in regard to method of indicating spoiled ballots were not complied with by election officers (Pol.Code, § 1207).

3. Municipal corporations ⇨12(8)

Words "spoiled ballot" written across back of ballot did not require rejection of ballot as a spoiled or canceled ballot where ballot was not found among spoiled ballots, legal requirements in regard to method of indicating spoiled ballots were not complied with, and there was nothing on face of ballot to indicate that it was a spoiled ballot (Pol. Code, § 1207).

4. Municipal corporations ⇨12(8)

Statute providing that crosses in appropriate voting squares opposite desired answer to question, proposition, or constitutional amendment submitted to electors "shall" be made only with stamp provided by election officers is mandatory and compelled use of

prescribed method of voting (Pol.Code, § 1205).

[Ed. Note.—For other definitions of "Shall," see Words & Phrases.]

5. Municipal corporations ⇨12(8)

Ballots which contained marks in squares opposite propositions submitted which were not uniform and were not made with legal stamp furnished by election officers, but were made with lead pencil or blunt instrument, like corner of stamp or end of lead pencil, *held invalid* (Pol.Code, § 1205).

6. Municipal corporations ⇨12(8)

Ballot which showed two crosses for director in particular ward and no other mark except vote on proposition submitted was not invalid as against contention that superfluous cross for ward director was placed there to identify ballot (Pol.Code, § 1211, subd. 4).

7. Municipal corporations ⇨12(8)

Ballot which contained cross in blank space opposite word "Yes" and cross superimposed over word "Yes" *held not invalid* as against contention that cross superimposed over word "Yes" was placed there to identify ballot (Pol.Code, § 1211, subd. 4).

8. Municipal corporations ⇨12(8)

Ballot which contained cross in space opposite word "Yes" and another cross immediately after word "Proposition" *held not invalid* as marked ballot (Pol.Code, § 1211, subd. 4).

9. Municipal corporations ⇨12(8)

Ballot which contained cross properly made after word "Yes" and light smudge or erasure after word "No" *held properly allowed* as affirmative vote, as against contention that erasure was intended as distinguishing mark (Pol.Code, § 1211, subd. 4).

Appeal from Superior Court, Butte County; R. M. Rankin, Judge.

Action by Ira R. Morrison against Henry W. White, as chairman of the Board of Supervisors of the county of Butte, and others. From the judgment, plaintiff appeals.

Affirmed.

J. Oscar Goldstein, of Chico, for appellant.

Charles A. Walker, Dist. Atty., of Oroville, and Coyle E. Bybee, of Chico (Louis Bartlett, of San Francisco, of counsel), for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal from a judgment rendered in an action for a recount of votes cast in a special election on the proposed establishment of the Bidwell Municipal Utility District, which included the city of Chico, a municipality having a charter form of government, and also certain adjoining unincorporated contiguous territory.

In an opinion filed this day, we have held valid all of the proceedings leading up to and including this election. *Morrison v. White et al.* (Cal.App.) 52 P.(2d) 261. We are here concerned solely with the question pertaining to the result of the special election in the municipality of Chico, wherein appellant contends the proposition for the formation of said utility district was in fact defeated. The board of supervisors of Butte county canvassed the returns of said election and after such canvass declared that the election was carried in said incorporated city of Chico by a majority of 19 votes and in the unincorporated area included in the proposed utility district by a majority of 251 votes. After a certificate declaring said result by the board of supervisors had been filed as provided by law, plaintiff herein, a qualified voter of the city of Chico, filed a contest of said election upon various grounds, principally claiming that the proposition had not carried by a majority of 19 votes, but in fact was defeated in said municipality, and hence said district could not be declared established as a matter of law. The trial was had on said issue and after such trial and a recount of the ballots cast within the municipality of the city of Chico, the court made its finding and judgment against plaintiff and held that said election was in fact carried in the municipality by a majority of three votes, and in the unincorporated territory by a majority of 251 votes.

No question is here raised relative to the result as declared in the unincorporated area of said proposed district, but appellant confines this contest to the findings of the court that the election was carried in the incorporated city of Chico by a majority of three legal votes.

Thirteen questioned ballots are submitted to this court for a ruling, all of which appellant claims were illegally rejected or improperly counted. Upon the proper determination of the legality of these ballots

depends the outcome of this contest. We will now proceed to an examination of the several disputed ballots.

[1] In Chico precinct No. 16 there was cast and counted as a "Yes" vote, a ballot from which the serial number in the upper left-hand corner had not been removed by the inspector, and also upon the face of which, in the column providing for the proposition, was a cross made of two intersecting pencil lines approximately two inches in length. It is the contention of appellant that this ballot should have been rejected as a spoiled or canceled ballot.

As to the claim that the ballot is void because of the attached stub, *Farnham v. Boland*, 134 Cal. 151, 66 P. 200, 366, is authority to the contrary. The failure to remove the stub cannot be construed as an identifying mark, as the law refers to marks made by the voter, and it is only marks so made that demand rejection of the ballot. This principle is also upheld in the case of *Freshour v. Howard*, 142 Cal. 501, 77 P. 1101.

[2] As to the contention that the pencil marks across the right side of the ballot in the square labeled "Proposition" indicated a spoiled or canceled ballot likewise cannot be supported.

Section 1207 of the Political Code provides: "Any voter who shall spoil a ballot shall return such spoiled ballot to the ballot clerk and receive another in its place, one at a time, not to exceed three in all. All the ballots thus returned shall be immediately canceled, by drawing a cross upon the face thereof, * * * said cross to be more than three inches square, * * * and immediately upon the closing of the polls, and before any ballot shall be taken from the ballot-boxes or either thereof, the ballot clerks must, in the presence of all persons in the room, who may desire to observe the same, proceed to deface every unused or spoiled ballot by drawing across the face thereof, in ink, or indelible pencil, two lines which shall cross each other; said cross to be more than three inches square, and said ballot clerks shall thereupon, immediately, and before any ballots be taken from the ballot-box, or either thereof, place all said ballots thus defaced within an envelope and seal said envelope, and thereupon a majority of the election officers shall immediately write their names across the sealed portion of said envelope."

The questioned ballot was not found among the unused or spoiled ballots, and the legal requirements with respect to spoiled ballots not having been complied with by the election officers, it must be assumed that the ballot was properly cast and counted as a "Yes" vote, and should be accordingly accepted as such.

[3] The next ballot submitted is a ballot cast in Chico precinct No. 6 upon which the number still remained attached in the upper left-hand corner, and upon the back in pencil were written the words "spoiled ballot." As we have heretofore indicated, the presence of the numbered stub is not grounds for rejection of the ballot. The fact also that there had been written across the back, the words "spoiled ballot" is not sufficient to classify the ballot as such, as it does not conform to the requirements of section 1207 of the Political Code heretofore quoted in regard to the method of indicating a spoiled ballot, and there being nothing upon the face of the ballot to indicate that it was a spoiled ballot nor any testimony of the election officers to that effect, nor was it found among the spoiled ballots. This ballot should therefore have been counted as a valid "No" vote.

[4,5] A group of five ballots are presented from Chico districts Nos. 1, 6, 19, and 30. These ballots are marked either with lead pencil or with some blunt instrument, as perhaps the corner of the stamp or the end of a lead pencil. The markings made upon the ballots other than those made by lead pencil were large, irregular, and blurred. They obviously were not marked with the rubber stamp provided by the election officers for stamping the ballots, which stamp was properly used by all other voters in the precinct. In the case of *Evarts v. Weise*, 176 Cal. 218, 168 P. 122, 123, the court had before it certain ballots cast in a general election and marked with a large cross apparently made with the blunt end of a pen or pencil holder. These ballots were allowed by the court because there was no evidence in the record disclosing the size or character of the stamps used in the several precincts in which the ballots in question were cast; the court saying: "Yet we cannot say, from the mere appearance of the ballots, and in the absence of evidence de hors the ballots themselves, showing or tending to show by what means the marks were made, that said marks or crosses were not produced by means of a stamp." The court

further said in regard to these particular ballots: "All the marks upon the five ballots, it should be explained, are substantially the same or of the same general character."

In the case at bar there were several hundred ballots cast, each marked with the regular legal rubber stamp and an inspection of the questioned ballots here clearly show they were not marked or stamped with the legal stamp furnished for use by their officers in these precincts, nor were the particular markings uniform, but each was a distinct and individual mark, not stamped, but drawn. Furthermore, section 1205 of the Political Code prescribes the use of a rubber stamp in voting. The pertinent language of the statute is as follows: "In case of a question, proposition or constitutional amendment, submitted to the vote of the electors, the elector shall mark his ballot by stamping in the appropriate voting square a cross (X) opposite the answer he desires to give as to such question, proposition or constitutional amendment. All crosses shall be made only with a stamp, which with necessary pads and ink, shall be provided by the officers who by law are required to furnish election supplies for each booth or compartment provided for the marking and preparation of ballots."

The case of *Evarts v. Weise*, supra, is not contrary to the rule laid down in such cases as *Sweetser v. Pacheco*, 172 Cal. 137, 155 P. 639, 641, where the court, in a contest over a county office where the crosses were made with a lead pencil said the intent of the voter could be expressed only by stamping a cross in the voting square, and lacking such stamped cross the ballot could not be counted. "The express language of the law forbids it." Also, in *Castagnetto v. Superior Court*, 189 Cal. 673, 209 P. 549, the court said: "Said section 1205 contains the provision that 'all crosses shall be made only with a stamp,' and is mandatory in that regard."

To hold that the use of the word "shall" in the section was merely permissive or directory only would be to rob the section of all its force and its enactment an unnecessary act. Without doubt, it was the intention of the Legislature, in the interest of uniformity and to guard against illegal voting to compel the use of the prescribed method of voting, that is, by stamping a cross, made only with the

stamp provided by the election officers. The ballots here marked are not, therefore, legal votes.

[6] There was a ballot cast in Chico No. 1 which showed two crosses for a director in ward 1, and no other mark on the ballot, except the vote on the proposition in the square marked "Yes." It is the contention that the superfluous cross in the square for director in ward 1, in view of the fact that no cross at all was placed in any of the squares relating to the other four wards was put there to identify the ballot. This contention is untenable, and the vote was properly recorded as an affirmative vote.

[7] Section 1211, subdivision 4, of the Political Code provides: "No mark upon a ballot which is unauthorized by this act shall be held to invalidate such ballot, unless it shall appear that such mark was placed thereon by the voter for the purpose of identifying such ballot."

In Chico precinct No. 12, a ballot was allowed as a "Yes" vote which contained a cross not only in the blank space opposite the word "Yes," but also another cross superimposed over the word "Yes." It was contended by appellant that this also was an attempt to identify the ballot. This was similar in principle to the foregoing objection, and the vote was properly recorded as a "Yes" vote.

[8] Another ballot cast in Chico precinct No. 16 had one cross in the space opposite the word "Yes" and another cross immediately after the word "Proposition." This also was contended by appellant to have been a marked ballot, but the trial court was correct in allowing the ballot as a yes vote.

There is nothing on any of these ballots last referred to which indicates any intent to identify the ballot. In the case of *Sweetser v. Pacheco*, supra, it was contended that a cross near the upper hand corner of the ballot on the margin to the right of the "Direction to Voters" constituted a distinguishing mark invalidating the ballot. The court held there was nothing to show that the cross was the result of a deliberate impression of the stamp and nothing to indicate it was not inadvertently made, and it could not be held that an examination of the ballot indicated that the cross placed thereon by the voter was for the purpose of identifying

such ballot. Upon another ballot in the same case a voter had stamped a cross over the word "Yes" as to several propositions and then had stamped a cross in the square. The court there held that there was nothing to indicate any intent to identify the ballot, and they were properly counted as effective ballots.

[9] Another objection is here made to a ballot cast in Chico precinct No. 26, wherein a cross properly made appears after the word "Yes" and a light smudge or erasure appeared after the word "No." The ballot clearly indicates the intention of the voter to cast an affirmative vote, and it cannot be held that there is any indication that the erasure was intended as a distinguishing mark.

When the envelope containing the ballots of Chico precinct No. 18 was opened before the trial court upon the hearing of the contest, by inadvertence a small packet of ballots was overlooked. After a recount had been concluded and after findings and conclusions were signed and the judgment entered, the attorney for contestant obtained an order from the trial court to make copies of certain of the ballots. Upon the reopening of the envelope of Chico precinct No. 18, a small packet of ballots tied with a string was found in the bottom of the container. Upon opening this small packet, it was found to contain nine ballots from which the serial numbers had been detached, but which did not show a cross in any place, with the exception of one ballot which appeared upon its face to be a valid "No" vote.

Respondent objects to the counting of this ballot, as the discovery came too late; that the ballots had not been presented to the trial court at the time set for the examination and recount of the ballots, and therefore should not now be considered by this court in passing upon the judgment and findings of the trial court. Inasmuch as the allowance or disallowance of this ballot will not affect the outcome of the contest, we do not deem it necessary to pass upon the objections urged.

The foregoing constitute all of the ballots that respective counsel deem of sufficient importance to challenge, and having examined the various objections urged to the rulings of the trial court, we find that the proposition to create the Bidwell Municipal Utility District has been carried,

and the judgment of the trial court so holding is hereby affirmed.

We concur: THOMPSON, J.; PLUMMER, J.



10 Cal.App.2d 196

ENGLISH v. OLYMPIC AUDITORIUM,
Inc., et al.
Civ. 5432.

District Court of Appeal, Third District,
California.

Nov. 14, 1935.

As Modified on Denial of Rehearing

Dec. 12, 1935.

1. Appeal and error ⇨1207(1)

After reversal of judgment in mechanic's lien action with directions for entry of judgment awarding lien on building in question down to surface of ground in accordance with findings of fact and conclusions of law thus amended, trial court held without authority to include in judgment conditions with respect to time of removal of building from premises by purchaser.

2. Mechanics' liens ⇨291(6)

Although court has inherent power upon proper showing to grant reasonable time within which building may be removed upon sale to satisfy mechanic's lien as necessary incident to fulfillment of judgment, question of what constitutes reasonable time therefor depends upon particular circumstances as to which parties have right to be heard.

3. Appeal and error ⇨1207(1)

Where court of review inadvertently omits from instructions to trial court upon reversal of judgment essential elements with-in issues necessarily determined on appeal, aggrieved party has remedy in petition for rehearing, but trial court may not exceed specific directions of reviewing court by addition of conditions which it assumes should have been included or by disregarding directions by adding or detracting therefrom any essential determination of issues.

4. Appeal and error ⇨1207(1)

Where reviewing court adopts written opinion determining issues on appeal and directing that judgment be modified or reversed accordingly, opinion becomes part of decision and instruction, vesting trial court with sound discretion to determine what reviewing court decided thereby.

5. Appeal and error ☞1207(1)

Where reviewing court adopts written opinion determining issues on appeal and modifies or reverses judgment specifically directing lower court with respect to particular issues, trial court has no discretion to interpret opinion of appellate court, but is bound to specifically carry out instructions thereof, and any material variance from explicit directions of reviewing court is void.

Appeal from Superior Court, Los Angeles County.

Consolidated actions by James G. English, doing business under the fictitious name and style of English Electric Company, against the Olympic Auditorium, Incorporated, and others, and the Los Angeles Athletic Club and another. From the judgment, the plaintiff appeals.

Judgment modified.

Dryer, Castle & Richards, Horton, Anderson, Horton & Armstrong, Rufus L. Horton, and Joseph K. Horton, all of Los Angeles, for appellant.

Hunsaker, Britt & Cosgrove, Cosgrove & O'Neil, and Lawler & Degnan, all of Los Angeles, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiffs have appealed from a portion of the judgment in these consolidated mechanic's lien actions, which was rendered pursuant to the directions of the Supreme Court upon reversal of the former judgment therein. English et al. v. Olympic Auditorium et al., 217 Cal. 631, 644, 20 P. (2d) 946, 951, 87 A.L.R. 1281. It is asserted the trial court has added to its final judgment conditions which are not authorized by the specific directions of the Supreme Court, rendering them ineffectual and void.

Twenty suits for foreclosure of mechanic's liens were filed in Los Angeles county against the Olympic Auditorium Company, the Los Angeles Athletic Club and other defendants. These actions were consolidated for trial. Findings of facts were adopted by the court favorable to the plaintiffs, and a judgment was accordingly rendered in their favor for the various sums to which each plaintiff was entitled. They were awarded liens for the satisfaction of their respective judgments. Upon a subsequent motion made under the provisions of

section 663 of the Code of Civil Procedure, the findings and judgment were set aside and other findings were adopted favorable to the defendants with respect to the vesting of liens. A different judgment was then rendered accordingly. From that judgment the plaintiffs, English and Hammond Lumber Company, appealed. The judgment was reversed by the Supreme Court, and the trial court was directed to render judgment awarding the appellants mechanic's liens on the Auditorium building in question to secure the satisfaction of their ascertained claims. The language of the Supreme Court in the case of English v. Olympic Auditorium, supra, is very specific in that regard. It reads as follows: "It is therefore ordered that as to these appellants [English and Hammond Lumber Company] the order of the trial court of September 27, 1928, and the judgment entered October 6, 1928, be and each one of them is hereby reversed. It is further ordered that this cause be and it is hereby remanded, with directions to the trial court to enter its conclusions of law granting appellants a lien upon the Auditorium Building down to the surface of the ground, and to enter its judgment in accordance with the findings of fact and the conclusions of law thus amended, granting the lien as aforesaid."

Upon the issuing of the remittitur from the Supreme Court, the trial court adopted modified findings and rendered judgment June 26, 1933, in favor of these appellants for the respective sums theretofore determined to be due to each of them and awarded to each of them, in the language directed by the Supreme Court, a lien upon the Auditorium building to secure the ascertained indebtedness. The amended judgment further provides that if the judgments in favor of these appellants are not satisfied within ninety days of the entry of judgment the building shall be sold in the manner provided by law; that the purchaser thereof shall be granted a reasonable time thereafter within which to remove the building from the premises, but that such process of removal shall commence within sixty days from the time of sale and continue with due diligence until it is completed, and that pending the actual work of removing the building the Los Angeles Athletic Club and the Title Insurance & Trust Company shall be enjoined from the use or occupation of the building.

To these last-mentioned conditions the appellants objected on the ground that the trial court was without jurisdiction or authority to add to the specific directions of the Supreme Court any conditions regarding the nature of the judgment. The objection was overruled. From the foregoing conditions which were added to the directions of the Supreme Court in the rendering of judgment, the plaintiffs, English and Hammond Lumber Company have appealed.

[1] The trial court was neither authorized by the Supreme Court nor by law to change its final judgment by adding thereto conditions which were neither issues in the trial of the case nor contemplated by the court of review on appeal. The trial court is bound by the specific directions of the Supreme Court to modify the findings of facts and conclusions of law upon which the appeal was based, so as to change the findings in one respect only, and to render judgment accordingly. The Supreme Court directed the trial court to "enter its conclusions of law granting appellants a lien upon the Auditorium Building down to the surface of the ground, and to enter its judgment in accordance with the findings of fact and the conclusions of law thus amended, granting the lien as aforesaid." The trial court exceeded its authority by adding to the foregoing directions provisions that in the event of a sale of the building to satisfy the lien the purchaser thereof shall commence the removal of the building from the land upon which it stands within sixty days of the date of the sale, and prosecute such removal with diligence to its completion with as little damage to the freehold as possible, and that pending such operations of removal the defendants are enjoined from occupying or using the building. It was not necessary for the Supreme Court to direct the manner of satisfying the lien in the event of a sale of the building. The law provides that remedy. The added conditions above specified were not included in the findings which were before the Supreme Court on appeal. Those conditions were neither contemplated by the Supreme Court nor authorized by its specific directions to the trial court. Those changes in the judgment are in excess of the authority of the trial court, and therefore void.

[2] We may assume that a court has inherent power upon a proper showing to grant a reasonable time within which a

building may be removed from the premises upon which it is constructed upon the sale thereof to satisfy an established mechanic's lien, as a necessary incident to the fulfillment of its judgment. *Security Trust & Savings Bank v. Southern Pacific R. R. Co.*, (Cal.App.) 45 P.(2d) 268. But the question of what constitutes a reasonable time therefor depends on the particular circumstances of each case. Certainly the parties to the litigation have a right to be heard regarding that question of fact. In the present case, the challenged conditions which were added to the judgment by the trial court were neither included in the findings and judgment which were presented to the Supreme Court on appeal nor in the specific directions which were given to the trial court upon the reversal of the judgment. Upon the conditions contained in this judgment which are in excess of the directions of the Supreme Court, the appellants are entitled to be heard at a proper time.

[3] If a court of review inadvertently omits to include in its instructions to a trial court upon the reversal of a judgment essential elements within the issues necessarily determined on the appeal, the aggrieved party has his remedy in a petition for rehearing. A trial court may not exceed the specific directions of a court of review in remanding a cause after a reversal of the judgment on appeal and add thereto conditions which it assumes the reviewing court should have included.

The authorities are uniform to the effect that a trial court may not disregard the directions of a court of review upon and reversal and remanding of a case on appeal by adding thereto or detracting therefrom any essential determination of the issues. *Cowdery v. London & San Francisco Bank, Ltd.*, 139 Cal. 298, 307, 73 P. 196, 96 Am.St.Rep. 115; *Weaver v. City and County of San Francisco*, 146 Cal. 728, 732, 81 P. 119; *Lial v. Superior Court*, 133 Cal. App. 31, 23 P.(2d) 795; *Standard Accident Ins. Co. v. Allen*, 38 Ariz. 173, 298 P. 406; *Rogers v. Hill*, 289 U.S. 582, 53 S.Ct. 731, 77 L.Ed. 1385, 88 A.L.R. 744.

[4, 5] The directions of a court of review for the modification or reversal of a judgment, when the cause is not remanded for a new trial, may ordinarily be divided into two general classes. The appellate tribunal adopts a written opinion determining the issues on appeal and directs that the judgment be modified or reversed accord-

ingly, in which event the opinion becomes a part of the decision and instructions, vesting the trial court with a sound discretion to determine what the reviewing court decided thereby. In the other class of instructions, the appellate court may adopt a written opinion determining the issues on appeal and modify or reverse the judgment, specifically directing the lower court with respect to particular issues. In the last-mentioned class of cases, the trial court has no discretion to interpret the opinion of the appellate court, but, on the contrary, it is bound to specifically carry out the instructions of the reviewing court. Under such circumstances, any material variance from the explicit directions of the reviewing court is unauthorized and void. In the present case, the trial court was directed to change its findings and render judgment differing in one respect only from the findings and judgment from which the appeal was perfected. The court was specifically instructed to change the findings and judgment so as to award mechanics' liens to the appellants on the Auditorium building. This instruction was exceeded, and to that extent the judgment is void.

The judgment is modified by eliminating therefrom the conditions from which this appeal was taken. The appellants may recover their costs on appeal.

We concur: PULLEN, P. J.; PLUMMER, J.



10 Cal.App.2d 355

SERVENTE v. MURRAY, Mayor, et al.
Civ. 9357.

District Court of Appeal, First District,
Division 1, California.
Nov. 25, 1935.

Hearing Denied by Supreme Court
Jan. 23, 1936.

1. Judgment ⇨948(1)

Pleas of res judicata and estoppel by judgment are matters of defense.

2. Judgment ⇨738

Admitted allegations which are necessary to determine rights of adverse parties and are recited in findings are adjudicated within rule of res judicata (Code Civ.Proc. §§ 1908, 1911).

3. Trial ⇨396(7)

Admission in pleading warrants finding of court in conformity thereto.

4. Judgment ⇨695

Identity of parties is sufficient within rule of res judicata if they hold same rights of interest as principals, agents, or representatives, and are in fact adverse parties, or their interests are adverse in the proceedings (Code Civ.Proc. § 1910).

5. Judgment ⇨702

Generally, political subdivision and officers, boards, commissions agents, and representatives thereof form but a single entity within rule requiring identity of parties to support plea of res judicata (Code Civ.Proc. § 1910).

6. Judgment ⇨702

One suing members of board or commission cannot afterwards claim that issue determined therein concerning interest of political subdivision and petitioner affected only rights of members of commission in their private capacities.

7. Judgment ⇨702

Judgment denying petition by former policeman in mandamus proceedings against members of pension board, in which petition alleged that petitioner had been arbitrarily dismissed and answer admitted dismissal but alleged that removal was not accomplished arbitrarily, held res judicata on issue of legality of dismissal in petitioner's subsequent mandamus proceeding against city manager and others for reinstatement in police department (Code Civ.Proc. §§ 1908, 1910, 1911).

8. Judgment ⇨719

Matters put in issue and determined by necessary implication, though not expressly mentioned in judgment, are conclusive on parties and privies (Code Civ.Proc. §§ 1908, 1910, 1911).

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Proceedings by Louis Servente against William F. Murray, mayor of the city of Alameda, and others for mandamus. From an adverse judgment, plaintiff appeals.

Affirmed.

Randal F. Dickey, of Alameda, and Dunne & Dunne, of San Francisco, for appellant.

Breed, Burpee & Robinson, of Oakland, for respondents.

WARD, Justice pro tem.

Appellant Servente served as a fireman and subsequently in several capacities as a member of the police department in the city of Alameda. In 1929 he was dismissed by the city manager from all employment in the city of Alameda. In the following year proceedings were commenced against the members of the pension board in the form of a petition for a writ of mandate. The petition alleged that the removal of Servente was accomplished by the arbitrary action of the city manager without notification or the benefit of a hearing. The answer set forth that petitioner had been removed and dismissed, but that the removal was not accomplished arbitrarily and that the refusal of the pension board to grant a pension to Servente was in accordance with the provisions of the pension ordinance. Judgment in that proceeding was rendered against petitioner. The present appeal is from a subsequent judgment rendered against the petitioner Servente for a writ of mandate seeking reinstatement in the police department together with back pay from the date of his discharge.

As a fifth and separate defense to the cause of action set forth in the petition, respondents alleged: "That, in that certain action heretofore pending in the Superior Court of the State of California, in and for the County of Alameda, entitled, 'Louis Servente, Petitioner, vs. C. E. Hickok, Victor L. Shaefer and Homer Dallas, as members of the Pension Board of the City of Alameda, County of Alameda, State of California, Respondents,' No. 113445, judgment and decision was duly and regularly made and rendered finding and determining that, on September 23, 1929, C. E. Hickok, as City Manager of the City of Alameda, joined by William H. Wahmuth, as Chief of Police of the City of Alameda, did remove and dismiss petitioner from the Police Department of the City of Alameda and from all offices and employments held by petitioner therein. * * * That, thereafter, on appeal of said action to the District Court of Appeal of the State of California, First Appellate District, Division II, No. 7526, said District Court of Appeal did find and determine that petitioner herein was duly and regularly dismissed from his position as a member of the Police Department of the City of Alameda." The answer further alleged that the judgment in the superior court and the decision and determination of the District Court of Appeal are now final. In the superior court proceeding the findings show the

following: "That, on September 23, 1929, C. E. Hickok, as City Manager of the City of Alameda, joined by William H. Wahmuth, as Chief of Police of the City of Alameda, did remove and dismiss petitioner from the Police Department of the City of Alameda and from all offices and employments held by petitioner therein. That the grounds and cause assigned for such dismissal and removal, and the grounds and cause existing for such dismissal and removal were and are notorious and consecutive insubordination and neglect of duty. That on September 23, 1929, petitioner was notified in writing of said dismissal and removal and the cause thereof, as hereinabove set forth. That on the 18th day of March, 1930, petitioner made application to the Pension Board of the City of Alameda for pension under and in accordance with the Pension Ordinance of the City of Alameda, set forth as 'Exhibit A' to the petition on file herein, and on the 26th day of March, 1930, after hearing and after granting petitioner a full opportunity to be heard, said Pension Board duly and regularly denied said application of petitioner for said pension, and then and there refused, and ever since has refused, to grant to and has not granted to petitioner any pension as a member or former member of said police department." On appeal in *Servente v. Hickok*, 113 Cal. App. 301, 304, 298 P. 116, 117, the court held: "Here the trial court found that the pension board granted applicants full opportunity to be heard. This is the only hearing under either charter or ordinance to which they were entitled. This board having found that applicants had been removed from the department for causes which would bar them from a pension under the ordinance, and no attack being made upon that finding, or upon the proceedings leading up to it, it follows that the court was bound to deny the writ for the very obvious reason that mandamus will not lie to compel the pension board to grant a pension when the unimpeached record discloses that it was the duty of the board to deny it. *Mogan v. Board of Police Com'rs*, 100 Cal.App. 270, 276, 279 P. 1080. To have any standing in this proceeding it was incumbent upon petitioners to plead and prove that the pension board acted arbitrarily, capriciously, or fraudulently, or that in some other respect the proceedings before the pension board were conducted without due regard for the rights of the petitioners." A petition for hearing before the Supreme Court was denied.

[1-3] Pleas of *res judicata* and estoppel by judgment when presented by proper pleading are defensive matters. *Vitimin Milling Corporation v. Superior Court*, 1 Cal.(2d) 116-121, 33 P.(2d) 1016. There is a distinction between a second suit on the same cause of action when the judgment is a complete bar, and a suit on a different cause of action where judgment in the first proceeding may be advanced as an estoppel as to matters actually determined. A judgment is conclusive between parties and their successors upon matters directly adjudicated. Code Civ.Proc. § 1908. Appellant contends that in the prior proceeding the question of petitioner's dismissal was not directly adjudicated and relies primarily upon the case of *Freeman v. Barnum*, 131 Cal. 386, 389, 63 P. 691, 692, 82 Am.St.Rep. 355, wherein the court said: "But this estoppel in actions upon a different cause of action only extends to matters actually litigated and determined, and not to questions involved, and defenses which might have been, but were not, made." In the prior proceeding the answer admitted the allegations relative to the dismissal of the petitioner. It is true that when allegations of a complaint are admitted, they cease to be controversial and require no determination. The entry of a judgment is essential, however, to a final disposition of the action. A judgment is entered upon the decision rendered by the court. A decision is a compilation of findings of fact and conclusions of law. An admission in the pleading warrants a finding in conformity thereto. *Bloomquist v. Haley*, 204 Cal. 251, 252, 268 P. 367. When the history of the proceedings is recited in the findings of the court and admitted allegations are necessary to determine the rights of the adverse parties, the admitted allegations become adjudicated and directly so by acquiescence of the litigants. The case of *Freeman v. Barnum*, supra, has not entirely met with the approval of the courts of this state in later decisions. The rule is that whatever is necessarily included in a judgment, or appears upon its face to have been determined, may be deemed to be adjudicated. Code Civ.Proc. § 1911. This latter rule is recognized in *Silverston v. Mercantile Trust Co.*, 18 Cal.App. 180, 122 P. 976, wherein judgment rolls in former actions were set forth in the answer to the complaint and a stipulation entered into that they were correctly pleaded. It was held that their validity as a trust was put in issue and therefore adjudicated, and the court said, 18 Cal.App. 180, at page 188, 122

P. 976, 979: "The rule as to estoppel by judgment is not correctly stated in the *Freeman Case*, supra. The learned justice who wrote the opinion apparently overlooked the latter part of section 1911 of the Code of Civil Procedure. That section furnishes the presumption or rule of evidence for our guidance in ascertaining what has been determined by a judgment. We are not limited to that 'which appears upon its face to have been so adjudged'; but the judgment also embraces whatever is actually and necessarily included therein or necessary thereto. Parties are therefore estopped, by a former judgment, from contending for the contrary, not only as to the matters which appear to have been determined, but also as to those which were necessarily involved therein or necessary thereto." *Price v. Sixth District Agricultural Ass'n*, 201 Cal. 502-511, 258 P. 387; *Caminetti v. Board of Trustees*, 1 Cal.(2d) 354-356, 34 P.(2d) 1021.

[4, 5] To support the plea of *res judicata* it is necessary to prove that there was an identity of parties involved in the two actions. Section 1910 of the Code of Civil Procedure provides: "The parties are deemed to be the same when those between whom the evidence is offered were on opposite sides in the former case, and a judgment or other determination could in that case have been made between them alone, though other parties were joined with both or either." This rule is subject to certain legal principles appertaining thereto. The successors of parties in interest or agents will sometimes be deemed to be the identical parties if the determined question is identical. As an example, if an agent extends credit upon his individual responsibility for a premium to an assured, and is charged with the amount by the assurer, the agent may sue for and recover the amount in his own name. Judgment in such a case, though the contract was between the assured and the company, is a bar to the collection of the premium by the company. *Nisbet v. Rhinehart*, 2 Cal.(2d) 477-484, 42 P.(2d) 71. The identity of the issue and the determination thereof is of more importance than the identity of the parties named. If they hold the same rights of interest as principals, agents, or representatives and are in fact adverse parties, or their interests are adverse in the two proceedings, the identity of the parties is sufficient. In the present case the identity of the petitioner is identical with the petitioner in the prior proceeding.

In the first action there was an adjudication against the members of the pension board of the city of Alameda consisting of the city manager, mayor, and treasurer ex officio. The present action was instituted against the mayor, city manager, treasurer, auditor, and chief of police of the same city. The respondent officers in each case were the agents of the municipality and equally bound by the original judgment. If the second petition had been directed against the chief of police to approve, the auditor to audit, and the treasurer to pay the salary claimed, without the inclusion of the mayor or city manager, the officers sued would have been justified in refusing to comply with the demand upon the ground that the petitioner had not performed the work due to a dismissal from the department. In each proceeding the respondents were merely the representatives of the real adverse party, the municipality. Special circumstances may arise making this rule inapplicable, but generally a political subdivision and the officers, boards, commissions, agents, and representatives thereof form but a single entity. *Price v. Sixth District Agricultural Ass'n*, supra, 201 Cal. 502, at page 513, 258 P. 387; *Davidson v. Baldwin*, 2 Cal.App. 733, 84 P. 238; *Bernhard v. Wall*, 184 Cal. 612, 194 P. 1040; *People v. Holladay*, 93 Cal. 241, 29 P. 54, 27 Am.St.Rep. 186.

Appellant contends that the sole authority of the respondents in the first proceeding was in relation to pensions, and that the only matter here in controversy is whether or not the petitioner is, de jure, a police officer, and that the pension board had no authority to determine this latter question. True, but the reason for the denial of the application for a pension was appellant's dismissal from the police department. The same reason must prevail in the present proceeding. Appellant cannot obtain the claimed salary because of nonperformance of the work as the result of a dismissal. It is urged that there was no authority given the pension board to represent the municipality in litigation, and that the municipality was not bound thereby. The municipality does not raise this objection, but appellant, who is the petitioner in each proceeding. As the petitioner in the first proceeding, appellant recognized his right to sue and the right of the respondent pension board to defend.

the public, but involving the members of the pension board only, individually in their private capacities; that the capacities of the respondents in the first proceeding were derived solely from the provisions of the pension ordinance and were distinct and complete in themselves. The answer to this argument is that, irrespective of the derivation of the pension board's power, the judgment inured to the benefit of the municipality. The pension board had no power to dismiss appellant from the department, but having been sued it had the right to admit or deny any allegation of the petition relative to his dismissal by another branch of the municipal government. No specific statutory authority is necessary to institute mandamus proceedings except as contained in the provisions regarding mandamus. If an alleged aggrieved party sues the members of a board or commission and a vital issue is determined concerning the rights and interests of the petitioner involving a political subdivision, the petitioner cannot thereafter claim that only the rights of the members of the commission in their private capacities were involved and that there was no determination of the rights of the public. If such a judgment was not effectual against or in favor of a political subdivision, there would be no end to litigation. *Suisun L. Co. v. Fairfield School Dist.*, 19 Cal.App. 587-594, 127 P. 349. In the first proceeding the pension board represented the public interest, and if the judgment was upon the merits, it is immaterial under such circumstances that the form of the action was an application for a writ of mandate. 34 C.J., p. 760, § 1173; *Davidson v. Baldwin*, 2 Cal.App. 733, 84 P. 238; *Bernhard v. Wall*, supra; *Price v. Sixth District Agricultural Ass'n*, supra. This rule would not apply if the members of the pension board had no authority to present and submit an issue on behalf of a political subdivision. As heretofore noted, the issue of dismissal in the first proceeding was presented by the petitioner. Respondents merely admitted the allegation of removal of Servente from the police department. If respondents denied the issue raised by petitioner, the burden of proving the dismissal, or that the dismissal was invalid, would have been upon the petitioner. It was an issue submitted by the petitioner to which the respondents acquiesced.

[6] Appellant proceeds one step further and contends that there was no determination of the question of dismissal involving

[7, 8] The difficulty in this matter is that in the first petition for a writ of mandate the then attorney for petitioner pro-

ceeded upon the theory that the dismissal of Servente was a valid dismissal. The attorney in the present petition for a writ of mandate contends that the order of dismissal was utterly void in that the city manager solely on his own motion, without notice or opportunity to be heard, dismissed appellant from the police department; that the allegation of dismissal in the first petition was inadvertently made, and mistakenly admitted in the answer; that in fact appellant was not dismissed. This was a matter that should have been determined upon the original proceeding. In *Caminetti v. Board of Trustees*, supra, petitioner obtained a writ of mandate to establish her right to teach in the Jackson Union High School in Amador county. The trustees ignored the writ and refused to reinstate the petitioner in her position whereupon a second writ of mandate was issued to compel payment of salary. The defendants in their answer to the second petition set forth that the certificate of qualification of the petitioner as a teacher was not on file in the office of the county superintendent of schools. On appeal the court said, 1 Cal.(2d) 354, at page 356, 34 P.(2d) 1021, 1022: "It is apparent that this defense, and the various denials found in the answer, are disposed of by the application of the doctrine of *res judicata*. By its judgment in the first mandamus proceeding, the court in October, 1931, determined that plaintiff was entitled to teach, and was ready, able, and willing to do so, during that school year. The defense that she had disqualified herself by removal of her credentials in May was available at that time, and hence, whether or not it was actually made, it was determined adversely to defendants by the judgment. It is elementary that the judgment is conclusive not only as to issues raised but also as to those which could have been raised. *Price v. Sixth District Agricultural Ass'n*, 201 Cal. 502, 258 P. 387."

The question of appellant's dismissal and whether or not it was accomplished by the arbitrary action of the city manager was necessarily an issue involved in the pension proceeding and was actually determined. Any error in the pension case would have been reversible on appeal. *Vitimin Milling Corporation v. Superior Court*, 1 Cal.(2d) 116-121, 33 P.(2d) 1016. The issue of dismissal involved in this proceeding having been determined by a prior judgment, no issue of fact of dismissal remains to be lit-

igated. If petitioner was dismissed lawfully, he is not entitled to back salary from the date of dismissal. The court's decision that the petitioner was removed or dismissed for cause necessarily involved a determination that the order of dismissal was lawful. Matters put in issue, although not expressly mentioned in the judgment, if determined by necessary implication, are conclusive on parties to the action and persons in privity with them. This case comes within the general rule that requires parties to rest upon one decision. *Price v. Sixth District Agricultural Ass'n*, supra. The second proceeding was *res judicata*. It is therefore unnecessary to consider respondents' additional affirmative defenses of laches, and that the cause of action was barred by the statute of limitations.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.



PEOPLE v. RUBENS et al.*

Cr. 1448.

District Court of Appeal, Third District,
California.

Nov. 20, 1935.

Rehearing Granted Dec. 5, 1935.

1. Criminal law ⇨1023(8)

Order denying motion to arrest judgment is not appealable (Pen.Code, § 1237).

2. Conspiracy ⇨43(1)

False pretenses ⇨26

Licenses ⇨42(3)

Indictment for grand theft, conspiracy, and for violation of Corporate Securities Act by selling an interest in an oil and gas lease without a permit from the commissioner of corporations *held* sufficient to charge an offense (Pen.Code, §§ 950-952; St. 1931, p. 950, § 18).

Indictment alleged in each count that defendants on specified date willfully and knowingly authorized and aided in issue and sale to designated persons of security of their own issue as defined in Corporate Securities Act, to wit, "a certain certificate of interest in an oil and gas lease" on specifically described property without permit from corporation commissioner.

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 54 P.2d 1107.

3. Licenses ⇨18½

Option to purchase oil and gas lease assignment representing fractional interest in leases and entitling purchaser to pro rata proportion of net proceeds derived from sales of oil and gas produced on designated tract held "security" or "certificate of interest in oil enterprise" within Corporate Securities Act requiring permit from corporation commissioner for sale thereof (St. 1931, p. 950, § 18).

[Ed. Note.—For other definitions of "Security," see Words & Phrases.]

4. Conspiracy ⇨47

False pretenses ⇨49(1)

Licenses ⇨42(4)

Evidence held to support conviction of grand theft, conspiracy, and violation of the Corporate Securities Act by selling an interest in an oil and gas lease without a permit from commissioner of corporations (St. 1931, p. 938, § 2 (a) (7-9); Pen.Code, §§ 31, 182, 971).

5. Criminal law ⇨398(1)

In prosecution for grand theft, conspiracy, and violation of Corporate Securities Act in issuance of certificate of interest in oil and gas lease without permit, true copies of written instrument representing assignment of interest complained of held admissible where original documents were in possession of defendants and defendants admitted that documents offered were exact copies of originals (St. 1931, p. 938, § 2 (a) (7-9); Pen.Code, § 182).

6. Criminal law ⇨1170(1)

In prosecution for grand theft, conspiracy, and violation of Corporate Securities Act in selling certificates of interest in oil and gas lease without permit, exclusion of testimony that land in question was good prospective oil land in rebuttal of testimony adduced by prosecution as to representations relative to prospects of striking oil held not reversible error since evidence was collateral to issues (Pen.Code, § 182; St. 1931, p. 950, § 18; Const. art. 6, § 4½).

7. Criminal law ⇨396(1)

Admission of irrelevant evidence adduced by one party does not justify admission of irrelevant evidence offered in contradiction thereof by other party.

8. Criminal law ⇨829(3)

In prosecution for grand theft, conspiracy, and violation of Corporate Securities Act in issuing and selling certificates of interest in oil and gas lease without permit, instructions as to meaning of "security" and "certificate of interest" within Corporate Securities Act with reference to oil and gas lease assignments held properly refused as mis-

leading in view of instruction properly defining terms as used in act (Pen.Code, § 182; St. 1931, p. 950, § 18).

9. Criminal law ⇨1186(4)

In prosecution for grand theft, conspiracy, and violation of Corporate Securities Act in issuing and selling certificates of interest in oil and gas lease without permit, pronouncement of sentence in less than two days after rendering of verdict held not reversible error where no reason for delay was suggested by defendants when judgment was pronounced, since time for pronouncing sentence is not jurisdictional, and no prejudice resulted from premature sentence (Pen.Code, §§ 182, 1191; St. 1931, p. 950, § 18; Const. art. 6, § 4½).

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Si Rubens, F. L. Appleton, and Gregory Linder were convicted of grand theft, conspiracy to commit a crime, and violation of the Corporate Securities Act, and they appeal.

Affirmed.

Frank G. Warren, of Stockton, and Lester R. Godward, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendants have appealed from judgments of conviction of five counts of an indictment for grand theft, two counts of conspiracy to commit a crime under section 182 of the Penal Code, and fourteen counts for violation of the Corporate Securities Act (St. 1917, p. 673, as amended) in issuing and selling to various named individuals certificates of interests in an oil and gas lease without securing from the corporation commissioner of California a license therefor. These defendants also purport to have appealed from an order denying their motion in arrest of judgment.

It is asserted each of the counts of the indictment fails to specifically allege facts sufficient to constitute a public offense; that the evidence fails to support the verdict and judgment chiefly because the documents upon which the prosecution relies in support of the judgment are mere op-

tions for the purchase of an interest in real property and on the contrary that they are not certificates of interests in an oil and gas lease; that the court erred in excluding evidence intended to rebut a showing of fraudulent representations respecting the condition of the oil wells which are involved in the transaction; that the court erred in giving and refusing certain instructions and in pronouncing sentence in less than two days after the rendering of the verdict contrary to the provisions of section 1191 of the Penal Code.

[1] The statute does not authorize an appeal from an order denying an arrest of judgment. Section 1237, Pen. Code; *People v. McCalla*, 63 Cal.App. 783, 220 P. 436; *People v. Jackson*, 138 Cal. 462, 71 P. 566. Section 1237, *supra*, provides that a defendant may appeal, only, from a final judgment of conviction, from an order denying a motion for new trial, and from an order made after judgment. It is obvious that an order denying a motion in arrest of judgment is necessarily made before and not after judgment is rendered. The purported appeal from the order denying defendants' motion to arrest the judgment is therefore dismissed.

[2] We are of the opinion each count of the indictment states facts sufficient to constitute the offense with which it purports to charge the defendants. *People v. Ratliff*, 131 Cal.App. 763, 22 P.(2d) 245; *People v. Main*, 75 Cal.App. 471, 242 P. 1078. Each count is couched in clear and concise language describing the public offense with which the defendants are charged. Each count conforms to the provisions of sections 950, 951, and 952 of the Penal Code. The chief challenge to the sufficiency of the allegations of the indictment refers to an alleged failure to specify facts constituting the particular charges of issuing and selling certificates of interest in the oil lease contrary to the inhibition of the Corporate Securities Act so as to enable the defendants to plead former conviction of such transactions in any subsequent prosecution therefor. The indictment, as amended, alleges in each count that the defendants, on a specified date "did willfully, unlawfully and knowingly authorize, direct and aid in the issue and sale of, and did issue, execute and sell, and cause, and assist in causing to be issued, executed and sold for value to" individuals who are named therein, "a security of their own issue, as defined in said Corporate Securities Act, to-wit: A certain certificate of

interest in an oil and gas lease" on specifically described real property in Sacramento county, "without first having applied for and secured from the Commissioner of Corporations of the State of California a permit authorizing them so to do." This is a sufficient allegation of facts constituting the public offense prohibited by the provisions of section 18 of that act. St. 1917, p. 673, 2 Deering's Gen. Laws, 1931, p. 1924, Act 3814, and amendments thereto. There is no merit in the contention that the indictment fails to state facts sufficient to constitute the public offenses against the defendants which are sought to be charged therein.

There appears to be nothing in the cases of *People v. Mahony*, 145 Cal. 104, 78 P. 354, *People v. McKenna*, 81 Cal. 158, 22 P. 488, or *People v. Lamanuzzi*, 77 Cal. App. 301, 246 P. 557, upon which the appellants rely, in conflict with the preceding determination as to the sufficiency of the allegations of the indictment.

[3,4] We are also of the opinion the evidence amply supports the verdict and judgment of conviction of each appellant upon each challenged count of the indictment. While there is a conflict of evidence regarding many issues of the case, the evidence satisfactorily shows that the defendant Si Rubens owned an oil lease on 1,283 acres of land in Sacramento county, which land is described in the indictment, authorizing him to prospect for, sink wells, and produce oil and gas from the property upon terms which are expressed therein; that he sold the interests in the enterprise under the fictitious name of Capitol Lease Development Company and operated the oil producing business in the name of the Great American Petroleum Company, a corporation having 25,000 shares, of which he was president and manager and owned all but 2 shares thereof; that the other appellants, Appleton and Linder, were agents and salesmen of the enterprise who knowingly participated in the illegal sales of the certificates of interests complained of; the defendants solicited customers and for a consideration sold interests in the oil-producing project; upon payment to the defendants of the sum of \$17.50 by the respective purchasers named in the indictment, a document was executed and issued to each by the Capitol Lease Development Company, as seller. This document is termed an "option to purchase oil and gas lease assignment." It purports to give to the vendees an "option to purchase oil and

gas lease assignments of [an undivided] five sixty-fourths (5/64) of an acre" of the 1,283-acre tract of land, but failed to describe the allotted portion thereof. It contains a provision that within thirty days from the "bringing in" of the first well on the entire tract of land, the purchaser shall pay an additional sum of \$30, entitling him to a community lease for his proportionate interest in the entire project. A copy of the proposed community lease was set out in full and attached to the so-called option. This option provides for the drilling of five oil wells on each purchaser's property by the Great American Petroleum Company, under specified terms and conditions, which procedure is designated therein as "a part of a proposed drilling program that calls for the drilling of a well to each ten (10) acres on the above-described property, until the total of one hundred and twenty-eight (128) wells shall have been completed" on the entire property. The so-called option then stipulates that the Great American Petroleum Company will, upon completion of the contracts to purchase the assigned interests, execute to each of the purchasers a "community lease" for his proportionate interest in the entire project on a participating basis in the profits of the enterprise as follows: 12½ per cent. thereof "to landowners"; 15 per cent. "to the sublessors"; 22½ per cent. "to the Great American Petroleum Company"; and 50 per cent. "divided among the separate lease holders entering into the community lease agreement, in the same proportion as each leaseholder's holding bears to the full number of lease parcels contained in the community lease." A bank was then named as trustee to receive and distribute to the shareholders the funds derived from the enterprise in accordance with the provisions of the contract.

Attached to the so-called option above referred to was the detailed form for the proposed community lease to be issued by the Great American Petroleum Company, which, in effect, is a contract making each purchaser a pro rata shareholder in the oil-producing enterprise in the entire 1,283-acre tract of land. It provides that all interests in the project "shall nevertheless be developed and operated as one lease"; that "the assignee and separate assignors herein are to bear production and marketing costs of entire production in proportion that the interest bears to the entire lease"; that a designated bank shall act as trustee to receive and distribute to the respective share-

holders the proceeds of the enterprise in the proportions heretofore specified. The Great American Petroleum Company covenanted to operate the enterprise and sink a maximum number of 128 wells pursuant to the agreement and to promptly account for all proceeds therefrom.

We are satisfied the transaction above related amounts to sales or offers of sales of pro rata participating interests in an oil and gas-producing enterprise to be operated by the lessor, evidenced by written instruments in the nature of certificates of participating interests or securities therefor, in direct violation of the Corporate Securities Act of California. Each unit or share represents a 5/64 undivided portion of an acre and upon completion of the first well and the payment of the total sum of \$47.50 the purchaser is entitled to his stipulated pro rata proportion of the net proceeds derived from sales of all the oil and gas produced from all the wells on the entire tract of 1,283 acres of land.

Section 18 of the Corporate Securities Act (St. 1917, p. 682, as amended by St. 1931, p. 950) provides that:

"Every officer, agent, or employee of any company and every other person, who knowingly authorizes, directs, or aids in the issue or sale of, or issues or executes, or sells, or causes or assists in causing to be issued, executed, or sold, any security, * * * contrary to the provisions of this act, * * * or who, with knowledge that any security has been issued or executed, in violation of any of the provisions of this act, sells, or offers the same for sale, * * * or who, in any respect, wilfully violates or fails to comply with any of the provisions of this act, * * * or who with one or more other persons conspires to violate * * * any of the provisions of this act, is guilty of a public offense and shall be punished."

The term "security" is defined in section 2(a), subd. 7, of the same act (St. 1917, p. 673, as amended by St. 1931, p. 938), as follows:

"The word 'security' shall include any stock, bond, note, treasury stock, debenture, evidence of indebtedness, certificate of interest or participation, certificate of interest in a profit-sharing agreement, certificate of interest in an oil, gas or mining title or lease, collateral trust certificate, any transferable share, investment contract, or beneficial interest in title to property, profits or earnings."

Under circumstances very similar to those which exist in the present case, it was determined in the recent cases of *People v. Craven*, 219 Cal. 522, 27 P.(2d) 906, and *Domestic & Foreign Petroleum Co., Ltd., v. Long* (Cal.Sup.) 51 P.(2d) 73, that contracts which were called "grant deeds" assigning undivided interests in oil and gas leases entitling the holders thereof to participate in the proceeds of the petroleum produced by the vendor from the land were in fact "securities" within the meaning of the Corporate Securities Act which are prohibited from being transferred or sold without first procuring a permit therefor from the corporation commissioner. In the last-mentioned case it was contended, as it is in this case, that the challenged instrument was called a deed and was in the nature of a deed containing the significant language that the leasehold interest in land was thereby "granted and conveyed" and, on the contrary, that it was therefore not a "security" for an interest in an oil enterprise. The court said in that regard:

"It is the contention of defendants that the lessees herein did not issue a security, but granted undivided interests in the leasehold estate, which leasehold is an estate in real property, or in the oil to be produced therefrom; that the instruments of transfer are entitled 'grant deed,' and use the words 'grant' and 'convey,' which are appropriate to a deed rather than to a certificate of interest or a security. The contention that the interests are not securities is fully answered by our decision in *People v. Craven*, 219 Cal. 522, 27 P. (2d) 906, 907. * * * The decision fully sustains the constitutionality of the provisions of the Corporate Securities Act which require an individual to obtain a permit to issue securities as applied to an individual oil lessee who assigns oil interests such as those in the *Craven* Case and in the case now before us. * * *

"Instruments such as those in the *Craven* Case and the instant case are not issued to persons who expect to reap a profit from their own services and efforts exerted in the management and operation of oil-bearing property, but to those in the category of investors, who, for a consideration paid, stipulate for a right to share in the profits or proceeds of a business enterprise or venture to be conducted by others. * * *

"In decisions in this state and in other jurisdictions where it has been contended

that a transaction under attack did not come within the Corporate Securities Act because it constituted only a sale of specific real or personal property or an interest therein, the courts have looked through form to substance and found that in fact the transaction contemplated the conduct of a business enterprise by others than the purchasers, in the profits or proceeds of which the purchasers were to share."

The preceding language of the Supreme Court is peculiarly applicable to the facts of the present case and conclusively answers adversely to them the very contentions made by the defendants on this appeal.

Assuming that the assignments of interests or securities which were sold in this case were all actually owned by the defendant Rubens and that they were therefore securities "of his own issue," as the indictment alleges, the other defendants, Appleton and Linder, who aided, assisted, and conspired to unlawfully sell and transfer these interests contrary to the Corporate Securities Act would also be guilty as principals in the transaction. Sections 31 and 971, Pen. Code. Moreover, the Corporate Securities Act specifically makes an agent or employee guilty as a principal who unlawfully solicits sales or sells securities without a license so to do. Section 2 (a), subdivisions 8 and 9 of the act (St. 1917, p. 673, as amended by St. 1931, p. 938), provide that:

"'Sale' or 'sell' shall also include a contract of sale, * * * an option of sale, a solicitation of a sale, * * * directly or by an agent. * * *

"9. The word 'agent' means and includes every person or company employed or appointed by a company or broker or any other person who shall, within this state, either as an employee or otherwise, for a compensation, sell, offer for sale, negotiate for the sale of or take subscriptions for any security."

Upon the authorities of *People v. Craven* and *Domestic & Foreign Petroleum Co. v. Long*, above cited, it is clear that the so-called options or assignments of interests in the oil enterprise to be conducted by the Great American Petroleum Company, which was managed, controlled, and almost exclusively owned by the defendant Si Rubens were in effect securities or certificates of interests in the oil enterprise, the issuing and sales of which are prohibited by the Corporate Securities Act until a license

to do so has been first procured. These securities were therefore sold and transferred in violation of the act. The evidence adequately supports the verdict and judgment of conviction of each of the appellants.

[5] It was not error for the court to admit in evidence true copies of the written instrument representing the assignment of interests complained of, for the reason that the defendant Rubens admitted that they were exact copies of the original documents. In response to the following question: "I will show you an instrument marked 'Assignment and Agreement, East Coyote Hills', and ask you if that is a duplicate form used in this development, with the exception of the words 'Coyote Hills'?" he replied: "A. And with the exception of 'Coyote Hills.'" Mr. Atherton, one of the defendants' attorneys, also stipulated that the copy of the community lease which was attached to the option for assignment was a true copy of the original. It was conclusively proved that the original documents were in the possession of the defendants. Mr. Bailey testified that the original instruments were taken by the defendants and remained in their possession. The language of these instruments was not disputed at the trial. Having shown that the original instruments were not available, but, on the contrary, that they were in the possession of the defendants, the true copies thereof were competent evidence. *People v. Chapman*, 55 Cal.App. 192, 203 P. 126, 130; *People v. Jarvis*, 135 Cal.App. 288, 311, 27 P.(2d) 77; 16 C.J. p. 616, § 1219. In the *Chapman Case*, supra, it is said in that regard:

"It is axiomatic that the court cannot compel the defendant in a criminal case to produce any incriminating writing. It is for this reason that, ordinarily, the prosecution may give secondary evidence of the contents of an incriminating document whenever it appears prima facie that it is in the possession of the accused."

[6, 7] Nor is it reversible error for the court to have excluded testimony to the effect that the land in question was good prospective oil land upon which they had found evidence of the presence of petroleum, in rebuttal of the testimony adduced by the prosecution that one of the defendants had stated to a purchaser of oil interests that "this formation resembled the formation in the Kettleman Hills," and that it was stated that in the drilling of

the well gas pressure was encountered "which was a very good indication of oil," and that "they were now in the oil sand," and similar assertions regarding representations to the effect that there were good prospects of striking oil on the land in question. An objection was sustained to the following question which was propounded to defendants' witness Grabel: "Q. Do you know whether or not * * * any oil was ever encountered in the well at Clay?" Defendants' witness Furber, an expert geologist, was asked: "From your inspection * * * could you state whether or not the location of the well * * * is a probable place for the finding of oil?" To this question an objection was also sustained. The court stated that the question of alleged misrepresentations or fraud with respect to the nature of the oil land or the prospect of producing petroleum therefrom was collateral to the issues involved in this case, for the reason that the defendants were not charged with fraudulently misrepresenting the nature of the soil, but, on the contrary, they were indicted for illegally selling and transferring securities for interests in an oil enterprise contrary to the provisions of the Corporate Securities Act.

It is true that the defendants were not charged with fraudulently misrepresenting the character of the oil land or the prospects of producing petroleum in paying quantities. The evidence of such alleged misrepresentations regarding the nature of the soil was collateral to the issues of this case and incompetent, but it was harmless. It did not tend to prove another crime. There was no attempt to impeach the prosecution's witnesses in that regard by calling the defendants to testify they had not so stated, but, on the contrary, the defense attempted to prove by expert witnesses that the tract was in fact good oil land, and that there was a good prospect of producing petroleum therefrom. This proffered evidence was collateral and incompetent. Irrelevant testimony adduced by one party does not justify the admission of irrelevant evidence by the other party to contradict it. *People v. Dye*, 75 Cal. 108, 16 P. 537.

Even though it be deemed the evidence of alleged misrepresentations regarding the nature of the oil land was prejudicial, it is not reversible error under the circumstances of this case for the reason that it does not appear the conviction of the appellants resulted in a miscarriage of justice. The judgment may nevertheless be

sustained under the provisions of article 6, § 41½, of the Constitution.

[8] The court did not err in refusing to give an instruction which was offered by the defendants to the effect that although the purchaser of a lease of land may expect thereby to derive a profit from his investment, the instrument may not be deemed to constitute a security or certificate of interest in an oil enterprise in contemplation of the Corporate Securities Act, the issuing or sale of which is prohibited, until a license therefor has been first procured. Nor did the court err in refusing to give the following instruction:

"You are instructed that a deed to, a lease of, an assignment of interest in or an option to purchase a lease or an interest in oil land is not in itself a security as defined in the act of the Legislature of the State of California, approved May 18, 1917, Statutes of 1917, page 673, as amended and known as Corporate Securities Act."

It is contended these instructions are proper and should have been given to the jury on the authority of *People v. Steele*, 2 Cal.App. (2d) 370, 36 P.(2d) 40, 42, *Callahan v. Martin* (Cal.Sup.) 43 P.(2d) 788, and *Domestic & Foreign Petroleum Co., Ltd., v. Long* (Cal.App.) 42 P.(2d) 1085. We think not. They have no application to the facts of the present case. They are misleading and were properly rejected. The distinction between the facts of the *Steele* Case, *supra*, and the present action is very clear and vital. In that case, *Steele* was the owner of a certain placer mining claim and machinery. The prosecuting witness *Dunn* leased this claim and machinery for a period of two years in consideration of the sum of \$250 for the purpose of operating the claim as a mining enterprise solely by his own efforts. He agreed to pay the owner of the claim a large percentage of whatever proceeds he derived from the mining enterprise. The lessor had no part in or obligation to perform any service in connection with the proposed enterprise. The court clearly says in that regard:

"In the case now before us, the agreement contemplates no return on the money invested, other than the right to use certain property, and any anticipated profits could come only through the proceeds of operations to be conducted by the appellant himself."

Under such circumstances there could be no violation of the Corporate Securities

Act by merely leasing the land for the lessee to conduct his own independent enterprise thereon. This distinction is also recognized in the recent case of *Domestic & Foreign Petroleum Co. v. Long*, *supra*, from which we have heretofore quoted. In the present case the challenged instrument does create an interest by assignment in an oil-producing enterprise to be operated and conducted by the defendants alone. Nor are the facts of the *Callahan* Case applicable to this case. The question of a violation of the Corporate Securities Act was not involved therein. Since the submission of this case, the *Domestic & Foreign Petroleum Co. Case*, upon which the appellants rely, has been decided by the Supreme Court on hearing from the District Court of Appeal, 42 P.(2d) 1085, and regardless of whether it be deemed that such a lease creates an interest in real property or not, it has been definitely determined that the transfer of such a document creating an interest in the proceeds of an oil enterprise to be conducted by the lessor or assignor, is deemed to be in the nature of a security or certificate of oil interest within the meaning of those terms as they are used in the Corporate Securities Act.

The jury was clearly and properly charged in several instructions regarding the essential elements constituting the terms of "a security" and "a certificate of oil interest" as they are used in the Corporate Securities Act. The court was authorized to determine as a matter of law and to instruct the jury regarding the legal effect of the terms of the challenged "option to purchase oil and gas lease assignment." *People v. McCalla*, 63 Cal.App. 783, 789, 220 P. 436. But the court did not do so. It was very cautious, very clear, and very fair in instructing the jury regarding the effect of the instruments which are involved on this appeal. We are satisfied there was no error committed in giving to the jury or refusing instructions.

[9] Finally it is contended that the court erred in pronouncing sentence upon the defendants in less than two days after the rendering of the verdict of conviction, contrary to the provisions of section 1191 of the Penal Code. It is true the verdict of the jury was rendered in this case on June 11, 1935. Judgment was inadvertently pronounced on June 13, 1935. The defendants, with their counsel, were present in court and were asked if they had any reason to suggest why judgment should not

then be pronounced against them. No reason for delay was then suggested. Neither the defendants nor their attorneys replied to the inquiry of the court. No objection was made to the pronouncing of sentence at that time. The defendants waived their right to object to the failure to pronounce sentence within the time prescribed by statute. The time for pronouncing sentence in a criminal case is not jurisdictional. No prejudice resulted from the premature sentence. It has been uniformly held that in the absence of a showing of prejudice therefrom the failure to strictly comply with the provisions of section 1191 of the Penal Code with respect to the time for pronouncing sentence is not reversible error. *People v. Zuvela*, 191 Cal. 223, 215 P. 907; *People v. Stroff*, 134 Cal.App. 670, 26 P.(2d) 315; *People v. Kloss*, 130 Cal.App. 194, 19 P.(2d) 822; *People v. Powell*, 83 Cal.App. 62, 256 P. 561; *People v. Haines*, 64 Cal.App. 628, 222 P. 183. The time for pronouncing sentence in a criminal case is merely procedural in its nature. Under the provisions of article 6, § 4½, of the Constitution, a failure to comply strictly with the provisions of section 1191 of the Penal Code in imposing sentence is not reversible error unless it results in a miscarriage of justice. In the present case there is no miscarriage of justice.

The judgments are affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



10 Cal.App.2d 91

SEIB v. MITCHELL (two cases).

Civ. 10444, 10445.

District Court of Appeal, Second District,
Division 2, California.

Nov. 8, 1935.

Rehearing Denied Dec. 2, 1935.

Hearing Denied by Supreme Court
Jan. 6, 1936.

1. Appeal and error ⇨994(3)

Determination of trial court as to truth or falsity of testimony is binding upon reviewing court.

2. Executors and administrators ⇨221(5)

In actions against executor for services rendered to decedent, evidence supported

judgments for plaintiffs based on findings that decedent had agreed to pay for plaintiffs' services to be rendered continuously during such part of remainder of decedent's life as she might require, that services were not terminated before decedent's death, and that temporary cessation of services was without fault of plaintiffs.

3. Work and labor ⇨4(1)

Where services are rendered by one person, from which another derives benefit, presumption arises from proof of services rendered, that person enjoying benefit was bound to pay what they were reasonably worth, although there was no express contract to pay therefor.

4. Limitation of actions ⇨50(2)

Statute of limitations did not begin to run against cause of action for services rendered decedent during her life under agreement for services during such part of remainder of her life as she should require to be paid for upon termination of services at or before her death, until after death of decedent, where plaintiffs were at all times ready, able, and willing to perform services, and temporary cessation of services was without fault of plaintiffs and was caused by their wrongful temporary discharge by decedent.

5. Executors and administrators ⇨205(2)

In actions against executor for services rendered decedent during her life, plaintiffs held entitled to judgments for reasonable value of services regardless of value of estate left by decedent.

6. Executors and administrators ⇨221(3)

In actions against executor for services rendered decedent during her life, expert testimony held properly received on issue of reasonable value of services.

7. Executors and administrators ⇨451(2)

In actions against executor on common counts for services rendered decedent, value of services was for trial court to determine where circumstances of amount and kind of services actually rendered were in evidence.

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Actions by Etta B. Seib and John C. Seib against Willis S. Mitchell, as executor of the estate of Elizabeth J. Herbst, deceased. Judgments for plaintiffs, and defendant appeals.

Affirmed.

William Ellis Lady, of Los Angeles, for appellant.

Mier & Schaper, of Los Angeles, for respondents.

WOOD, Justice.

These actions were commenced against the executor of the will of Elizabeth J. Herbst, after rejection by the executor of claims presented in the probate proceedings. John C. Seib and Etta B. Seib are husband and wife, and Mrs. Seib was the niece of Mrs. Herbst. It is set forth in Mrs. Seib's complaint that in April, 1917, Mrs. Herbst requested her to render services continuously during such part of the remainder of Mrs. Herbst's life as she might require, and that Mrs. Herbst agreed to pay plaintiff at the time of her death by bequeathing to her and her husband all or practically all of her estate or a sum equal to the reasonable value of plaintiffs' services; that Mrs. Seib's services were rendered whenever desired by Mrs. Herbst between April 11, 1917, and the date of Mrs. Herbst's death, which occurred October 28, 1932. The complaint sets forth a second cause of action in which it is alleged that the decedent became indebted to plaintiff for services rendered and performed at the special instance and request of decedent. The complaint of John C. Seib is similar to that of his wife except that the services rendered were of a different nature, and Mr. Seib's complaint contains various allegations of money due for certain expenditures made by him. Mrs. Herbst did not compensate plaintiffs during her lifetime, nor did she leave her property to them in her will. The principles of law governing the two actions are the same and have been treated as such in the briefs of the parties.

The trial court found that the services were performed as alleged, and that "it was the understanding and agreement by and between the plaintiff and the said Elizabeth J. Herbst that plaintiff would perform the said services continuously during such part of the remainder of the lifetime of the said Elizabeth J. Herbst as the said Elizabeth J. Herbst would pay to the plaintiff for the same in money or property to the amount of the reasonable value of said services, upon the termination of said services, at or before her death"; that the services were not terminated before the death of Mrs. Herbst, and that the services were rendered to Mrs. Herbst whenever she desired such services between April 11, 1917, and the

date of her death. The court further found that on a number of occasions, some of which were for extended periods, plaintiff did not render services to Mrs. Herbst, but that "such cessation of services was without fault on the part of the plaintiff and was caused by the wrongful temporary discharge by the deceased."

[1,2] Defendant contends that these findings are not supported by the evidence, and plaintiffs point out that the findings and conclusions are almost identical with the findings and conclusions in the cases of *Mayborne v. Citizens' Trust & Savings Bank*, 46 Cal.App. 178, 188 P. 1034, 1036, and *Warder v. Hutchison*, 69 Cal.App. 291, 231 P. 563. To this defendant rejoins, "The closer the analysis of the situation and of the detailed matters and things, the more convinced one becomes that there is full justification for the assertion that these cases were put together pursuant to plans and specifications specially prepared therefor, and which are in accordance with adjudicated forms, and that they are, therefore, far from being what one might say a house 'not made with hands, eternal in the Heavens.'" If, indeed, plaintiffs "put together" their evidence falsely, it was a matter for the determination of the trial court and the determination of the trial court as to the truth or falsity of the testimony is binding upon us. There is substantial evidence in the record to support the findings of the court, which for the reasons given in *Koeberle v. Hotchkiss* (Cal.App.) 48 P.(2d) 104, will not be set forth here. There was much evidence of the extensive and arduous services performed by plaintiffs and of statements made by Mrs. Herbst of her intention to compensate plaintiffs and to will her property to them.

[3] On the common count for services rendered, the findings are fully supported. An express contract need not necessarily be proved, but "it is sufficient if from the facts and circumstances it reasonably can be inferred that compensation was in the view and contemplation of the parties." *Mayborne v. Citizens' Trust & Savings Bank*, supra. When services are rendered by one person, from which another derives a benefit, although there is no express contract or agreement to pay for the services, there is a "presumption of law which arises from the proof of services rendered, that the person enjoying the benefit of the same is bound to pay what

they are reasonably worth." *Moulin v. Columbest*, 22 Cal. 508, 509.

[4] Defendant contends that the larger part of the sum claimed is barred by the statute of limitations, basing this contention upon the finding of the court that during part of the time plaintiffs did not render services and that "such cessation of services was without fault of the plaintiff and was caused by the wrongful temporary discharge by the deceased." This contention cannot be upheld. The contract was for continuous services from 1917 until the death of Mrs. Herbst. The court found that plaintiffs were at all times ready, able, and willing to perform the services. The finding of "the wrongful temporary discharge" was tantamount to a holding that deceased, during the periods of cessation of services, did not desire the assistance of plaintiffs, especially in view of the fact that after each cessation of services plaintiffs were again requested by deceased to resume their ministrations to her, and they did in fact on each occasion render further services. The statute of limitations did not begin to run until the death of Mrs. Herbst. *Mayborne v. Citizens' Trust & Savings Bank*, supra; *Wardler v. Hutchison*, supra.

[5] Defendant contends that the evidence is insufficient to justify the findings as to the reasonable value of the services. During the time in which plaintiffs were employed, Mr. Seib was allowed \$50 a month and Mrs. Seib was allowed \$40 a month for part of the time and \$50 a month for the balance of the time. Defendant emphasizes the fact that the estate was small in value, and that in view of the size of the estate, the sums allowed are claimed to be excessive. We think that the better test would be the value of the services rather than the ability of Mrs. Herbst to pay. She was bedridden a large part of the time and required the services of both Mr. and Mrs. Seib. If they fairly earned the sums awarded, they should have judgment accordingly, regardless of the value of the estate left by Mrs. Herbst.

[6,7] Defendant argues that the value of the services was not proved in the manner required by law, contending that the expert testimony was legally insufficient. The expert testimony was properly received, but such testimony was not necessary. The circumstances of the amount and kind of services actually rendered

were in evidence, and the value of the services was for the trial court to determine. *Nylund v. Madsen*, 94 Cal.App. 441, 271 P. 374. The evidence was sufficient to sustain the findings concerning the value of the services.

The judgments and orders are affirmed.

We concur: CRAIL, P. J.; GOULD, Justice pro tem.



10 Cal.App.2d 258
PEOPLE v. HOWARD.
Cr. 2801.

District Court of Appeal, Second District,
Division 2, California.
Nov. 19, 1935.

Hearing Denied by Supreme Court
Dec. 19, 1935.

1. Criminal law ⇨404(4)

Admission in evidence, in prosecution for assault with a deadly weapon, of object found near scene of assault several hours thereafter, *held* error, where there was no evidence of defendant's use thereof.

2. Assault and battery ⇨92

Evidence *held* insufficient to sustain conviction for assault with a deadly weapon.

3. Criminal law ⇨913(1)

New trial will not be granted because of trial court's delay in pronouncing judgment, unless examination of trial record discloses that miscarriage of justice resulted (Pen. Code, § 1191).

4. Criminal law ⇨1188

Reviewing court, on finding evidence sufficient to justify conviction for assault but insufficient to warrant conviction for assault with deadly weapon, could remand case for judgment upon the lesser offense, without ordering new trial (Pen.Code, § 1181, subd. 6).

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Richard S. Howard was convicted of assault with a deadly weapon, and he appeals.

Modified, and cause remanded, with directions.

Franklin B. MacCarthy and Ingall W. Bull, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

McCOMB, Justice pro tem.

Appellant was convicted after a trial by the court without a jury of assault with a deadly weapon. This is an appeal from the judgment and order denying a new trial.

Viewing the evidence most favorably to the prosecution (People v. Dukes, 90 Cal.App. 657, 659, 266 P. 558), the facts in the instant case are:

Appellant about 2 a. m., while driving his automobile, accidentally struck a car, parked without lights. As he left his car the complaining witness, Mr. Rice, approached him, inquiring if he could be of assistance. Receiving no answer to his repeated queries, he turned to walk away, whereupon appellant struck him on the head, rendering him unconscious. Mr. Rice received a cut approximately 4 inches long on the top of his head. He also testified that he did not know whether the appellant struck him with his fist or some other object. Several hours after the incident there was found near the scene an object measuring $4\frac{1}{2}$ "x1"x $\frac{7}{8}$ ", composed of four bolts, not sharp at either end, and wrapped in two layers of ordinary bicycle tape. This object was received in evidence as People's Exhibit No. 2.

Appellant relies for reversal of the judgment on the following propositions: First, the trial court committed prejudicial error in receiving in evidence People's Exhibit No. 2; second, the evidence is insufficient to sustain the judgment; third, the trial court erred in denying appellant's motion for a new trial on the ground (a) of newly discovered evidence; (b) that the judgment was not pronounced within the period prescribed by section 1191, Penal Code.

[1] Appellant's first contention is fully sustained by the holding of our Supreme Court in the case of People v. Hill, 123 Cal. 571, 56 P. 443, wherein Mr. Justice Harrison held that the trial court erred in receiving in evidence a club alleged to have been used by defendant in committing a homicide. He says, 123 Cal. 571, at page 574, 56 P. 443, 444: "The court also erred in permitting the club which

McClure found in the corral to be received in evidence, and exhibited to the jury. There was no evidence identifying the stick as the one with which the defendant struck the deceased, or in any way connecting the defendant with it. * * * It was necessary that there should be some evidence identifying this stick as the one with which the blow was given before it could be offered in evidence. Otherwise, the jury could only conjecture that it had been used by defendant."

In the instant case there is a total absence of any evidence that the appellant used or had ever seen prior to the time of trial the alleged deadly weapon, People's Exhibit No. 2. Therefore, it should not have been received in evidence.

[2] Appellant's second proposition must be sustained, in view of the fact that People's Exhibit No. 2, improperly received in evidence, was the sole evidence of a deadly weapon.

Appellant in his third contention claims the court committed prejudicial error in denying his motion for a new trial on the following grounds:

(a) Newly discovered evidence. It is unnecessary for us to pass upon this question, since the alleged newly discovered evidence in the main tended to show that appellant did not use a deadly weapon.

[3] (b) That the judgment was not pronounced within the period prescribed by section 1191, Penal Code. A new trial will not be granted because of such error, unless an examination of the trial record discloses that the error resulted in miscarriage of justice. We are satisfied that the delay of the trial court in pronouncing judgment was not prejudicial to appellant. People v. Carter, 130 Cal.App. 95, 97, 19 P.(2d) 843.

[4] From an examination of the record in this case, we find the evidence insufficient to justify a conviction for the crime of assault with a deadly weapon. However, it is amply sufficient to justify a conviction of the lesser and included crime of assault. The error of the trial court may be corrected without subjecting the state and the appellant to the delay and expense of a new trial. Section 1181, subd. 6, Pen.Code; People v. Kelley, 208 Cal. 387, 392, 281 P. 609.

The judgment of the lower court of assault with a deadly weapon is modified.

The cause is remanded to the trial court, with directions to enter judgment against appellant, finding him guilty of assault, and thereupon to pronounce judgment upon him as prescribed by law.

It is so ordered.

We concur: CRAIL, P. J.; WOOD, J.



10 Cal.App.2d 234

KARBERG v. SOUTHERN PAC. CO.

Civ. 5411.

District Court of Appeal, Third District,
California.

Nov. 18, 1935.

Hearing Denied by Supreme Court
Jan. 16, 1936.

1. Master and servant ⇨204(1)

Under Federal Employers' Liability and Safety Appliance Acts, brakeman assumed risk of operating hand brake as located on box car, but did not assume any additional hazard by reason of any looseness, defect, or inefficient brake assembly (Federal Employers' Liability Act, 45 U.S.C.A. §§ 51-59; Federal Safety Appliance Act, 45 U.S.C.A. § 1 et seq.).

2. Master and servant ⇨286(13)

Whether looseness and possible variation of pawl of hand brake on box car, when considered with hazardous position of brakeman when operating brake, and possibilities of pawl being worn on lower side and engaging in cog on ratchet-wheel worn on upper side, was such as to render brake defective or inefficient within Federal Safety Appliance Act, entitling brakeman injured thereby to recovery held for jury (Federal Safety Appliance Act, April 14, 1910, § 2, 45 U.S.C.A. § 11; Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51).

3. Master and servant ⇨286(13)

In action by brakeman for injuries sustained because of defective hand brake on box car, whether engagement of pawl with ratchet-wheel was such that action of brakeman in preparing to release brake would add to liability of pawl and ratchet-wheel becoming disengaged without fault of brakeman, and question as to extent pawl might be overriding ratchet-wheel held for jury (Federal Safety Appliance Act, April 14, 1910, § 2, 45 U.S.C.A. § 11; Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51).

4. Master and servant ⇨278(8)

In action by brakeman for injuries sustained by reason of defective hand brake on box car, jury held entitled to conclude that car, since it was at least sixteen years old, had traveled many miles and that brake had been set and unset hundreds of times, as respects question whether brake mechanism was worn and defective (Federal Safety Appliance Act, April 14, 1910, § 2, 45 U.S.C.A. § 11; Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51).

5. Master and servant ⇨286(13)

In action by brakeman for injuries sustained because of defective hand brake on box car, weight to be given testimony of witnesses for railroad that brake was efficient held for jury, notwithstanding testimony was uncontradicted, where exemplar of brake assembly was introduced in evidence (Federal Safety Appliance Act, April 14, 1910, § 2, 45 U.S.C.A. § 11; Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51).

6. Master and servant ⇨286(13)

In action by brakeman for injuries sustained when he was thrown from box car by sudden disengagement of brake pawl with ratchet-wheel as he was attempting to release hand brake, what was a loose pawl and weight to be given testimony of witness that pawl was not loose when it acted in certain manner were questions of fact for jury (Federal Safety Appliance Act, April 14, 1910, § 2, 45 U.S.C.A. § 11; Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51).

7. Master and servant ⇨286(13)

In action by brakeman for injuries sustained because of defective hand brake on box car, weight to be given statements by brakeman made shortly after injury as to how accident happened held for jury (Federal Safety Appliance Act, April 14, 1910, § 2, 45 U.S.C.A. § 11; Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51).

8. Appeal and error ⇨1064(1)

Master and Servant ⇨293(12)

In action by brakeman for injuries allegedly sustained by reason of defective hand brake, instruction that proof of failure of hand brake to work efficiently would sustain charge of railroad's violation of Safety Appliance Act held erroneous because of omission of words "when properly operated," but not prejudicial error where there was no evidence that brakeman had improperly operated brake (Federal Safety Appliance Act, April 14, 1910, § 2, 45 U.S.C.A. § 11; Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51; Const. art. 6, § 4½).

9. Damages ⇨62(2)

Injured plaintiff could not be compelled to submit to boring of holes in skull for pur-

pose of locating blood clot on brain to reduce amount of recovery against negligent defendant, where operation was attendant on fatal possibilities.

10. Damages ☞ 132(3)

\$42,500 to forty-three year old brakeman whose earnings in good times were \$300 per month and at time of injury were \$173 per month, for injuries consisting of extensive fracture of skull and injury to brain which had affected his mental operations and in all probability had disabled him for life, *held* not excessive (Federal Employers' Liability Act, 45 U.S.C.A. §§ 51-59; Federal Safety Appliance Act, 45 U.S.C.A. § 1 et seq.).

Appeal from Superior Court, Siskiyou County; C. J. Luttrell, Judge.

Action by Allie E. Karberg against the Southern Pacific Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

George R. Freeman, of Willows, and Tebbe & Tebbe, of Yreka, for appellant.

Clifton Hildebrand, of San Francisco, Allen & McNamara, of Yreka, and Louis E. Goodman and Louis H. Brownstone, both of San Francisco, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This action was and is based upon the provisions of the Federal Employers' Liability Act (45 U.S.C.A. §§ 51-59) and the Federal Safety Appliance Act (45 U.S.C.A. § 1 et seq), wherein an injured employee is permitted to seek damages sustained by him when in the employ of a railroad company engaged in interstate commerce.

The plaintiff, while employed by the defendant as a brakeman, sustained injuries on the 11th day of January, 1934, and upon the trial of the action was awarded a judgment in the sum of \$42,500. From this judgment, the defendant appeals.

The plaintiff's complaint alleges that his injury was sustained by reason of a defect and inefficient handbrake maintained in violation of sections 11 and 51 of title 45 U.S.C.A. At the time of the injury sustained by the plaintiff he was of the age of forty-three years and in good health. The plaintiff had been working as a railroad brakeman and conductor since 1911, and had been working for the defendant since some

time in 1913. In good times he earned as high as \$300 per month, and at the time of the injury was earning \$173 per month.

At the time of the injury the plaintiff was acting as a rear brakeman on the freight train. At approximately 5 p. m. on the 11th day of January, 1934, the crew was engaged in switching operations at a station called "Weed." As a part of these operations, it was necessary to move four cars standing on track known as "Dock No. 1." This track was within a shed, which was lighted by flood lamps. It was the duty of the plaintiff as rear brakeman to release the handbrakes on the four cars to be moved. These brakes had been previously set. The track in question was running approximately north and south, with the entrance toward the south. The engine had been backed almost to the four standing cars, and, in accordance with his duties, the plaintiff released the brakes on the first two cars. Immediately north of these two cars stood S. P. car No. 35783, the car on which the plaintiff was injured. After releasing the handbrakes on the first two cars, the plaintiff walked across the roof of the second car until he arrived at the northerly end thereof. The brake on car No. 35783 was on the southerly end of that car. The plaintiff looked at the brake, observed it was set, and thereupon he stepped over to the running board of car S. P. No. 35783, laid his brake club on the roof of that car, and proceeded to climb down the end ladder attached to the end of car S. P. No. 35783, in order to get over to the brake platform. When opposite the brake platform, the plaintiff let go of the grabiron with his right hand and reached over and took hold of the brake wheel on the lower left end side of the wheel. (The appellant raised some question as to whether the plaintiff took hold of the wheel with his left hand, instead of his right hand, but as we read the transcript we are satisfied that the plaintiff took hold of the brake wheel with his right hand.) The taking hold of the brake wheel with his right hand on the left-hand side of the brake shaft appears to be in accordance with the custom and practice of safety. The brake revolves in a counterclockwise direction. Pressure applied in that direction would, in the case of an efficient hand brake, tend to keep the dog or pawl engaged in the ratchet, and prevent the brake from releasing.

After placing his right foot on the brake platform, the plaintiff observed that the pawl was engaged in the ratchet. After noticing that the brake was set solid and tight, that the pawl was engaged in the ratchet, the plaintiff proceeded to climb to the platform, still pulling against the brake counterclockwise. He then reached over with his left hand to get hold of the brake club, and just as he got hold of the brake club, he glanced down to see where he was going to step. Both feet were still on the left side of the brake platform, and it was necessary for him to place his right foot on the right side of the brake platform in order to release the brake. As he looked down to see where he was going to step, he observed the dog or pawl kick up, and to use his own language, "override the ratchet." The brake so released spun in a counterclockwise direction, plaintiff still having his hand on the brake wheel. The spinning thereof threw him off the car.

The plaintiff's testimony is that the last he remembered was when he was flying through the air; he did not know where he fell; and the next thing he remembered was seeing his wife by his bed at the hospital at Weed three days after the injury.

There is no question in the testimony that as a result of the plaintiff's fall he received what is commonly known as a fractured skull, accompanied by concussion of the brain; that his injuries were severe; and that he has been totally disabled. The only serious dispute in the medical testimony is as to whether the plaintiff should have submitted to an exploratory operation in the hope that it would clear up his condition. This exploratory operation, however, held to a considerable degree the possibility of a fatal result. From the time of the injury until the date of the trial, the plaintiff was practically confined to his bed, and remained in the hospital until the date of the trial. He was allowed, and was able to leave his bed only for short intervals.

The hand brake assembly on S. P. car No. 35783 is located on the end of the car, consisting of a brake shaft which extends from the top of the car to the bottom. The brake wheel is fastened horizontally to the top of the brake shaft. The brake platform is a wooden structure approximately 28 inches long by 9 inches wide, and 1½ inches thick, attached to the end of the car about 3 feet below the roof. A metal pawl plate is fastened to the top of the brake platform. The brake shaft passes

through one end of the pawl plate and the ratchet wheel is fastened to the brake shaft just above the plate. The pawl or dog, as it is commonly called, is on one end of the pawl plate, and is encased in a housing which is integral with the pawl plate. A ¾-inch bolt extending from the top of the pawl plate through the brake step passes through the center of the pawl and holds it in place. The ratchet wheel and the pawl, appellant states, are both 1 inch in thickness. As we measure the exemplar introduced in court, the thickness of the ratchet wheel and the pawl we find to be ⅞ of an inch. The pawl and ratchet wheel are on the same horizontal plane on top of the pawl plate. The pawl curves on the end, next to the ratchet wheel, and is so arranged that when setting a brake, it has to be inserted in one of the cogs of the ratchet wheel, and if the pawl and ratchet wheel are both working efficiently, the pawl cannot be removed from the ratchet wheel after being engaged until the pressure between the pawl and the ratchet wheel has been released by the brakeman operating the brake by means of the brake wheel to which we have herein referred.

In setting the brake, the brakeman stands on the brake platform facing the car, places his right hand on one side of the wheel, and uses a brake club about 32 inches long, with his left hand, in order to give additional pressure in setting the brakes. The brake wheel is turned in a clockwise direction by pulling on the brake wheel with the right hand, and pushing on the brake club with his left. The pawl is then kicked into the ratchet wheel with the left foot. In releasing the brake a sufficient force must be applied to enable the brakeman to kick the pawl out of the ratchet wheel. This is done with the left foot, and then the wheel spins counterclockwise. The pawl does not operate automatically in either setting or releasing the hand brake.

[1,2] Upon the trial of the action the appellant introduced in testimony an exemplar of the brake assembly, being, as it is claimed, an exact replica of the brake assembly involved in this action. We may here state that the record shows Exhibit G was taken to the jury room for examination by the jury, and our examination of the exemplar or exhibit has been requested by the appellant in this action, and we have complied with that request. This examination shows, as we have stated, that

the ratchet wheel and pawl are $\frac{7}{8}$ of an inch in thickness; that the end of the pawl which engages in the ratchet wheel is blunt or rounded; that the play of the pawl is such that by laying the weight of one's hand on what we will call the "lever" end of the pawl, the end of the pawl designed to engage in the cogs in the ratchet wheel is lifted $\frac{1}{2}$ inch above the level of the ratchet wheel, leaving only $\frac{3}{8}$ of an inch of the pawl for possible engagement with any one of the cogs of the ratchet wheel. There is no testimony in the record showing whether this looseness of the pawl is coincident with the assembling of the pawl plate, or whether it was the result of long-continued use. It is sufficient to say that the looseness and possible variation of the pawl in its operation, by reason of the manner of its assembly and what would be the result of long-continued use, were matters for the jury to take into consideration as to whether an assembly which would permit the pawl to rise a trifle more than one-half of its width above the level of the ratchet wheel was a defective or inefficient appliance, in view of the fact that long-continued use would tend to smooth off the lower portion of the pawl and the upper portion of the cogs on the ratchet wheel thus increasing the liability of the pawl and the ratchet wheel to become disengaged. In this connection the jury had a right to take into consideration the extremely hazardous position of the brakeman when operating a brake such as the one involved in this action. The plaintiff, of course, assumed the risk of operating the brake as located, but he did not assume any additional hazard by reason of any looseness, defect, or inefficient brake assembly. Whether the looseness of the pawl which we have mentioned, the possibilities and probabilities of its being worn on the lower side engaging in a cog on the ratchet wheel worn on the upper side adding to the hazard of setting and unsetting the brake, were all questions of fact for the jury to determine.

[3] As to the position of the pawl just before it became disengaged with the ratchet wheel, the appellant has several times asserted that the plaintiff testified that he observed that the pawl was securely seated in the teeth of the ratchet wheel. This statement is not exactly warranted by the testimony. We quote from the transcript as follows:

"Q. And was the pawl or dog inserted in the ratchet, and the brakes set at that time? A. Apparently it was.

"Q. And when you noticed the dog, so far as you could observe, how was it set? A. It was set in a normal position. * * *

"Q. Then, when you released that brake, you moved to the right in the direction in which you were going? A. * * * I looked down and saw that the brake was engaged, or that the dog was engaged with the ratchet.

"Q. Then, after observing that there was pressure on the wheel as I understand it, you reached for your brake-club. Is that correct? A. Well, after I saw that the brake was solidly set, tightly, and that the dog was in mesh into the ratchet, then I proceeded to climb down to the brake platform."

If the pawl and ratchet on S. P. car No. 35783 was in all respects, at the time of the accident, similar to the exhibit offered in testimony, as asserted by the appellant, then and in that case it is practically impossible to set the brake or place the foot upon the lever end of the pawl without raising the pawl at the end where it engages with the ratchet wheel at least a half-inch above the level of the ratchet wheel. That would be the normal position of the dog with such an assembly, and the jury with the exemplar before them, and laying a hand upon the lever end of the pawl, and observing that the weight of the hand would raise the pawl, just as we have stated, could not come to any other conclusion than that the mere weight of the foot, even though no pressure was exerted, would cause the pawl to rise above the level of the ratchet wheel, just as we have stated. In this particular it is argued that even though the portion of the pawl which we have stated, according to our measurement, is only $\frac{3}{8}$ of an inch, was engaged with the ratchet wheel, it would be physically impossible for the pawl and the ratchet wheel to become disengaged so as to allow the brake wheel to spin before the brakeman could anticipate the counter-clockwise motion of the brake wheel. But whether such an engagement of the pawl with the ratchet wheel was such that the normal action of the brakeman in getting ready to release the brake was such as to add to the liability of the pawl and the ratchet wheel becoming disengaged, without fault of the brakeman, was a question

of fact for the jury, and also, just to what extent the pawl might be said to be over-riding the ratchet wheel.

[4] S. P. car No. 35783 was at least sixteen years old. Just how much service it had seen during that time does not appear in the transcript, but it may safely be assumed, and we think the jury had a right to conclude that it had traveled many miles, and that the brake had been set and unset hundreds of times.

[5,6] Upon the trial of the action several witnesses were placed upon the stand by the appellant, testifying that after the injury to the plaintiff the brake assembly was examined and these witnesses testified that it operated efficiently. While most of the witnesses testified that they examined the pawl, our attention has not been called to any testimony in the record that any witness, other than plaintiff, testified to the up-and-down motion of the pawl. Some of these witnesses testified that they never saw a loose pawl or dog except on a car that had been wrecked. Without quoting the testimony we may state that at least four witnesses testified that they inspected the brake assembly on S. P. car No. 35783 after the injury to the plaintiff, and that the brake operated efficiently, all pronouncing it an efficient hand brake. The weight to be given to this testimony, in view of the exemplar of the brake assembly introduced in evidence, was for the jury to determine. What was or is a loose pawl, was and is a question of fact, and the weight of the testimony of a witness that a pawl is not loose when its assembly permits the engaging end of the pawl to rise a trifle more than one-half of its width above the ratchet wheel, was for the jury. A question of fact was presented, and the finding of the jury upon that question of fact is binding upon us. The fact that no witness was introduced by the plaintiff to contradict the testimony of the defendant's witnesses that the brake assembly was in a first-class condition, does not lead to the conclusion, as urged by the appellant, that it was physically impossible for the pawl to become disengaged with the ratchet wheel on S. P. car No. 35783, in view of the fact that the replica introduced in testimony exhibited what we have set forth herein. Such testimony raised only a question of fact, and the testimony of the witnesses that the brake assembly on S. P. car No. 35783 depended not alone upon their observation,

but upon their conclusions as to what constituted a first-class assembly. By calling the brake assembly on S. P. car No. 35783 first-class, of which the exemplar introduced in evidence was said to be an exact replica, did not take away from the jury the fact of determining that the assembly was not first-class, or was what it should be, or was not defective or inefficient, or was not such as to add to the hazards of the plaintiff's employment a hazard which the plaintiff did not assume.

Upon the trial of the action there was introduced in testimony a bulletin issued by the Interstate Commerce Commission giving an analysis of accidents to employees while operating hand brakes for the year 1933. That analysis shows that eighty-nine employees were injured in connection with the use of hand brakes, sixty-eight where it is alleged that no defects appeared, and twenty-one by reason of pawl or ratchet defects, or failure thereof. Whether this table is accurate or inaccurate as to the causes of the injuries of the employees, it does establish the fact that the operation of the hand brakes is exceedingly hazardous, and enforces upon railroad companies the necessity of maintaining appliances so as to not add to the extreme hazardousness of a brakeman's duties, that is, all reasonable care must be taken.

We may here add that if the bolt passing through the housing holding the pawl in position, becomes worn by constant use, the pawl would be permitted to rise still higher at the end where it is intended to engage with the cogs on the ratchet wheel. Our attention has not been called to any testimony in the record showing that the bolt passing through the pawl, which acts somewhat in the nature of a fulcrum, had ever been replaced by a new bolt after the car had been placed in service, which the record shows was at least sixteen years prior to the 11th day of January, 1934.

[7] Our attention is called to some statements made by the plaintiff after the injury, in which it is asserted that the plaintiff stated that the brake club gave him a dirty crack. That does not in any particular contradict any testimony tending to show that the pawl on the ratchet wheel became disengaged. A witness by the name of Sullivan testified that the plaintiff stated to him that he did not know what caused the accident. This was shortly after the injury, and during the time

when other witnesses testified that the plaintiff was irrational and had not fully regained consciousness.

A witness by the name of Dr. Walker testified that the plaintiff was irrational and had a partial lapse of memory during the weeks that he spent at the Southern Pacific Hospital, to which hospital the plaintiff was not removed until several days after the injury. The witness Stevens testified that the plaintiff said he had been "knocked from the car by a brake stick." That does not militate against the plaintiff's testimony. The statement made by the plaintiff when he was lying on his back in the Southern Pacific Hospital is as follows: "Just as I was going to release the brake with the club, it evidently let go and the brake club must have struck me on the side, throwing me off the platform. I was knocked unconscious." These answers were taken down by the witness Lloyd, made out in his own handwriting, neither read by, nor read to, nor signed by Karberg. These were matters, again, for the jury, and we do not think them of sufficient importance to demand further attention.

Counsel, both for the plaintiff and the defendant, have cited and quoted at length from a large number of cases. We have selected the leading cases on both sides which illustrate the law involved and obviate the necessity of here reviewing at length the large number of cases cited.

In *Qualls v. Atchison, T. & S. F. R. Co.*, 112 Cal.App. 7, 296 P. 645, 648, this court had before it section 11 of title 45 U.S.C.A., where it is specified that "it shall be unlawful for any common carrier subject to the provisions of this chapter to haul, or permit to be hauled or used on its line any car * * * not equipped * * * with secure * * * and efficient hand brakes." Without quoting the cases there cited, this court held, basing its decision upon a large number of cases, that: "It is the absolute duty of an interstate railroad company to equip and maintain efficient brakes," etc. Also, that whether the defect, act of negligence, etc., complained of was the proximate cause of the injury was a question for determination by the jury.

The leading case cited by the plaintiff is that of *Didinger v. Pennsylvania R. Co.* (C.C.A.) 39 F.(2d) 798, 799. That case involved injury resulting from the pawl and ratchet wheel becoming disengaged.

A verdict was directed for the defendant, and upon appeal the judgment was reversed. We quote therefrom the following: "There are two recognized methods of showing the inefficiency of hand brake equipment. Evidence may be adduced to establish some particular defect, or the same inefficiency may be established by showing a failure to function, when operated with due care, in the normal, natural, and usual manner. *Altman v. Atlantic Coast Line R. Co.*, 18 F.(2d) 405 (C.C.A. 5). The plaintiff adopted the latter method of proof. By the opening statement he offered to show by evidence that, in a switching operation, he was required to firmly set the brake upon a freight car; that in doing so he placed his foot against the dog, and it 'went in' (the ratchet), and he heard it click; seeing that the brake held after it was set, and preparatory to leaving the car, that he placed his hand lightly upon the top wheel, when the brake suddenly 'gave way,' 'swung around the other way,' and, as he tried to hold it, threw him from the car; and that the brake was set 'in accordance with the proper and usual manner of setting the brake, and it gave way and did not hold.' In view of the frequently repeated assertion that the brake had been properly set and that the dog or pawl had firmly engaged one of the teeth of the ratchet, it cannot be assumed that this was a case of so-called 'hair-trigger' setting, where the dog lodges insecurely upon the outer extremity of a ratchet tooth." It will be noted that the court quotes the testimony of the plaintiff to the effect that the pawl or dog had been firmly engaged with one of the teeth of the ratchet, and therefore it could not be assumed that it was a case of so-called "hair-trigger" setting. In the case at bar, as we have shown, the testimony does not show that the pawl had been firmly engaged or securely engaged with the ratchet wheel, as argued by the appellant, and that under the circumstances, by reason of the looseness of the pawl and its capability of rising a trifle over half its width above the ratchet wheel, presented at all times the possibility and probability of a "hair-trigger" setting of the brake. The court further said, however: "Assuming the proper setting of the brake, the fact that it did not hold demonstrates its inefficiency." (Citing cases.)

The next case which we will consider, cited by the plaintiff, illustrating the rule

of law which we think applicable here, is that of *Detroit, T. & I. R. Co. v. Hahn* (C.C.A.) 47 F.(2d) 59, 60, from which we quote the following: "It is insisted for appellant that the case is governed by *Chicago, M. & St. P. R. Co. v. Coogan*, 271 U. S. 472, 46 S.Ct. 564, 70 L.Ed. 1041, since all the inferences which the jury might reasonably draw from the evidence would not be sufficient to support a finding of a cause of injury other than the negligence of the appellee in failing to apply the brake. We do not think the evidence falls within this rule, nor do we think it leaves the cause of injury in the realm of conjecture, as was the case in *Northern R. Co. v. Page*, 274 U.S. 65, 47 S.Ct. 491, 71 L. Ed. 929 and *Burnett v. Pennsylvania R. Co.*, 33 F.(2d) 579 (C.C.A.6). If there was an inefficient brake which caused the injury, there is inescapable liability under the Safety Appliance Act (45 U.S.C.A. § 1 et seq.). The appellant introduced evidence which would have supported a finding for it on that issue, that is, evidence that the brake was examined before and immediately after the accident and found to be in good working order. We are asked to accept that evidence as conclusive. This we cannot do, for the evidence of appellee that the brake was used in the normal and usual manner and failed to work, was such evidence of inefficiency as to make an issue for the jury. *Didinger v. Pennsylvania R. Co.* (C.C.A.) 39 F.(2d) 798." The decision in this case conclusively answers the contention of the appellant that the jury should have been, and this court is bound by the testimony of the witnesses introduced by the appellant that the brake assembly on S. P. car No. 35783 worked efficiently after the injury sustained by the plaintiff. The function of a jury cannot be eliminated in such manner.

The appellant cites a number of cases where the testimony was held insufficient to justify a verdict in favor of the injured employee, two of which we may consider as illustrating the appellant's contention, which we think inapplicable to the circumstances presented by the record in this case.

In *Burnett v. Pennsylvania R. Co.* (C. C.A.) 33 F.(2d) 579, 580, it was held that where proofs of an injury to a railroad brakeman, though consistent with the existence of a defect in the hand brake as the cause of the accident, were at least equally consistent with the existence of

some other equally effective cause, there was no question for the jury. A quotation from the opinion in that case differentiates the facts from what we are considering, very plainly, to wit: "It is plain enough that this reverse spinning, thus happening, if in any way abnormal, must have been the direct result of an overtight setting by the employee who had previously set this brake. Certain possible defects in a brake assembly might or might not contribute to an overtight setting; whether there was such a defect here is a matter of surmise. In any event, according to plaintiff's testimony, and if there was an extreme and dangerous tension on the brake chain, he increased that tension by the exertion of the necessary physical strength, and then released the dog. It is impossible to see how there was any direct causal relation between the brake defect, if there was one, and the supposedly dangerous tension which caused the injury to Burnett. His own voluntary act increased that tension before it took effect." There is nothing of that kind in the instant case. The act of the plaintiff did not increase the tension, but was calculated, on the other hand, to prevent, if it had any effect, the disengaging of the pawl from the ratchet-wheel.

The case of *Grand Trunk Western R. Co. v. Holstein* (C.C.A.) 67 F.(2d) 780, 782, where the testimony was held insufficient to raise an issue, is cited by the appellant to support its contention that the evidence here is likewise insufficient. It will be observed that in this case the case of *Didinger v. Pennsylvania R. Co.*, supra, and the case of *Detroit, T. & I. R. Co. v. Hahn*, supra, are approved and distinguished from the *Holstein* Case. In the *Holstein* Case the following principle of law is laid down, as shown by the following quotation, and likewise, its inapplicability demonstrated, to wit: "From this it would seem that the finding of inefficiency was even there founded upon an inference of physical defect to be drawn from the abnormal action of the brake under normal operating conditions. But if the plaintiff in this case must rely upon an inference of physical defect, he cannot recover. It is a familiar principle that if several inferences are deducible from the facts shown, and such inferences are equally consistent with all those facts, 'a verdict in favor of the party bound to maintain one of those propositions against the other is necessarily wrong.' * * * No jury

should be permitted to draw a conclusion from the evidence when the proper conclusion to be drawn lies wholly within the realm of speculation and conjecture. The principle above referred to is ordinarily applied where either one of two conclusions may just as logically be drawn from the same set of circumstances. In such case there is no conflict of evidence."

In the case at bar there is direct evidence as to the failure of the brake assembly to operate properly. There is not one word of evidence in the record—at least no testimony to which our attention has been called—indicating, or even tending to indicate that the plaintiff had performed any act in connection with the brake in question, other than that which was proper and in accordance with the necessary procedure in making preparation for the release of the brake on S. P. car No. 35783. There is direct testimony as to the condition of the brake assembly and how it acted. There was, as we have stated, introduced in testimony an exemplar of the brake assembly, said to be an exact replica. This testimony and the replica in the condition which we have pointed out, justified two conclusions, either one of which would hold the defendant liable, to wit: Either that the pawl on the brake assembly on the car in question was so loose as to allow it to override the cogs on the ratchet wheel; and likewise, that it was so loose that in the setting of the brake the pawl would necessarily rise so that more than one-half of the pawl would be above the level of the ratchet wheel, and cause the brake unexpectedly to let go. In this connection it must be remembered, also, that the car had been in service over sixteen years. There is no speculation presented by the testimony in this case. The foregoing are simply legitimate inferences which the jury was warranted in deducing from the facts presented for its consideration. A number of other cases are cited by the appellant along the same lines as the two cases just considered, and therefore do not need to be reviewed herein.

The alleged misconduct of counsel in argument does not appear to merit any setting forth in this opinion.

[8] Following the alleged insufficiency of the testimony, it is urged that the court was guilty of prejudicial misconduct in its instructions to the jury. At the request of the plaintiff the court gave to the jury the

following instruction, being instruction No. XVIII:

"The duty imposed upon the carrier by the Safety Appliance Act to equip its cars with efficient hand-brakes is a duty to maintain such brakes in an efficient condition. The test of the observance of this duty imposed by the Safety Appliance Act is the performance of the appliance. A failure of the appliance to work efficiently will sustain a charge that the act has been violated, and render the carrier liable for an injury which results from such failure."

At the request of the appellant the court gave to the jury instruction No. XXVII, reading as follows:

"The Safety Appliance Act provides that all cars shall be equipped with efficient hand-brakes. To be efficient the hand-brake must be capable of operation and kept in such condition that it shall at all times be operative, and, therefore the test of compliance with the requirement of the statute is primarily effectiveness in operation and the question is whether or not it was able to produce the expected result when properly applied (and if it was so effective then, it would be deemed efficient."

Following the case of *Devaney v. Atchison, T. & S. F. R. Co.*, 219 Cal. 487, 27 P. (2d) 635, it must be held that instruction No. XVIII given to the jury at the request of the plaintiff is not a strictly correct statement of the law. That instruction should have read in the last sentence as follows: "A failure of the appliance to work efficiently when properly operated will sustain a charge that the act has been violated, and render the carrier liable for an injury which results from such failure." The words "properly operated" should have found a place in the instruction, just as appears in instruction No. XXVII. This, however, does not establish the fact of prejudicial error, because in the light of the testimony to which we have referred concerning the conduct of the plaintiff in making preparations to release the brake, there does not appear one scintilla of testimony indicating that so far as the plaintiff was concerned, what he did, or was doing, was other than proper and strictly in accordance with the customary procedure necessary to be taken in the performance of his duties. Thus, if a special interrogatory had been submitted to the jury, and the jury had found improper conduct on the part of the plaintiff, this court would then be under the necessity of set-

ting aside such a finding on the ground of its being unsupported by the testimony. No prejudicial error can be based upon any such state of facts. Section 4½ of article 6 of the Constitution forcibly applies to this case.

[9, 10] Appellant concludes its argument by combining two objections, to wit: That the damages are excessive; and that the plaintiff, by refusing to be operated upon, added to the extent of his own injury.

In support of its contention that the award is excessive, the appellant sets forth the following calculations, to wit:

"If we take the sum of \$2,076.00 per annum for 26 years, which was the expectancy of the plaintiff, we would obtain a total of \$53,976.00, which divided by 256 (\$1.00 plus \$1.56) which is 6 per cent for 26 years, would result in \$21,000.00 as the amount allowable as the present cash value of future earnings. Certainly, an allowance of that amount additionally for pain and suffering seems to be excessive. * * Counsel have taken the pains to figure \$42,500.00 at 4 per cent for 26 years, making allowance of \$2,076.00 per annum for the full period of 26 years from principal and interest, and finds that at the end of the 26 years after using the interest and sufficient of the principal to make up the annual earnings, the amount remaining in the fund would be \$20,825.00."

This first calculation, of course, is based simply upon the cash value of the plaintiff's prospective earnings, and does not take into consideration the pain, suffering, and continuing disability of the plaintiff, which at least presented to the jury a very serious question as to what would compensate an injured person for a lifetime disability. As has been said in many cases, the jury is as well qualified to estimate such damages as is an appellate court. Our attention has not been called to any fact indicating that the verdict of the jury was the result of passion, prejudice or undue influence. Just a plain argument that the extent of the injuries are not sufficient to justify the amount of the award.

While it would unnecessarily extend the length of this opinion were we to set out all of the testimony relating to the injury, we may begin by stating that the plaintiff suffered a very extensive fracture of the skull, and an injury to the brain which has affected his mental operations, in all probability disabled him for life and rendered

him incapable of performing any labor by which to maintain himself, and likewise rendering him to some extent mentally incapable. As one of the witnesses testified, he is unable to concentrate and can do no work whatever. The plaintiff was under hospital treatment from the entire date of the injury on January 11, 1934, up to and including the date of the trial in 1935. The plaintiff's weight had dropped from 187 to 139 pounds; he had been in bed most of the time during the year intervening between the injury and the trial; suffered very severe headaches. Even the doctors for the defendant admitted the fracture of the skull and the suffering of a moderately severe concussion of the brain. The severity of the injuries suffered by the plaintiff does not seem to be seriously questioned. The most serious question was as to whether the plaintiff's injury could or could not be alleviated by what we may call experimental operations performed upon his skull. Dr. Towne, one of appellant's witnesses, testified that concussion of the brain involved actual brain injury, but testified that in his opinion, while the plaintiff was gradually growing worse, his condition could be bettered by an operation being performed to remove what he assumed to be a blood clot upon the brain.

It appears from the record that the operation sought to be performed was that of boring holes in different portions of the skull for the purpose of determining the location of the blood clot, if any, upon the brain, and then draining off the blood through the hole locating the blood clot. Just how many holes would have to be bored in the skull, the record does not disclose, but it does appear that the idea of the surgeons was that holes should be bored in the skull until the blood clot was located. The testimony is to the effect that this exploratory operation was not attended with more than a five per cent. mortality. Dr. Ruedy, who examined the plaintiff, testified in his behalf as follows: "In addition to the fracture of the left parietal bone of the skull, plaintiff has sustained the following head injuries as a result of the accident: A traumatic separation of an area of the inner table of the parietal bone with medial displacement; traumatic opening of the sagittal and occipital-parietal suture line; overlapping of the outer table of the left parietal bone upon the right parietal bone; development of

an increased inter-cranial pressure; severe cerebral injury." It was next explained how these injuries interfered with the movement of the plaintiff's body, causing him to have a staggering gait, making him feel like he was falling; and also the effect upon the nervous system or nerve centers. The consensus of all of the doctors was that unless the proposed operation was performed, the plaintiff's condition would become worse.

While the appellant has cited a number of cases to the effect that under ordinary conditions a plaintiff was bound to take such action as seems proper to mitigate damages by lessening the extent of his injuries, the following cases lead us to the conclusion just as was said in the case of *Murray v. Cohen*, 132 A. 221, 223, 4 N.J. Misc. 139: "The plaintiff cannot be compelled to submit to an operation which involves the least danger to life." *Sarcady v. Biedenweg*, 116 Cal.App. 581, 3 P.(2d) 43; *Wells v. Clark & Wilson Lumber Co.*, 114 Or. 297, 235 P. 283.

We cannot hold that the plaintiff in this case was under obligations to submit to the boring of holes in his skull for the purpose of locating a blood clot upon his brain, when that operation was attendant upon fatal possibilities.

In answer to the appellant's calculations, the respondent sets forth the following: "\$173.00 is the amount that appellant admits that Karberg earned per month. Karberg testified that during good times he earned as high as \$300.00 per month, and in poor times, not less than \$200.00. His average earning can therefore be stated to be \$250.00 per month. Figuring the present worth of an annuity of \$250.00 per month for twenty-six years, at 3 per cent, we get the sum of \$43,820.00."

Were there no financial losses incurred by the plaintiff, the fact that his whole life is ruined; that his mental capacities are so lessened as to render him incapable of engaging in any gainful undertakings; that his whole life, if it extends through the period of normal expectancy, must be one not only clouded, but practically a continued hopelessness, presents a condition that can scarcely be compensated by any monetary consideration.

The judgment is affirmed.

We concur: THOMPSON, J.; PULLEN, P. J.

10 Cal.App.2d 387
PEOPLE v. CARTER.
Cr. 2784.

District Court of Appeal, Second District,
Division 1, California.

Nov. 25, 1935.

Rehearing Denied Dec. 9, 1935.

Hearing Denied by Supreme Court
Dec. 23, 1935.

1. Infants $\Rightarrow$ 20

In prosecution for contributing to delinquency of minor, autopsy surgeon's testimony that minor was pregnant held sufficient to establish corpus delicti; defendant's connection with crime being no part of corpus delicti.

2. Criminal law $\Rightarrow$ 409

Corpus delicti being established, defendant's incriminatory statements are admissible.

3. Criminal law $\Rightarrow$ 406(4)

In prosecution for contributing to delinquency of minor who was shot and killed by defendant's wife, defendant's testimony at wife's trial held properly admitted as against contention that such testimony was not voluntary.

4. Criminal law $\Rightarrow$ 564(1)

In prosecution for contributing to delinquency of minor who at times lived with defendant and his wife within county of forum, and who after brief absence returned and lived with them for over six weeks before her death, evidence that defendant had been having sexual intercourse with minor for about six months before her death, and that last act occurred about one week before death, held sufficient to prove locus delicti.

5. Criminal law $\Rightarrow$ 564(2)

Necessity of proof beyond reasonable doubt applies only to issue of guilt, and not to venue of crimes.

Appeal from Superior Court, Los Angeles County; Raglan Tuttle, Judge.

Archie C. Carter was convicted of contributing to the delinquency of an unmarried minor under the age of 21, and he appeals.

Affirmed.

Donald MacKay, of Los Angeles, and George H. Shreve, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for the People.

DORAN, Justice.

Appellant was convicted of contributing to the delinquency of Frances Isabelle Walker, an unmarried minor under the age of 21 years. Miss Walker had been shot and killed on April 13, 1935, by the wife of appellant. The autopsy surgeon testified that the post mortem examination revealed that she was pregnant, and had become so two or three weeks before her death. The information alleged the offense to have been committed on or about April 11, 1935.

Appellant presents five claims of error for consideration, namely: (1) That proof of the corpus delicti was not sufficient; (2) that, therefore, the declarations and admissions of defendant were inadmissible; (3) that the testimony of defendant given at the trial of his wife was not free and voluntary, and hence inadmissible; (4) that the trial judge was influenced by his belief that appellant's acts and conduct led to the killing, by his wife, of the minor, Miss Walker; and (5) that the evidence was insufficient to prove the locus delicti.

[1] It was clearly evident, from the testimony of the autopsy surgeon, that some one had contributed to the delinquency of Miss Walker, which alone was sufficient to establish the corpus delicti; the connection of the defendant with the crime is no part of the corpus delicti.

[2] The rule that, the corpus delicti being established, the incriminatory statements of defendant are admissible, is too well known to require the citation of authorities.

[3] The defendant's testimony, given at the trial of his wife, was properly admitted. *People v. Mitchell*, 94 Cal. 550, 29 P. 1106.

Appellant's brief merely notes, without comment, that the trial judge was influenced by his belief that the acts of defendant led to the killing of Miss Walker. Such a bare assumption merits no more comment or consideration here, than it received in appellant's brief.

[4] The fifth claim urged by appellant, namely, that the evidence was insufficient to prove the locus delicti, is without support either in the record or the law.

Appellant and his wife resided near Newhall in Los Angeles county. Miss Walker was a playground instructor at the Newhall school, and at times lived with appellant and his wife. She had returned to live with them in February, 1935, after a brief absence, and remained there until April 13, when she was killed. It was in evidence that appellant had testified at his wife's trial that he had been having sexual intercourse with Miss Walker for about six months before she met her death, and that the last act occurred a week or ten days before she died. The evidence, for example, of defendant's practice, of stopping and lingering beneath the drooping branches of a clump of trees off the highway, while driving Miss Walker to or from school, was a circumstance not easily ignored. Without reviewing the details further, it is sufficient to note that the evidence abundantly supports the inference that the offense was committed in Los Angeles county. *People v. Tipton*, 73 Cal. 405, 14 P. 894; *People v. McGregor*, 88 Cal. 140, 26 P. 97.

[5] The state gives no assurance to its feloniously insubordinate citizens that the venue of their crimes will be fixed beyond a reasonable doubt; that doctrine applies only to the issue of guilt. *People v. McGill*, (Cal.App.) 51 P.(2d) 433; *Underhill on Criminal Evidence*, vol. I, § 36, p. 45. The defendant and appellant, therefore, is in no position to complain because the location of the offense was not established to a degree of certainty more to his liking.

The judgment and order denying a new trial are affirmed.

We concur: HOUSER, P. J.; YORK J.

On Petition for Rehearing.

PER CURIAM.

In the petition of appellant for a rehearing it is pointed out that the evidence referred to by way of example, in the opinion, to appellant's practice of stopping and lingering beneath the drooping branches of a clump of trees, was stricken at the trial. This appears to be correct. It is again urged "that there is no evidence, other than the residence of the parties, upon which any court could draw an inference as to the locus delicti of the alleged offense."

The evidence shows that, with the exception of a few hours on the evening of

April 8th, when Miss Walker and members of her family and appellant's family visited in Ventura county, she was not outside the boundaries of Los Angeles county, between the date of her return in January and the time of her death; that she lived at the home of appellant from February until she was killed by appellant's wife; and that appellant's home was in Los Angeles county. With the admissions of appellant, in evidence, that he had been having sexual intercourse with the deceased for six months before her death, in addition to the foregoing, it is hardly likely that any one would or could infer that he always took her outside of Los Angeles county when the acts or act which contributed to her delinquency took place.

The petition is denied.



10 Cal.App.2d 441

CITY OF LOS ANGELES v. WELSH et al.
Civ. 10027.

District Court of Appeal, Second District,
Division 1, California.
Dec. 2, 1935.

1. Eminent domain ⇨262(3)

Evidence on appeal was presumed sufficient to support order disallowing attorney's fees as item of taxable costs on dismissal of condemnation proceeding, where attorney was to receive 5 per cent. of award and only part of evidence relative to attorney's contract and services was presented on appeal (Code Civ.Proc. § 1255a).

2. Appeal and error ⇨931(5)

Reviewing court must assume that testimony not presented on appeal related to issues and that trial court gave it due consideration.

3. Appeal and error ⇨936(2)

Reviewing court must presume that objection to motion to strike out item of attorney's fees in cost bill, based on failure of motion to specify that fee was contingent, was waived, where objection was not made at hearing (Code Civ.Proc. § 1255a).

Proceedings by the City of Los Angeles against Byron Welsh and others for condemnation. From an order taxing costs on abandonment of the proceedings and striking out an item of attorney's fees, defendant Marie Domblides Taix appeals.

Affirmed.

D. Joseph Coyne, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Charles F. Reiche, Deputy City Atty., all of Los Angeles, for respondent.

SHINN, Justice pro tem.

Appeal from an order taxing costs and striking out item of attorney's fees claimed under section 1255a of the Code of Civil Procedure.

[1,2] Upon abandonment by plaintiff of a proceeding to condemn land and dismissal of a condemnation action, the court entered judgment of dismissal and awarded defendant Taix her costs. She filed a cost bill claiming \$2 clerk's fee for filing her answer and the sum of \$729 for attorney's fees. Upon plaintiff's motion, the court struck out the item of attorney's fees and denied appellant any allowance therefor, from which order she appeals. In the notice of motion to tax costs, plaintiff objected to the attorney's fees claimed as excessive, exorbitant, and unreasonable. It appears from the cost bill that the amount claimed was 5 per cent. of an award of \$14,581, theretofore made in appellant's favor, and it appears, inferentially, that the fee was contingent and dependent upon the amount of the award. Affidavits of defendant Taix and her attorney were used upon the hearing. It appears therefrom that the attorney was to receive a fee equal to 5 per cent. of the award and it does not appear that the fee would not have been due unless the award was paid, nor does it appear that the attorney was to receive nothing in case the proceedings should be abandoned. A counter affidavit of the deputy city attorney who was in charge of the proceeding was also used at the hearing. The only issue to which the affidavits were pertinent was as to the value of the services. From this record, alone, contained in the clerk's transcript, certified by the judge, it appears

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

without question that the attorney rendered services which could not be held to be valueless. Unfortunately, however, this record is incomplete. The minutes of the court, brought to this court upon diminution of the record, show that upon the hearing of the motion, the attorney for defendant Taix was sworn and testified. The testimony which he gave is not before us. Whether it related to the value of his services or to the terms of his contract of employment or to both, we cannot know, but we are bound to assume that it related to the issues before the court and that it was given due consideration. If the court concluded from that testimony that the fee was contingent upon payment of the ward by the city, the order disallowing the item of attorney's fees was a proper one. This court has held in *City of Long Beach v. O'Donnell*, 91 Cal.App. 760, 267 P. 585, that attorney's fees are recoverable by a defendant, when an action to condemn land is dismissed, only in case they have been paid or there exists an obligation to pay them, and that a contingent fee may not be collected as costs where the contingency upon which it was to be paid has not occurred. As only a part of the evidence is before us, we are bound by the presumption that the evidence, as a whole, was sufficient to support the order disallowing the attorney's fees. We conclude, therefore, that the court found that defendant Taix had not paid and was under no liability to pay her attorney anything for the services he had performed in her behalf in the defense of the action, and that the testimony of her attorney which is not before us supported that conclusion.

[3] A point is made of the fact that the motion to strike out the item of attorney's fees in the cost bill did not specify, as one of the grounds therefor, that the fee was contingent and not due or payable. The record does not show that any objection was made upon that ground at the time of the hearing of the motion and we must presume that the point was waived. 18 Cal. Jur. 652. It is unnecessary to consider whether the order appealed from is sustainable upon other grounds.

The order is affirmed.

We concur: HOUSER, P. J.; YORK, J.

11 Cal.App.2d Supp. 755

FENTON v. MARKWELL & CO. et al.

C. A. 3095.

Appellate Department, Superior Court, Los Angeles County, California.

Nov. 29, 1935.

1. Constitutional law ☞24

Later constitutional provision repeals earlier statute where two provisions are irreconcilably repugnant.

2. Constitutional law ☞24

Statute is superseded, notwithstanding absence of inconsistencies or repugnancies, where later constitutional provision is revisory of entire subject-matter of statute and is declared a substitute therefor.

3. Usury ☞8

Constitutional provision fixing maximum rate of interest but exempting building and loan associations, banks, pawnbrokers, etc., held to repeal earlier usury law (St. 1919, p. lxxxiii, §§ 1-3; Const. art. 20, § 22, as added in 1934 [see St. 1933, p. 3159]).

4. Usury ☞8

Provision of usury law for recovery of treble amount of usurious interest paid imposed a "penalty," and repeal of statute prevented subsequent recovery of treble interest, though interest was paid while statute was in force (St. 1919, p. lxxxiii, §§ 1-3; Const. art. 20, § 22, as added in 1934 [see St. 1933, p. 3159]).

[Ed. Note.—For other definitions of "Penalty," see Words & Phrases.]

5. Statutes ☞232

Right given by statute falls and statutory remedy ceases with repeal of statute without saving clause, unless right has been carried into final judgment.

6. Usury ☞8

Repeal of usury law held to prevent borrower from recovering usurious interest paid, though part of payments were made while usury law was in force (St. 1919, p. lxxxiii, §§ 1-3; Const. art. 20, § 22, as added in 1934 [see St. 1933, p. 3159]).

7. Constitutional law ☞104, 159

Construction of constitutional provision repealing usury statute as withdrawing borrower's right to recover usurious interest paid, does not deprive borrower of vested right, or impair obligation of any contract, since defense of usury is in nature of statutory penalty (St. 1919, p. lxxxiii, §§ 1-3; Const. art. 20, § 22, as added in 1934 [see St. 1933, p. 3159]).

Appeal from Municipal Court of Los Angeles; Newcomb Condee, Judge.

Action by D. Fenton against Markwell & Co. and others. From an order sustaining a demurrer to the complaint and from the judgment thereon, plaintiff appeals.

Judgment affirmed, and appeal from order dismissed.

Sig E. Murphy, William H. Brawner, and Harry K. Sargent, all of Los Angeles, for appellant.

Vernon S. Gray, of Los Angeles, for respondent.

Mathes & Sheppard, Robert E. Ford, L. J. Styskal, O'Melveny, Tuller & Myers, Williamson, Ramsay & Hoge, and Lloyd A. Free, all of Los Angeles, amici curiæ, for respondents.

SHAW, Presiding Judge.

By counts 1 and 3 of his complaint herein plaintiff seeks to recover, under the Usury Law (St. 1919, p. lxxxiii), treble the sums paid by him for interest on certain loans alleged to have been usurious. Some of this interest was paid more than one year before the complaint was filed, and plaintiff has added to his complaint counts 2 and 4 for money had and received, by which he seeks to recover the sums paid for interest, not trebled. The loans were made and the interest thereon was paid prior to the general election of November 6, 1934, except that \$49.50 of the interest was paid November 27, 1934. This action was commenced December 5, 1934. The trial court sustained a general and special demurrer to this complaint, and from the judgment entered on that ruling plaintiff appeals. By vote at the general election above mentioned, a new section, numbered 22, was added to article 20 of our State Constitution (see St. 1933, p. 3159), relating to usury. This amendment, having been proposed by the Legislature, took effect on the day of the election. *Johnston v. Wolf*, 208 Cal. 286, 289, 280 P. 980. This case therefore presents for decision the questions whether the constitutional amendment above mentioned operated to repeal the Usury Law, and, if it did, whether such repeal abrogated and destroyed any or all of the causes of action asserted in the complaint.

The Usury Law was a statute adopted as an initiative measure by vote of the people in 1918. Stats. 1919, p. lxxxiii; Deering's Gen. Laws, Act 3757. Sections 1 and 2 and

the first part of section 3 of that statute read as follows:

"§ 1. The rate of interest upon the loan or forbearance of any money, goods or things in action or on accounts after demand or judgments rendered in any court of this state, shall be seven dollars upon the one hundred dollars for one year and at that rate for a greater or less sum or for a longer or a shorter time; but it shall be competent for parties to contract for the payment and receipt of a rate of interest not exceeding twelve dollars on the one hundred dollars for one year and not exceeding that rate for a greater or less sum or for a longer or shorter time, in which case such rate exceeding seven dollars on one hundred dollars shall be clearly expressed in writing.

"§ 2. No person, company, association or corporation shall directly or indirectly take or receive in money, goods or things in action, or in any other manner whatsoever, any greater sum or any greater value for the loan or forbearance of money, goods or things in action than at the rate of twelve dollars upon one hundred dollars for one year; and in the computation of interest upon any bond, note, or other instrument or agreement, interest shall not be compounded, nor shall the interest thereon be construed to bear interest unless an agreement to that effect is clearly expressed in writing and signed by the party to be charged therewith. Any agreement or contract of any nature in conflict with the provisions of this section shall be null and void as to any agreement or stipulation therein contained to pay interest and no action at law to recover interest in any sum shall be maintained and the debt cannot be declared due until the full period of time it was contracted for has elapsed.

"§ 3. Every person, company, association or corporation, who for any loan or forbearance of money, goods or things in action shall have paid or delivered any greater sum or value than is allowed to be received under the preceding sections, one and two, may either in person or by his or its personal representative, recover in an action at law against the person, company, association or corporation who shall have taken or received the same, or his or its personal representative, treble the amount of the money so paid or value delivered in violation of said sections, providing such action shall be brought within one year after such payment or delivery."

Section 3 contains further provisions declaring certain acts to be misdemeanors, all of which provisions have been held unconstitutional and void (*In re Washer*, 200 Cal. 598, 254 P. 951; *Wallace v. Zinman*, 200 Cal. 585, 254 P. 946), except a provision declaring it a misdemeanor to "violate the provisions of sections one and two of this act." *People v. Campbell*, 110 Cal.App. (Supp.) 783, 291 P. 161. Other parts of the act contain merely a repeal of certain conflicting laws, and a designation of the act as the "Usury Law."

Prior to the constitutional amendment above mentioned, there was no provision in the Constitution regarding usury, and the only provision in respect to interest was that of article 4, § 25, subd. 23, prohibiting the passage by the Legislature of local or special laws regulating the rate of interest on money.

The constitutional amendment reads as follows:

"Sec. 22. The rate of interest upon the loan or forbearance of any money, goods or things in action, or on accounts after demand or judgment rendered in any court of the State, shall be seven per cent per annum but it shall be competent for the parties to any loan or forbearance of any money, goods or things in action to contract in writing for a rate of interest not exceeding ten per cent per annum.

"No person, association, copartnership or corporation shall by charging any fee, bonus, commission, discount or other compensation receive from a borrower more than ten per cent per annum upon any loan or forbearance of any money, goods or things in action.

"However, none of the above restrictions shall apply to any building and loan association as defined in and which is operated under that certain act known as the 'Building and Loan Association Act,' approved May 5, 1931, as amended, or to any corporation incorporated in the manner prescribed in and operating under that certain act entitled 'An act defining industrial loan companies, providing for their incorporation, powers and supervision,' approved May 18, 1917, as amended, or any corporation incorporated in the manner prescribed in and operating under that certain act entitled 'An act defining credit unions, providing for their incorporation, powers, management and supervision,' approved March 31, 1927, as amended or any duly licensed pawnbroker

or personal property broker, or any bank as defined in and operating under that certain act known as the 'Bank Act,' approved March 1, 1909, as amended, or any bank created and operating under and pursuant to any laws of this State or of the United States of America or any nonprofit cooperative association organized under Chapter 4 of Division VI of the Agricultural Code in loaning or advancing money in connection with any activity mentioned in said title or any corporation, association, syndicate, joint stock company, or partnership engaged exclusively in the business of marketing agricultural, horticultural, viticultural, dairy, live stock, poultry and bee products on a cooperative nonprofit basis in loaning or advancing money to the members thereof or in connection with any such business or any corporation securing money or credit from any Federal intermediate credit bank, organized and existing pursuant to the provisions of an act of Congress entitled 'Agricultural Credits Act of 1923,' as amended in loaning or advancing credit so secured, nor shall any such charge of any said exempted classes of persons be considered in any action or for any purpose as increasing or affecting or as connected with the rate of interest hereinbefore fixed. The Legislature may from time to time prescribe the maximum rate per annum of, or provide for the supervision, or the filing of a schedule of, or in any manner fix, regulate or limit, the fees, bonus, commissions, discounts or other compensation which all or any of the said exempted classes of persons may charge or receive from a borrower in connection with any loan or forbearance of any money, goods or things in action.

"The provisions of this section shall supersede all provisions of this Constitution and laws enacted thereunder in conflict therewith."

[1] Two different rules regarding repeals must be considered here. Respondents invoke the rule declared in *Crooks v. People's Finance, etc., Co.*, 111 Cal.App. (Supp.) 769, 292 P. 1065, and *Beneficial Loan Soc. v. Haight*, 215 Cal. 506, 11 P.(2d) 857, that where there is an irreconcilable repugnancy between two statutory provisions, the later statute repeals the earlier one. This rule applies also to the case where the later provision is constitutional and the earlier is statutory. *McDonald v. Patterson*, 54 Cal. 245; *Oakland Paving Co. v. Hilton*, 69 Cal. 479, 484, 11 P. 3; *Martello v. Superior Court*, 202 Cal. 400,

405, 261 P. 476; *Ransome-Crummey Co. v. Woodhams*, 29 Cal.App. 356, 358, 156 P. 62. The basic difference between sections 1 and 2 of the Usury Law and the first two paragraphs of section 22, article 20 of the Constitution, is that the former prohibit interest at a greater rate than 12 per cent. per annum, and the latter, while also prohibitory, fix the maximum rate at 10 per cent. This difference alone does not create an irreconcilable repugnancy, and if the first two paragraphs of section 22, article 20, were all of the constitutional amendment, and the rule of construction above stated were the only one to be considered, we might well hold that the Usury Law remained in force after the constitutional amendment, and could be applied to all those violations of the latter which it would reach.

[2] But there are other parts of the constitutional amendment to be considered, and there is another rule regarding repeals which is stated in *Mack v. Jastro*, 126 Cal. 130, 132, 133, 58 P. 372, 373, as follows: "While it is true that repeals by implication are not favored, whenever it becomes apparent that a later statute is revisory of the entire matter of an earlier statute, and is declared as a substitute for it, the later statute will prevail, and the earlier statute will be held to have been superseded, even though there be found no inconsistencies or repugnancies between the two. * * * It is not so much a repeal by implication as it is that, the legislature having made a new and complete expression of its will upon the subject, this last expression must prevail, and whatever is excluded therefrom must be ignored." To the same effect are *State v. Conkling*, 19 Cal. 501, 512; *Treadwell v. Board of Sup'rs of Yolo County*, 62 Cal. 563, 564; *Dillon v. Bicknell*, 116 Cal. 111, 114, 47 P. 937; *Sponogle v. Curnow*, 136 Cal. 580, 584, 69 P. 255, 256; *Harris v. Cooley*, 171 Cal. 144, 147, 152 P. 300; *Carter v. Stevens*, 208 Cal. 649, 651, 284 P. 217; *Suydam v. Los Angeles R. Co.*, 27 Cal.App. 157, 161, 149 P. 55; *In re Weymann*, 92 Cal.App. 646, 650, 268 P. 971; *Bank of Italy v. Symmes*, 118 Cal.App. 716, 721, 5 P.(2d) 956; *Wood v. Roach*, 125 Cal. App. 631, 638, 14 P.(2d) 170; *Jewett v. City Transfer, etc., Co.*, 128 Cal.App. 556, 562, 18 P.(2d) 351; *People v. Carter*, 131 Cal. App. 177, 181, 21 P.(2d) 129. In *Sponogle v. Curnow*, supra, the court said: "Although an act, or part of an act, may not be repealed expressly or by necessary implication, still a revision of the whole subject-matter

covering said act would supersede all such portions as were omitted from the revisory act." We have no doubt that this rule, like that first referred to, applies to a case where the later provision is found in the Constitution.

[3] On a consideration of the constitutional provision as a whole, we are of the opinion that it was clearly intended to cover the whole subject-matter of usury, that the Usury Law is repugnant to it, and that such parts of the Usury Law as are not repeated in it are repealed by it. Following the first two paragraphs of the amendment, which, as above stated, might, if they stood alone, be consistent with the continued existence of the Usury Law, we find the provisions that "none of the above restrictions shall apply to" many different sorts of money lending institutions, and that "the Legislature may from time to time prescribe the maximum rate per annum of, or provide for the supervision, or the filing of a schedule of, or in any manner fix, regulate or limit, the fees, bonus, commissions, discounts or other compensation which all or any of the said exempted classes of persons may charge or receive from a borrower in connection with any loan or forbearance of any money, goods or things in action." The "exempted classes" here provided for, including, as they do, building and loan associations, banks, pawnbrokers, personal property brokers, and various other moneylenders, undoubtedly do a major part of the moneylending business transacted in the state. It is not at all likely that the Legislature in framing and the people in adopting this constitutional amendment, intended to free all of these moneylending institutions from the limitation of interest rates to 10 per cent. and at the same time subject them to all the pains and penalties of usury if they charged interest in excess of 12 per cent.; but if there were any doubt on this point, it could not survive a consideration of the provision authorizing the Legislature to regulate all of these institutions. That provision undoubtedly empowers the Legislature to fix the rate of interest on loans made by the "exempted classes," and since it contains no limitation on such rate, that is left to the discretion of the Legislature. Such a power in the Legislature is inconsistent with the continued existence of the provisions of the Usury Law fixing a maximum rate of interest, because the Usury Law was adopted as an initiative measure, and is therefore not subject to

amendment or change by the Legislature. *Beneficial Loan Soc. v. Haight*, supra, 215 Cal. 506, at page 509, 11 P.(2d) 857. To make such legislative action possible, those parts of the Usury Law just mentioned must first be repealed, and this was done by the constitutional amendment in question. The other valid parts of the Usury Law directly refer to the provisions limiting the rate of interest and apply to them alone, and hence must follow those provisions into the limbo of repeal. To this statement the provision regarding compound interest may be an exception, but this case does not require us to decide that point. Of course, the Constitution might have directed that the Usury Law should remain in force until the Legislature should enact other regulations, but it does not so provide; and, in view of the provisions already mentioned, and the further provision that "the provisions of this section shall supersede all provisions of this Constitution and laws enacted thereunder in conflict therewith," it cannot be so construed.

[4, 5] A portion of the interest sued for was paid after this repeal, and plainly plaintiff can found no rights on that payment. But the larger part of the interest payments in question was made while the Usury Law was still in force. Counts 1 and 3 are based on the part of section 3 of that law above quoted which declares that the person who has paid usurious interest may recover from the recipient thereof "treble the amount of money so paid." The sum recoverable under this provision of the act is a penalty (*Haines v. Commercial Mortg. Co.*, 200 Cal. 609, 619, 254 P. 956, 255 P. 805, 53 A.L.R. 725; *Esposti v. Rivers Brothers, Inc.*, 207 Cal. 570, 573, 279 P. 423; *Scott v. Hollingsworth*, 215 Cal. 314, 316, 9 P.(2d) 836, 82 A.L.R. 995; 66 *Corpus Juris*, 361), and so cannot be recovered after repeal of the statute providing for it. *Spears v. County of Modoc*, 101 Cal. 303, 35 P. 869. Even should this recovery not be deemed a penalty, the right to it is one created by and dependent for its enforcement on the statute, and the rule in such a case is that the right falls and the statutory remedy ceases with the repeal of the statute, without a saving clause, unless that right has been carried into a final judgment. *Napa State Hospital v. Flaherty*, 134 Cal. 315, 317, 66 P. 322; *People v. Bank of San Luis Obispo*, 159 Cal. 65, 67, 112 P. 866, 37 L.R.A. (N.S.) 934, Ann.Cas. 1912B, 1148; *Moss v. Smith*, 171 Cal. 777, 788, 155 P. 90; *Freeman v.*

Glenn County Tel. Co., 184 Cal. 508, 510, 194 P. 705; *Callet v. Alioto*, 210 Cal. 65, 67, 290 P. 438; *Krause v. Rarity*, 210 Cal. 644, 652, 293 P. 62, 77 A.L.R. 1327; *Pacific Gas, etc., Co. v. State of California*, 214 Cal. 369, 373, 6 P.(2d) 78; *Coombes v. Franklin*, 213 Cal. 164, 166, 1 P.(2d) 992, 4 P.(2d) 157; see also *Ewell v. Daggs*, 108 U.S. 143, 150, 2 S.Ct. 408, 27 L.Ed. 682; *Petterson v. Berry*, (C.C.A.) 125 F. 902. Here there is no saving clause, and the action was begun and judgment was entered after the repeal of the Usury Law. We find nothing to impair the rule just stated or defeat its application to the present case in *Coombes v. Getz*, 285 U.S. 434, 52 S.Ct. 435, 76 L.Ed. 866, on which plaintiff relies. It is true that case does reverse the decision of the California Supreme Court in *Coombes v. Franklin*, supra, but it does not question the rule stated by the California court; it merely holds that the cause of action there is contractual in nature, and hence the rule is not applicable to it.

[6, 7] Counts 2 and 4 are not founded on section 3 of the Usury Law. Indeed, a part of the interest paid by the plaintiff was paid more than one year before the action was brought, and hence could afford no basis for a recovery under section 3. These two counts are in the form of ordinary common counts for money had and received, and by them plaintiff seeks to recover merely the actual sums paid by him as usurious interest. This he could do, while the usury act was in force. *Taylor v. Budd*, 217 Cal. 262, 266, 18 P.(2d) 333; *Babcock v. Olhasso*, 109 Cal.App. 534, 537, 293 P. 141. But, although the remedy here sought is not statutory, the liability was created by the Usury Law, which made the receipt of usury unlawful. While the general rule is that if a contract is void by the law in force at the time it is made, the subsequent repeal of the law will not validate such contract, statutes changing the law relating to usury are an exception to this rule. *Willcox v. Edwards*, 162 Cal. 455, 462, 463, 123 P. 276, Ann.Cas. 1913C, 1392; *Ewell v. Daggs*, 108 U.S. 143, 150, 2 S.Ct. 408, 413, 27 L.Ed. 682; *Petterson v. Berry* (C.C.A. 9th) 125 F. 902, 905; 66 *Corpus Juris*, 170; 27 R.C.L. 206; note in 87 A.L.R. 470, and cases there cited. The defense of usury is in the nature of a statutory penalty upon the lender, and comes within the rule that repeal of a penal law releases the penalty imposed. *Willcox v. Edwards*, supra; *Ewell v. Daggs*, supra; *Petterson v. Berry*,

supra; *O. H. May Co. v. Anderson*, 156 Tenn. 216, 300 S.W. 12, 14. The repeal so construed does not deprive the borrower of a vested right, or impair the obligation of any contract. *Ewell v. Daggs*, supra. In the case just cited, the court said: "That the right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that whatever the statute gives, under such circumstances, as long as it remains in fieri, and not realized by having passed into a completed transaction, may, by a subsequent statute, be taken away." It is obvious that, in the face of the rule declared by the authorities above cited, plaintiff can maintain no common-law action to recover the usurious interest paid by him, after the repeal of the statute making it usurious and penalizing the lender by reason of the usury.

The judgment is affirmed; respondent to recover his costs of appeal. The appeal from the order sustaining demurrer is dismissed.

FOX, J., and SCHAUER, Judge pro tem.,
concur.

PEOPLE v. CARR. *

Cr. 2815.

District Court of Appeal, Second District,
Division 2, California.

Dec. 6, 1935.

Rehearing Denied Dec. 18, 1935.

Hearing Granted by Supreme Court

Jan. 2, 1936.

Criminal law ⇨1126

Whether defendant, convicted on four counts of rape, could be sentenced to county jail for consecutive terms of one year upon each count, would not be considered where record did not include any commitment (Pen. Code, § 19a, as added by St. 1933, p. 2217, § 2).

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Lee R. Carr was convicted on four counts of rape, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

McCOMB, Justice pro tem.

Appellant was convicted after trial by jury on four counts of rape. In each instance the jury recommended punishment by confinement in the county jail. Thereafter the trial judge sentenced appellant to the county jail for a period of one year on each count, the sentences to run consecutively.

The sole question presented for determination is: In view of the limitation in section 19a of the Penal Code (as added by St. 1933, p. 2217, § 2), reading in part as follows, "In no case shall any person sentenced to confinement in a county or city jail on conviction of misdemeanor * * * be committed for a period in excess of one year," was the trial court without jurisdiction to sentence appellant to the county jail for the term of one year on each count upon which he had been convicted and direct that the sentences run consecutively?

This section does not prohibit the trial judge from pronouncing sentence, but limits the commitment to a period of one year.

In the instant case, the record does not include any commitment; therefore appellant has not presented to this court an affirmative showing of prejudicial error.

The judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.



10 Cal.App.2d 484

KAZAMA v. MUNICIPAL COURT OF CITY
OF LOS ANGELES et al.

Civ. 10051.

District Court of Appeal, Second District,
Division 1, California.

Dec. 5, 1935.

1. Criminal law ⇨1099(5)

Appellant held not entitled to mandate compelling municipal court to settle statement on appeal so as to relieve appellant from failure to serve copy of evidence, or to mandate compelling municipal court to settle statement without evidence, where petition for mandate did not show that statement specified any grounds of appeal presentable without any part of evidence (Pen.Code, § 1468).

2. Criminal law ⇨1099(5)

Municipal court has no power to relieve appellant, by settling statement on appeal, from consequences of his failure to take procedural steps necessary to invoke appellate jurisdiction (Pen.Code, § 1468).

3. Criminal law ⇨1099(3)

Failure to serve copy of evidence on appellee held fatal to appeal from municipal court judgment (Pen.Code, § 1468).

4. Criminal law ⇨1028

Judgment cannot be reversed for failure of trial court to grant relief not sought in trial court.

Appeal from Superior Court, Los Angeles County, Appellate Department; Shaw, Bishop, and Fox, Judges.

Petition by K. Kazama for a writ of mandate to compel the Municipal Court of the City of Los Angeles, State of California, and another to settle a statement on appeal in a criminal case. From a judgment denying the writ and dismissing the proceeding, petitioner appeals.

Affirmed.

J. Marion Wright, of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, and Earl O. Lippold, Deputy Co. Counsel, both of Los Angeles, for respondents.

SHINN, Justice pro tem.

Appellant, who petitioned the superior court for a writ of mandate to compel a judge of the municipal court to settle a statement on appeal in a criminal case, by the allegations of his petition, made out the following case: He had been convicted of a misdemeanor and sentenced; he gave oral notice of appeal and also written notice, and within five days thereafter filed a statement on appeal, attached to which was a transcript of the evidence given at the trial, and he duly served a copy of the statement upon plaintiff's counsel, the city attorney, which copy was defective in that it did not contain a copy of the transcript or any statement of the evidence. The judge of the municipal court, basing his rulings upon want of jurisdiction alone, refused to settle the statement, refused to grant petitioner relief from his failure to serve a proper copy of his proposed statement on appeal, and made an order declaring the attempted appeal ineffectual. A demurrer was filed to the petition upon general and special grounds; it was sustained by the superior court without leave to amend; the writ applied for was denied and the proceeding was dismissed by the court.

[1-4] The questions necessarily decided by the superior court in ruling on the demurrer were the following: First, that the judge of the municipal court was not under the duty of passing upon the merits of petitioner's application to be relieved from his failure to serve a sufficient copy of the statement on appeal; and, second, that the judge was not under the duty of settling the statement on appeal, as it was presented for settlement.

The application for relief from the default was made under section 473 of the Code of Civil Procedure, which has recently been held by the Supreme Court to have no application to criminal cases. *Gonzales v. Superior Court*, 44 P.(2d) 320. We are aware of no power possessed by the court to relieve an appellant from the consequences of his failure to take procedural steps necessary to invoke appellate jurisdiction, and therefore hold that petitioner was not entitled to an order relieving him from his default.

Section 1468 of the Penal Code requires the statement to set forth the grounds upon which the party intends to rely upon the appeal and so much of the evidence as may be necessary to explain the grounds, and it further provides that if no statement is filed and served as therein provided the appeal is ineffectual for any purpose and shall be deemed dismissed. The superior court held that the failure to serve a copy of the evidence was fatal to the appeal—as much so as would be a failure to serve a copy of the statement. We do not see that the correctness of this ruling upon the case as presented to the court is open to question or that it requires argument in its support. *Keaton v. Municipal Court*, 209 Cal. 52, 285 P. 696. There was no service of an adequate copy of the filed statement within the five-day period allowed therefor. The judge of the municipal court, therefore, was without authority to settle that statement and the superior court properly refused to issue its mandate requiring him to do so.

It is now contended for the first time that if the right to have the evidence included had been lost, the statement should have been settled without the evidence. Such a statement would have consisted of a mere specification of the grounds of appeal. This claim can have no validity unless there were grounds of appeal specified in the statement which could have been legally presented to the superior court without any part of the evidence. The duty rests upon petitioner to show that such other grounds existed, that is to say, that one or more of such grounds had been specified in his proposed statement. No such showing has been made. The petition is silent upon the subject. For aught that was before the superior court, or that is before us, the sole ground of appeal may have been alleged insufficiency of the evidence. If such be the case (which we are obliged to believe in the absence of a contrary showing), the settlement of a statement which contained none of the evidence would have been a useless act and the refusal to settle it would have deprived petitioner of no substantial right. The superior court properly sustained the demurrer to the petition for the reason that facts were not alleged therein which would give petitioner the right to have a statement on appeal settled, either with or without the evidence. Furthermore, no demand was made upon the judge of the municipal court to settle a statement which did not contain the evidence, and, consequently, there was no refusal to do so. Another reason for

denying appellant's claim that this court should order such a statement settled is the fact that no such relief was sought in the superior court. A judgment may not be reversed because of the failure of the trial court to grant relief that has not been sought in that court.

The judgment is affirmed.

We concur: HOUSER, P. J.; YORK, J.



10 Cal.App.2d 696

**MASON et al. v. HOME INS. CO. OF
NEW YORK et al.**
Civ. 10549, 10550.

District Court of Appeal, Second District,
Division 2, California.
Dec. 18, 1935.

Rehearing Denied Jan. 17, 1936.
Hearing Denied by Supreme Court
Feb. 13, 1936.

Frauds, statute of §144

In absence of evidence that landlord had changed position in reliance on asserted assumption of leases by corporation pursuant to oral agreement, corporation held not estopped to invoke defense of statute of frauds by fact that it had allegedly partially performed agreement (Civ.Code, §§ 1624, 2309).

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Two actions by Mary Strong Mason and others against the Home Insurance Company of New York and another. Judgments for plaintiffs, and the named defendant appeals.

Reversed.

Hindman & Davis and Angus C. McBain, all of Los Angeles, for appellant.

Mott, Vallee & Grant, John G. Mott, and Paul Vallee, all of Los Angeles, for respondents.

GOULD, Justice pro tem.

Awards by a jury in favor of respondents (plaintiffs) and against appellant (defendant corporation) in two consolidated actions for rent in the sums of \$28,351.94 and \$5,608.69 cannot be upheld. Involved are written leases executed by respondents as lessors, not with appellant, but with another

corporation as lessee. After the premises had been occupied for some time by the rent-paying lessee, appellant and other corporations moved in under a joint office arrangement for the purpose of economizing office expenses. For a period thereafter, rental was paid out of a joint bank account to which the various occupants of the premises contributed in proportions mutually agreed upon by them. Appellant never signed either of the original leases, signed no agreement to assume or pay the rental or any part thereof, and in fact executed no writing of any nature whatever with respondents respecting the use or occupation of the premises or the payment of rental therefor. Neither did appellant ever accept or receive any written assignment of leases. All rentals were paid while the premises were occupied—for a portion of the time by the joint bank account arrangement, and, after the insolvency of the original lessee, by appellant herein. After appellant vacated the premises, respondents notified its agent that appellant would be held responsible for the rentals under the original leases. The present suits followed for rentals accruing after the vacation of the premises by appellant.

It is to be noted that appellant did not sign the original leases, nor were such leases assigned to it. Even an assignment of the leases would have created no privity of contract between appellant and respondents, but simply a privity of estate, which would have been completely and finally terminated by abandonment of the premises. *Farber v. Greenberg*, 98 Cal.App. 675, 277 P. 534. The actions herein are predicated upon the theory that appellant became responsible under the original leases by assuming such leases and agreeing to pay the rentals therein reserved. Ordinarily, such assumption and agreement, covering as in this case a period of more than one year, to comply with the statute of frauds, must be in writing. Civ. Code, §§ 1624 and 2309. In the admitted absence of any writing, respondents urge that appellant is estopped to interpose the defense of the statute of frauds because, it is claimed, it has partially performed an oral agreement to assume the leases.

Assuming that there is evidence to sustain the implied findings of the jury that appellant actually orally agreed to assume and be bound by the leases, and that thereafter appellant's acts and conduct amounted to a

partial performance of the agreement, nevertheless respondents cannot prevail. Before appellant can be estopped to rely upon the statute of frauds, it must appear that respondents have been placed in such a changed position that to allow appellant to assert the statutory defense would be to work an unjust and unconscionable loss upon respondents [Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am.St.Rep. 154] amounting in effect to a fraud upon them [Mitchell Camera Corporation v. Fox Film Corporation (Cal.App.) 51 P.(2d) 186]. There is no substantial evidence in the record showing any changed position whatsoever on the part of respondents in reliance upon the asserted assumption of the leases by appellant. Consequently it follows as a matter of law that appellant is not estopped to invoke the statutory defense.

Inasmuch as the judgments must be reversed for the reasons set forth, it becomes unnecessary to consider other points raised.

Judgments reversed.

We concur: WOOD, J.; CRAIL, P. J.



10 Cal.App.2d 488

**CITIZENS' NAT. TRUST & SAVINGS BANK
OF LOS ANGELES v. McNENY.**

Civ. 10599.

District Court of Appeal, Second District,
Division 2, California.

Dec. 5, 1935.

Rehearing Denied Dec. 26, 1935.

Partnership Ⓒ279

Where partners upon dissolving partnership agreed that commissions from unfinished business should be divided between partners, commissions so held by former partner could not be attached for individual indebtedness of other partner (Civ.Code, § 2424, and § 2419, subsec. (2) (c)).

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by the Citizens' National Trust & Savings Bank of Los Angeles against Walter L. McNeny, also known as W. L. Mc-

Neny, wherein judgment was entered for plaintiff. From an order granting defendant's motion to quash an execution and attachment and vacate the judgment, plaintiff appeals.

Affirmed.

Paul J. Otto and Paul E. Iverson, both of Los Angeles, for appellant.

Shaw & Bailey, by Charles D. Shaw, all of Los Angeles, for respondent.

McCOMB, Justice pro tem.

This is an appeal by plaintiff from an order granting defendant's motion to quash an execution, recall an execution and attachment, and vacate a judgment entered against defendant.

Plaintiff filed this action to collect the balance due on a promissory note executed in its favor by defendant. A writ of attachment was issued and served on Weatherford W. Touchstone garnisheeing all moneys, etc., in his possession belonging to the defendant. He made a return to the sheriff showing there was in his possession (a) \$688.13 belonging to the defendant and (b) a promissory note signed by Albert J. Wallace, in which defendant had an undivided 45 per cent. interest.

The sole question presented for determination is: Was either (a) the sum of \$688.13 or (b) the undivided 45 per cent. interest in the promissory note signed by Albert J. Wallace partnership property of defendant and the garnishee?

Defendant had been a partner of Weatherford W. Touchstone in the real estate business prior to October 1, 1931. On this date defendant and Touchstone entered into an agreement dissolving their partnership. The agreement provided, among other things, that, if certain transactions were consummated which the partnership had previously negotiated, defendant should receive a certain percentage of any commissions received by Touchstone. The cash and interest in the promissory note which the garnishee returned to the sheriff as property belonging to defendant represented a portion of defendant's share of commissions collected by Touchstone subsequent to October 1, 1931.

The partnership was not terminated by its dissolution, but continued during the winding up of the partnership affairs. Section 2424, Civ. Code. Hence the property which Touchstone returned as being in his posses-

sion belonging to defendant was partnership property, and as such not subject to attachment or execution upon a claim against defendant individually. Section 2419, subsec. (2) (c), Civ. Code; *Sherwood v. Jackson*, 121 Cal.App. 354, 8 P.(2d) 943.

The order appealed from is affirmed.

We concur: CRAIL, P. J.; WOOD, J.



10 Cal.App.2d 628

STEFFENS v. ROWLEY et al.

Civ. 9948.

District Court of Appeal, Second District,
Division 1, California.

Dec. 16, 1935.

1. Dismissal and nonsuit ☞39

Where oral motion by plaintiff to dismiss petition, asking that hearing be had to determine title to property, on which he had levied and to which third party claim had been filed, was granted, granting motion with prejudice over objection of plaintiff *held* erroneous, although motion might have been denied (Code Civ.Proc. § 581, subd. 1).

2. Dismissal and nonsuit ☞18

Fact that affirmative relief is sought against party desiring to dismiss action would prevent court from dismissing action, but would not give it authority to dismiss with prejudice (Code Civ.Proc. § 581, subd. 1).

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action by Gustav Steffens against L. T. Rowley and another, wherein R. E. Rowley filed a third party claim. From an order dismissing with prejudice plaintiff's petition on his motion for dismissal, plaintiff appeals.

Order modified, and, as so modified, affirmed.

Anne O'Keefe and Ralph C. Curren, both of Los Angeles, for appellant.

Walter S. Barrette, of Los Angeles, for respondent.

EDMONDS, Justice pro tem.

This appeal questions the right of the superior court to add "with prejudice" to

an order granting the motion of petitioner in an application for a hearing on a third party claim, pursuant to sections 549 and 689 of the Code of Civil Procedure, to dismiss the petition.

Gustav Steffens brought an action in the superior court and procured a writ of attachment which was levied upon certain property alleged to be owned by L. T. Rowley, one of the defendants. R. E. Rowley filed a third party claim to the property. Plaintiff then presented to the court his petition asking that a hearing be had for the purpose of determining title to the property which had been levied upon. The matter came on regularly for hearing. During the taking of evidence and after the third party claimant's motion for a nonsuit had been denied, petitioner orally moved the court to dismiss his petition. This motion was granted but, as shown by the minute order of the court, "upon request of counsel for claimant, said order of dismissal is made with prejudice."

The appeal by plaintiff is from the order of dismissal. The defendant has not appealed from the order. Appellant is not, of course, questioning the right of the court to dismiss the proceeding, but only its authority to add to the order of dismissal, made pursuant to his motion, the provision that it was with prejudice.

[1,2] While the oral motion to dismiss might have been denied by the court (*Chapman v. Superior Court*, 1 Cal.App.(2d) 512, 36 P.(2d) 1093), it should not have been granted with prejudice over the objections of the appellant. Respondent is not assisted by taking the position that the third party claimant is seeking affirmative relief against the party who brings the question before the court for hearing, and that no dismissal can, therefore, be had. Section 581, subd. 1, Code Civ.Proc. If it be true that in such a case affirmative relief is being asked, this would prevent the court from dismissing the proceeding, but would not give it authority to dismiss with prejudice. *Matteson v. Klump*, 100 Cal.App. 64, 279 P. 669.

The order should be modified by striking therefrom the words "and upon request of counsel for claimant, said order of dismissal is made with prejudice." As so modified, the order is affirmed.

We concur: HOUSER, P. J.; DORAN, J.

10 Cal.App.2d 608

TAYLOR et al. v. RODRIQUEZ.

Civ. 10636.

District Court of Appeal, Second District,
Division 2, California.

Dec. 12, 1935.

Hearing Denied by Supreme Court
Feb. 10, 1936.**1. New trial** ⚭70

Trial court has discretion to grant new trial on ground of insufficiency of evidence to justify verdict.

2. Appeal and error ⚭977(3)

Order granting new trial will not be disturbed in absence of showing of abuse of discretion.

3. New trial ⚭72

On motion for new trial, trial court must set aside verdict which is against weight of evidence.

4. Appeal and error ⚭901, 933(1)

On appeal from order granting new trial, presumption is in favor of order, and appellant has burden of showing that order is erroneous.

5. New trial ⚭70

Order granting new trial for insufficiency of evidence to support award of damages which trial court believed to be grossly inadequate *held* not abuse of discretion, where different conclusions could rationally be drawn from inferences fairly deducible from evidence.

Appeal from Superior Court, Los Angeles County; J. T. B. Warne, Judge.

Action by Elizabeth L. Taylor, a widow, and others against Reyes Rodriquez. From an order granting a new trial, the defendant appeals.

Plaintiffs' motion to dismiss appeal denied, and order affirmed.

C. F. Jorz, of Los Angeles, for appellant.

Harry B. Ellison, of Los Angeles, for respondents.

CRAIL, Presiding Justice.

This is an appeal from an order granting a new trial in a personal injury action arising out of an automobile collision.

At the trial the defendant (appellant) admitted his liability, and the sole question submitted to the jury was the amount of damages. Defendant cross-examined the witnesses for the plaintiff, but present-

ed no witness in his own behalf. The jury returned a verdict against the defendant for \$3,000, and judgment was entered thereon, but the court believed the damages grossly inadequate, and granted plaintiffs' motion for a new trial on the ground of insufficiency of the evidence.

[1-4] Insufficiency of the evidence to justify a verdict is a ground for new trial appealing peculiarly to the discretion of the trial court, and its order granting a new trial upon that ground will not be disturbed on appeal in the absence of a showing of abuse of discretion. The rule relied upon by defendant that the verdict of the jury will not be disturbed on the ground of insufficiency of the evidence unless it appears without substantial conflict that there is no evidence to sustain the verdict is a rule for the appellate courts and it has no application to the trial court. In the trial court, where the verdict appears to be against the weight of the evidence, it is not only within the discretion of the trial court, but it is that court's duty to set aside the verdict on motion for new trial. On appeal the presumptions are in favor of the order granting a new trial, and the burden is upon the appellant to make it affirmatively appear that the order complained of is erroneous. The reason for the different rules in the respective courts is founded upon the essential distinction under our system between trial and appellate courts.

[5] The contention of defendant is that this was an uncontested case and that there was no conflict in the evidence, and that for these reasons the court manifestly abused its discretion and "substituted its opinion for that of the jury." The trial court did not substitute its opinion; it merely granted a new trial. It must be remembered, also, that even though there is no conflict in the evidence, if the inferences fairly deducible therefrom are such that different conclusions might rationally be drawn therefrom by men equally sensible and impartial, as in this case with regard to the amount of the award for damages, the same rule must be applied as where the conflict arises directly from the evidence.

The plaintiffs' motion to dismiss the appeal is denied. The order appealed from is affirmed.

We concur: WOOD, J.; McCOMB, Justice pro tem.

9 Cal.App.2d 726

GANTENBEIN v. CITY OF LONG BEACH
et al.

Civ. 10511.

District Court of Appeal, Second District,
Division 2, California.

Dec. 3, 1935.

Appeal and error ⇨195

Where demurrer, which was good only on ground that ordinance incidentally referred to in petition was improperly pleaded, was erroneously sustained without leave to amend, petitioner *held* entitled to reversal, although it was not shown that he sought permission to amend, where petitioner could have amended to properly plead ordinance and improper pleading was not raised in special demurrer to petition.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

On petition for rehearing.

Rehearing denied.

Prior opinion, 51 P.(2d) 124.

Clarence P. Wallick and Robert E. Krause, both of Long Beach, for appellant.

George W. Trammell, Jr., City Atty., Henry D. Lawrence, Deputy City Atty., Harlan V. Boyer, Asst. City Atty., and Walfred Jacobson, Deputy City Atty., all of Long Beach, for respondents.

PER CURIAM.

In a petition for rehearing herein, respondents stress the point that appellant is not entitled to a reversal because there is no showing that after the demurrer was sustained without leave to amend appellant asked permission to amend. The demurrer was good on at least one ground, they point out, to wit, that a city ordinance was improperly pleaded, and therefore the order of the lower court sustaining the demurrer without leave to amend should be sustained in the absence of a showing that appellant requested leave to amend.

The rule is somewhat broader than respondents indicate. As stated in *Philbrook v. Randall*, 195 Cal. 95, 231 P. 739, 743, "appellant is not entitled to a reversal on the ground that he was deprived of an opportunity to amend, in the absence of a showing that he asked permission to amend, that he desired to amend, or that he could have amended." Plainly in this case appellant could readily have amended his

complaint to correctly plead the ordinance. Moreover, the ordinance in question was only incidentally referred to, and, as pointed out in the original opinion herein, the question of the improper pleading of the ordinance was not even raised in respondents' special demurrer to the petition.

Rehearing denied.



10 Cal.App.2d 490

PEOPLE v. GUTTMANN.

Cr. 2783.

District Court of Appeal, Second District,
Division 2, California.

Dec. 5, 1935.

Rehearing Denied Dec. 17, 1935.

Hearing Denied by Supreme Court
Jan. 2, 1936.

1. Criminal law ⇨1158(1), 1160

Reviewing court cannot interfere where substantial evidence appears in record to sustain trial court's refusal to direct verdict of acquittal and its denial of motion for new trial.

2. Criminal law ⇨673(5)

Admission in evidence in grand theft prosecution of letters written by defendant to woman in another state to show defendant's intent *held* not error, notwithstanding possible inference therefrom of defendant's guilt of a different offense, where trial court limited jury's consideration of letters.

3. Criminal law ⇨371(12)

In prosecution for grand theft, testimony showing defendant's motive is admissible though it may establish commission of other offenses.

Appeal from Superior Court, Los Angeles County; Thomas P. White, Judge.

Henry Guttman was convicted of grand theft, and he appeals.

Affirmed.

Charles R. Morfoot, John L. Fleming and Harry Sutton, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen. and James S. Howie, Deputy Atty. Gen., for the People.

GOULD, Justice pro tem.

Defendant was indicted by a grand jury upon eight separate counts, each charging grand theft. The trial jury returned verdicts of guilty as to two counts, not guilty as to three, and as to the remaining three counts failed to agree. This appeal is prosecuted from the order denying motion for new trial and from the judgment of conviction pronounced by the court upon the two counts as to which the jury found defendant guilty.

[1] Appellant urges reversal upon the ground that the trial court committed error in refusing to advise the jury to acquit, and also committed error in denying his motion for new trial. Both these points relate to the evidence produced at the trial. While appellant claimed that the very large amounts of securities placed in his hands by the complaining witness were gifts, the testimony of the complaining witness was otherwise. The latter's testimony may have been evasive and contradictory, as appellant claims, but there is ample substantial evidence to sustain the verdict of the jury and to uphold the trial court in its refusal to direct a verdict of acquittal and also in its denial of the motion for a new trial. It is not our province to interfere where substantial evidence appears in the record to sustain the trial court.

[2, 3] Assignment of error is also predicated upon the admission in evidence of certain letters written by defendant to a woman in New York. It is argued that the jury might have inferred from the letters that appellant was guilty of a violation of the Mann Act (18 U.S.C.A. §§ 397-404), a separate and distinct offense from that for which he was on trial, and that therefore the introduction of the letters was manifestly improper and reversible error, as tending to degrade and prejudice appellant in the minds of the jurors. This evidence was introduced to show the intent of appellant; and while the letters contained much immaterial matter and might possibly have suggested to the jury that appellant had been guilty of other improper acts, the situation was completely clarified by the court's appropriate admonition that the letters were received solely for the purpose of showing motive

or intent in the mind of the defendant with reference to his transactions with the complaining witness, and that no inference was to be drawn therefrom respecting a violation of the Mann Act, or that the person to whom the letters were addressed was brought to Los Angeles "for anything other than a lawful purpose." Motive being an element of the crime charged, testimony showing motive was admissible, even though it might establish the commission of other offenses (*People v. Cornell*, 29 Cal.App. 430, 155 P. 1026); and in any event appellant's rights were completely safeguarded by the court's timely admonition.

Judgment and order affirmed.

We concur: CRAIL, P. J.; WOOD, J.



10 Cal.App.2d 521

CLAWSON v. HARRIS.

Civ. 1559.

District Court of Appeal, Fourth District,
California.

Dec. 6, 1935.

Fixtures ⇨ 27(2)

Owner of realty indorsing on lease agreement to terms thereof held bound by provision of lease that personalty annexed to realty should not become fixtures, but that lessee should have right of removal, and hence owner was liable for conversion of such property, since owner of realty and party annexing property thereto may fix upon such chattels any character upon which they agree and provide for their removal.

Appeal from Superior Court, Riverside County; R. A. Moore, Judge.

Action by B. B. Clawson against C. W. Harris. Judgment for plaintiff, and defendant appeals.

Affirmed.

W. E. Kalbfleisch, of Covina, for appellant.

Leonard J. Difani, of Riverside, for respondent.

MARKS, Justice.

This is an action for damages for the conversion of personal property. The court gave plaintiff judgment in the sum of \$520, and defendant has appealed.

The personal property consists of drying racks, an electric motor, an oil water pump, electric wiring and equipment, pulleys and sprockets, shafting, lumber, wrenches, and belting used in the manufacture of tile and other clay products. While the answer of defendant, and the bill of exceptions are most inartistically drawn, it would seem that defendant's defense is based on the contention that, as most of the property in question was securely attached to the realty, the items were fixtures and belonged to him as owner of the fee.

The real estate belonged to defendant, who by some agreement was selling it to J. R. Myers. Myers leased the realty to Corona Clay Products, Limited, which the record shows was not a corporation. Plaintiff traces his title to Corona Clay Products, Limited. Defendant acquired Myers' interest and claimed title to the personal property.

The lease from Myers to Corona Clay Products, Limited, contains the following: "It is also understood and agreed by and between the above named parties that any machinery, fixtures or equipment of any kind or description, which Lessee may bring into, or install on said land, shall be considered as property of the Lessee, whether fixed to the ground, buildings, or otherwise, and said Lessee shall have the right to remove any machinery, fixtures or equipment which Lessee may install, or place upon said premises, at any time during the life of this lease, and shall have the right to remove any and all machinery, fixtures or equipment upon the termination of this lease at the end of the term specified, or upon the sooner termination thereof. If owned by the Lessees." On the bottom of the instrument the following appears: "I hereby accept and agree to the terms of said Lease. Dated this 25 day of January, 1932. C. W. Harris."

In 12 California Jurisprudence, 566, it is said: "It is settled that an owner of land and a party affixing property thereto may enter into an agreement permitting its removal. Indeed, the parties themselves may, by express agreement, fix upon chat-

tels annexed to realty whatever character they agree upon. Property which the law regards as fixtures may be by them considered as personalty, and that which is considered in law as personalty they may regard as a fixture."

The parties to the lease having agreed that the personal property should not become fixtures, and defendant having in writing agreed to this provision, he is bound by it.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.



SCHWALBACH v. BOARD OF EDUCATION
OF SAN LUIS OBISPO HIGH
SCHOOL DIST. et al. *
Civ. 9517.

District Court of Appeal, Second District,
Division 1, California.
Dec. 10, 1935.

Hearing Granted by Supreme Court
Feb. 6, 1936.

1. Schools and school districts ☞141(4)

Teacher of special class of backward pupils held engaged in a "particular kind of service" within statute authorizing dismissal of employee on account of discontinuance of particular kind of service (School Code, § 5.710).

2. Schools and school districts ☞141(4)

Maintenance of special room and class for backward students being optional with school board, board had power to discontinue such class and to dismiss teacher (School Code, § 5.710).

HOUSER, P. J., dissenting.

Appeal from Superior Court, San Luis Obispo; T. A. Norton, Judge.

Mandamus proceeding by Amelia Schwalbach against the Board of Education of San Luis Obispo High School District and others to compel defendants to reinstate plaintiff as a permanent teacher. From a judgment for defendants, plaintiff appeals.

Affirmed.

Lemuel D. Sanderson, of San Francisco, for appellant.

A. H. Brazil, A. V. Muller and C. P. Kaetzel, all of San Luis Obispo, for respondents.

DORAN, Justice.

This was a petition for a writ of mandate to compel the respondent board of education to reinstate, and permit appellant to continue to serve, as a permanent teacher, in the public schools. The writ was refused and petitioner appeals.

At the conclusion of the trial the court found that appellant was employed as a teacher by respondent on June 30, 1930, and served as such teacher in the public schools in defendant school district continuously from said date to the date of her dismissal; that during all of said period appellant was classified as a permanent teacher by respondent and was so classified at the time of her dismissal; that appellant was employed during all the period of her employment as a teacher by respondent to perform a particular type of service and was engaged during all the period of her service as a teacher of a particular type of service, and that said type of service was discontinued by respondent for the school year 1932-1933, and has never been resumed; that it became necessary for respondent to dismiss appellant on account of the discontinuance of the type of service in which appellant was engaged and for which she was employed; and that respondent did dismiss appellant in April, 1932, on account of the discontinuance of said type of service.

The court further found that during the entire time of the employment of appellant she was employed and engaged in the same type of service; that she taught a special room and class of pupils of such mental disability as to cause their attendance at regular classes to be inimical to the welfare of the other pupils; that the special room and class and the teaching of the same was discontinued by respondent for the school year 1932-1933 commencing in August, 1932, and had never been resumed, and it became necessary to dismiss appellant on account of such discontinuance.

The findings are supported by the evidence in every respect. In short, the evidence reveals that petitioner had taught, what was termed, a room of mixed grades, the students of which were referred to as "retarded"; that on April 22, 1932, petitioner received the following letter from the respondent:

"(Letterhead San Luis Obispo City Schools)
"(Office of the Superintendent)

"April 22, 1932.

"Miss Amelia Schwalbach, San Luis Obispo, California.

"Dear Miss Schwalbach: Since it will be necessary for the Board of Education to reduce the annual expenditures in the Elementary Schools \$26,000 next year, and \$21,000 in the High School, certain reductions in the teaching staff appear necessary. The position that you are occupying in the San Luis Obispo City Schools, and the work connected therewith, will be discontinued at the conclusion of your present contract.

"The Board suggests that you submit a written resignation effective at the conclusion of the present school year, and the same will receive consideration at the regular meeting of the Board on Friday, May 6, 1932.

"Regretting the necessity of this action, and with best wishes, the Board remains
"Very truly yours

"[Signed] C. L. Smith, Clerk, Board of Education."

Thereafter she demanded reinstatement, which demand was refused.

Section 5.710 of the School Code provides as follows: "It is hereby provided that whenever it becomes necessary to decrease the number of permanent employees in a school district on account of a decrease in the number of pupils attending the schools of such district, or on account of the discontinuance of a particular kind of service in such district, the governing board may dismiss such employee at the close of the school year."

[1,2] It is urged on behalf of petitioner that she does not fall within the class referred to as those engaged in "a particular kind of service," and, that her tenure as a permanent teacher having become fixed by operation of law, the school board was without authority and power to dismiss her. It is contended that the phrase, "particular kind of service," must be construed to refer only to those holding a particular kind of certificate and exclude those holding a general teacher's certificate. Bad faith on the part of the board was not alleged nor was it claimed at the trial. On the contrary, the respondent board, in connection with the correspondence regarding her reinstatement, wrote petitioner the following: "* * * The Board, at this time, desires to further notify you that this action on

their part was entirely due to the present depression and not for any reasons reflecting upon your capacities as a teacher in the San Luis Obispo school system. The Board of Trustees of this district, in other words, desires to make it clear that your dismissal was entirely under honorable conditions."

The principal question raised here was carefully considered in the case of *Fuller v. Berkeley School District*, 2 Cal.(2d) 152, 40 P.(2d) 831, 833. In that case the court pointed out that, "of necessity, each case must be determined upon its own particular facts," and, on the basis of the facts in the case at bar, appellant's contention cannot be sustained. The evidence abundantly supports the conclusion that appellant was employed to perform, and did perform, within the meaning of section 5.710 of the School Code, a particular kind of service. It was a service that, under the school law, was optional with the school board to maintain and which, therefore, it had the power to discontinue. Having discontinued the service, there was no legal duty that compelled the board to re-employ appellant. *Fuller v. Berkeley School District*, supra.

The argument that, a particular kind of certificate should be the test as to what is meant by, "a particular kind of service," is untenable.

The judgment is affirmed.

I concur: YORK, J.

I dissent: HOUSER, P. J.



10 Cal.App.2d 621

WILLIAMS v. OWL DRUG CO.
Civ. 10593.

District Court of Appeal, Second District,
Division 2, California.
Dec. 13, 1935.

Rehearing Denied Jan. 6, 1936.

I. Appeal and error ¶927(7)

On appeal from judgment for defendant pursuant to directed verdict, appellate court would view evidence most favorable to plaintiff.

2. Municipal corporations ¶819(6)

Drug store owner held not liable for injuries sustained by pedestrian who slipped on sidewalk in front of entrance to store shortly after customer who had purchased bottle of mineral oil dropped bottle on sidewalk, where there was no evidence that owner had failed after actual notice of dangerous condition to take steps toward removing it.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Action by Annie R. Williams against the Owl Drug Company. From a judgment for defendant, plaintiff appeals.

Affirmed.

Haight, Trippet & Syvertson, Oscar A. Trippet, and Thomas T. Inch, all of Los Angeles, for appellant.

Joe Crider, Jr., and Elber H. Tilson, both of Los Angeles, for respondent.

McCOMB, Justice pro tem.

This is an appeal from a judgment in favor of defendant entered after the trial court granted defendant's motion for a directed verdict.

[1] Viewing the evidence most favorable to plaintiff (In re Estate of Flood, 217 Cal. 763, 768, 21 P.(2d) 579), the facts in the instant case are: Defendant owned and operated a drug store in the city of Los Angeles. A customer, after purchasing a bottle of mineral oil, dropped it on the sidewalk in front of the entrance to defendant's store. Shortly thereafter, plaintiff, while entering the pharmacy, slipped, fell, and sustained personal injuries. At this time she noticed a colorless and oily substance on her hands and the soles of her shoes.

The sole question presented for determination is: Disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled and indulging in every legitimate inference which may be drawn from this evidence, is there any evidence of sufficient substantiality to support a verdict in favor of the plaintiff?

[2] The facts in the instant case are analogous to those in *Gabriel v. Bank of Italy*, 204 Cal. 244, 267 P. 544, 58 A.L.R. 1039, and the question of law is identical. Our Supreme Court held in *Gabriel v. Bank of Italy*, supra, a case in which the plaintiff

slipped upon some substance deposited by a third party on a recess leading into the bank, that there was no obligation on the part of the owner of abutting property to keep the premises outside of its own doors free and clear of foreign substances, in the absence, as in the instant case, of evidence that defendant had failed after actual notice of the dangerous condition to take steps toward removing it, and affirmed the judgment in favor of the defendant predicated upon an order of the trial court granting a motion for a nonsuit.

The judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.



10 Cal.App.2d 503

PEOPLE v. McCALL.

Cr. 1452.

District Court of Appeal, Third District,
California.

Dec. 5, 1935.

Hearing Denied by Supreme Court
Jan. 2, 1936.

1. Criminal law ⇨404(4)

Admission of automobile crank, iron wrench, wooden manner handle, and jack handle which were found in automobile in which defendant and deceased were riding at time of killing, *held* reversible error, in absence of evidence connecting defendant with any of such implements, notwithstanding testimony that blow which killed deceased might have been struck with any of such implements.

2. Criminal law ⇨755½

Comments of trial judge to jury illustrating legal principles applicable by reference to evidence which were not argumentative and were temperately and fairly made and emphasized duty of jury to decide case, irrespective of court's opinion, *held* proper, although parts of comments, if standing alone, were objectionable (Const. art. 6, § 19).

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Otis Kelton McCall was convicted of manslaughter, and he appeals.

Reversed and remanded.

Hearing denied by Supreme Court; WASTE, C. J., and SEAWELL and SHENK, JJ., dissent.

Leonard B. Fowler, of Fresno, for appellant.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

DEIRUP, Justice pro tem., delivered the opinion of the court.

Appellant was charged with manslaughter and convicted. The record shows that the appellant and the deceased, Hubbard, had been acquainted with each other for four years prior to May 25, 1935, and that during a part of the time they had worked together on the highway. Their relations with each other had always been friendly. On the day in question, Hubbard visited McCall at his home near Madera, bringing with him a pint of whisky. They sat in Hubbard's automobile for an hour and a half, drinking and talking, then went into McCall's house and drank the rest of the whisky and some beer. After that they started for town in Hubbard's car; Hubbard driving in a zigzag and very dangerous manner.

The only witness who testified as to what occurred thereafter, up to the time the deceased received the injuries from which he died, is the appellant. He said that he protested with Hubbard about the way he was driving, and repeatedly asked permission to drive himself. He finally induced him to turn around to go home. Hubbard continued to drive drunkenly, then stopped the car at the side of the road, killing the engine. The self-starter being out of commission, Hubbard cranked the car, and McCall, expecting to drive, moved into the driver's seat. After the engine had been started, Hubbard came back and threw the crank into the rear portion of the automobile and insisted on getting into the driver's seat. McCall refused to allow him to do so; whereupon Hubbard began to beat him on the head and shoulders with his fist. McCall got out of the car and hit Hubbard two or three times on the face, knocking him to the pavement. He tried to arouse him from a stupor which, he said, he thought

was due to intoxication, but found that he could not make him talk or sit up. He then walked to his own home, not far away, to get his automobile for the purpose of taking Hubbard to some place where he could receive medical assistance.

The record shows that McCall took Hubbard to the latter's home, and, with the assistance of Mrs. Hubbard, tried to get him out of the car. A stranger, striking a match, noted that Hubbard's face was bloody and suggested that he be taken to the county hospital, and he and McCall did so. The next morning McCall went to Hubbard's home to tell him that his car had been removed to McCall's place, found that he was not there, then went to the hospital and learned that he had died. McCall had stated the evening before, and said again that morning, that he had found Hubbard on the highway, injured, but in the afternoon he gave a complete statement to the officers, detailing the events as he testified to them at the trial. He said that he had told the first story because he did not want it known that he and his friend had had a fight.

At the hospital Hubbard was found to be bruised and bloody, with a slight abrasion above his right ear. An autopsy disclosed a crack in the skull, four inches long from a point about an inch above and an inch back of the ear, with several lines extending downward. The skull was unusually thin. Medical experts testified that it would have been almost impossible for the injury to have been caused by a blow with a fist, but that it could have been due to a blow with a blunt instrument or to the head striking an elevated point on the pavement. Two of them thought that it would not have been possible for it to be the result of the head coming in contact with a smooth surface; two others considered that possible, but unlikely. The pavement was smooth, like that of any other fairly good oiled road.

[1] The court admitted in evidence, over the objection of the appellant, an automobile crank which was found in the car between the front and rear seats, a wrench from the pocket of the rear seat, a wooden hammer handle that lay on top of the seat springs (there being no cover over them), and a tire iron or jack handle which was under the springs. The experts agreed that the injury to the skull could have been caused by a blow with

any of the implements, excepting, perhaps, the wooden handle.

There was no evidence which connected the appellant with any of the implements. The car was not his. He did know that the crank was there, for he saw the deceased throw it into the automobile, but there is no evidence to indicate that he had even seen the other implements. There were no fingerprints or bloodstains on any of them. In fact, it is hardly conceivable that the appellant could have used the tire iron that was under the seat.

Counsel for appellant contends that it was reversible error on the part of the trial court to admit into evidence the said implements without showing first that they were in the immediate possession of the appellant or connected with the assault in some way.

Where the evidence on the part of the prosecution is circumstantial, an implement by means of which it is likely that a crime was committed is admissible in evidence, if it has been connected with the defendant. In *People v. Peete*, 54 Cal. App. 333, 202 P. 51, 60, it was held proper to receive in evidence a revolver, since "it was shown that the wound in the neck [of the deceased] might be produced by a bullet from just such a revolver as that which, with one cartridge discharged, was found secreted in the closet of a room that defendant had occupied at the time when the murder presumably was committed." In *People v. Gilman*, 43 Cal.App. 451, 185 P. 310 (an abortion case), it was held not to be error to receive in evidence certain surgical instruments owned by the defendant at the time of the alleged offense, there being circumstantial evidence that she had used them. In *People v. Coker*, 78 Cal.App. 151, 248 P. 542, the defendant had stated that he had "run an ice pick into" the deceased, and that it would be found in his car; and an ice pick, taken from the car, was received in evidence. Also, pieces of a buggy shaft with indications of blood on them (*People v. Wilson*, 23 Cal.App. 513, 138 P. 971), and a rock with fresh blood on it, found at the place where the beating occurred (*People v. Sampo*, 17 Cal.App. 135, 149, 118 P. 957), were held admissible, a proper foundation having been laid. But in cases where the implement by means of which the crime

might have been committed, is not shown to have been in the possession of the defendant, or to have been connected with the crime in any way, the exhibiting it to the jury has uniformly been held to be prejudicial error.

In *People v. Hill*, 123 Cal. 571, 56 P. 443, 444, there was testimony of eyewitnesses that the defendant had struck the deceased with a stick, following an altercation in a corral. About an hour after the occurrence a witness found a two-by-four scantling in the corral, close to what he thought were toe prints. Mr. Justice Harrison said: "The court also erred in permitting the club which McClure found in the corral to be received in evidence, and exhibited to the jury. There was no evidence identifying the stick as the one with which the defendant struck the deceased, or in any way connecting the defendant with it. Both of the witnesses who testified to having seen the defendant and the deceased together in the corral stated that they were unable to recognize it as the stick which the defendant had used; and the only other testimony relating thereto was that of the physician, who stated that the blow upon the head of the deceased must have been made by some rather large and smooth instrument, and that it could have been produced by such a stick. But, as it is evident from the description of the physician that the blow could have been produced by any other large and smooth implement, it was necessary that there should be some evidence identifying this stick as the one with which the blow was given, before it could be offered in evidence; otherwise, the jury could only conjecture that it had been used by defendant. See, *Tayl.Ev.* § 557."

In *People v. Smith*, 55 Cal.App. 324, 203 P. 816, 819, where there was evidence of murder by means of cyanide, it was held to be prejudicial error to introduce in evidence a can of cyanide which had been in the filing room of the company for which the defendant was working as a truck driver, in the absence of proof that the defendant even knew that it was there. It is said in the opinion: "Without doubt, it is the general rule that evidence that the accused had in his possession the means to commit the crime, or had an opportunity to do so, is ordinarily admissible when the evidence against him is entirely circumstantial. In applying this rule, however, caution should be exercised to avoid giving any undue significance to circum-

stances that are but the ordinary incidents of everyday life. The fact that the very existence of a prosecution tends to throw suspicion upon every act of the accused and to cause 'trifles light as air' to assume the appearance of 'confirmations strong as proofs of Holy Writ,' should give pause to any heedless imprudence in the admission in evidence of circumstances that are barren of incriminating significance. As is well said by the learned author of Wharton's Criminal Evidence (volume 2, § 915): 'Circumstances, trivial in themselves, take on an exaggerated character the moment that suspicion is directed toward a person accused of a crime; and, because of this tendency, no circumstances should be admitted that cannot be shown to have a direct and obvious relevancy to the crime charged.' That the introduction of the can of cyanide as an exhibit for the prosecution was highly prejudicial cannot be gainsaid for a moment; but that it in any appreciable degree tended to show that the defendant used any of its poisonous contents to do away with his wife must be denied."

The introduction in evidence of articles not traced to the defendant was held to be prejudicial error in *People v. Muhly*, 11 Cal.App. 129, 104 P. 466, and in *People v. Mullen*, 69 Cal.App. 548, 231 P. 588.

We think that it was highly prejudicial to the appellant to exhibit to the jury all of the implements that were found in the car of the deceased, upon the sole ground that, if any one of them had been used, it might have caused the injury which resulted in death. If such evidence were permitted, then in any case where the only witness is the defendant, all of the things which he might have used in the perpetration of the alleged crime could be brought into court and shown to the jury.

For the reasons stated in the decisions from which we have quoted, we must hold that the admission in evidence of the implements taken from the automobile was prejudicial error.

[2] The trial court gave to the jury the usual instructions relating to manslaughter. Later, at the request of the foreman of the jury, the trial judge illustrated legal principles applicable to the case by reference to evidence that had been introduced. Appellant maintains that error was committed, under the rules stated in *People v.*

Talkington (Cal.App.) 47 P.(2d) 368. We have read carefully the statement made by the court. Parts of it, referred to by counsel, would be objectionable if standing alone, but altogether the comments of the judge were within the privilege given by section 19 of article 6 of the Constitution of this state. They were not argumentative, and were temperately and fairly made, and emphasized the power and duty of the jury to decide the case for themselves, irrespective of the opinion of the court.

Appellant objects also to the refusal of the court to give two instructions requested by him; but the instructions given, amplified by the comments of the court, covered the subject fully.

The judgment is reversed, and a new trial granted.

We concur: PULLEN, P. J.; THOMPSON, J.



10 Cal.App.2d 604

**CITY OF BELL v. AMERICAN STATES
WATER SERVICE CO. OF CALI-
FORNIA et al.**
Civ. 10098.

District Court of Appeal, Second District,
Division 1, California.
Dec. 12, 1935.

1. Appeal and error ☞962

On appeal from judgment of dismissal, appellate court must review judgment to determine whether discretion has been judicially exercised.

2. Appeal and error ☞931(1)

All intendments are in favor of trial court's judgment, and, in absence of anything to contrary, presumption exists that there was sufficient proof in proper form to justify judgment.

3. Eminent domain ☞197

Dismissal of condemnation proceeding instituted by city for failure to bring proceeding to trial for more than two years after action was filed held not abuse of discretion (Code Civ.Proc. § 583).

4. Eminent domain ☞265(5)

Mere failure to bring condemnation action to trial for two years is not "abandon-

ment" within statute which would authorize allowance of attorneys' fees as costs in judgment of dismissal (Code Civ.Proc. § 583, and § 1255a, as amended by St. 1933, p. 790; St. 1925, p. 849, as amended).

[Ed. Note.—For other definitions of "Abandon; Abandonment," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Condemnation proceeding by the City of Bell against the American States Water Service Company of California, Alexander K. Podurgiel, and Frances G. Podurgiel. From adverse orders, Alexander K. Podurgiel and Frances G. Podurgiel appeal.

Affirmed in part, and reversed in part.

Victor A. Berry, of Beverly Hills, for appellants.

Carlton H. Casjens, of Bell, for respondent.

ROTH, Justice pro tem.

City of Bell, as plaintiff, commenced a condemnation proceeding under the Acquisition and Improvement Act of 1925 (St. 1925, p. 849, as amended). Summons and complaint were served upon defendants and appellants August 27, 1930. The amended answer of appellants was filed January 28, 1932. The action remained dormant until July 31, 1934, on which date a dismissal of judgment was entered by the trial court pursuant to the motion therefor made by said appellants based upon the ground that respondent had failed to bring the action to trial for more than two years after the filing of the answer. The judgment entered pursuant to the motion not only dismissed the action as against appellants, but allowed to appellants attorneys' fees "in accordance with section 1255a of the Code of Civil Procedure." Thereafter, appellants filed their cost bill in which, among other things, was listed an item of \$75 "attorneys' fees pursuant to section 1255a of the Code of Civil Procedure, as amended 1933."

Respondent then moved the trial court to vacate the judgment, its motion for this purpose reciting: "Said motion will be based upon the pleadings, records and files of the above entitled action, and upon the ground that said judgment is erroneous and void in that it awards and allows the said defendants their costs, disbursements,

including attorneys fees, contrary to section 1255a of the Code of Civil Procedure of the State of California; that plaintiff has not abandoned this action within the meaning and construction of said section 1255a of said Code of Civil Procedure as defined and set forth by the laws and decisions of the Courts of the State of California, and that this Court did not and does not have the authority under said decisions and law to award said defendants their costs and disbursements, including attorney fees."

A notice of motion to tax costs was also filed by respondent. Both were heard at the same time and at the conclusion of the hearing thereon the trial court made the following orders: "Motion to set aside and vacate Judgment and dismiss action with costs and motion to tax costs come on for hearing, C. H. Casjens appearing as attorney for plaintiff and V. A. Berry for defendants appearing; motion to set aside and vacate Judgment, etc. is granted. Motion to tax costs is granted and costs taxed at \$7.50."

[1-3] Appellants appeal from the two orders made as above. The motion made to vacate the judgment was not made pursuant to section 473 of the Code of Civil Procedure, as respondent contends, and it cannot be considered as having been made under that section. Section 473 provides that the court may "relieve a party * * * from a judgment * * * taken against him through his mistake, inadvertence, surprise, or excusable neglect." The record before us is incomplete, but it is complete enough to show that the motion to dismiss, pursuant to which judgment of dismissal was granted, was made under section 583 of the Code of Civil Procedure. Further, on the motion to vacate the judgment there is no showing of surprise, mistake, or excusable neglect which would be indispensable to a consideration of the motion as one made under section 473. There is no pretense that the motion to vacate the judgment might be considered as a motion for a new trial, and it cannot be, as it has none of the requisites of such a motion. It cannot be considered as one made under section 663 of the Code of Civil Procedure, as no other or different judgment was substituted, nor was a request made for the substitution of another and different judgment. The judgment of dismissal recites on its face, and the record shows, that the motion to dismiss was made because " * * * plaintiff has failed

to bring the above-entitled action to trial for more than two years after said action was filed. * * *" It affirmatively appears on the face of said judgment that it was granted pursuant to a motion made under section 583 of the Code of Civil Procedure. The trial court had undoubted discretion to grant the motion to dismiss. On appeal from the judgment of dismissal, an appellate court has the right, and it is its duty, to review such judgment to determine whether or not said discretion has been judicially exercised. There is nothing in the record before us which indicates or suggests that it has not been. It is trite to repeat that all intendments are in favor of said judgment, and, in the absence of anything to the contrary, it must be presumed that there was sufficient proof in proper form to justify the judgment. *Wood v. Johnston*, 8 Cal.App. 258, 96 P. 508; *Fox v. Townsend*, 149 Cal. 659, 87 P. 82; *J. & W. C. Shull v. Doerr*, 110 Cal. App. 613, 294 P. 464; *In re Estate of Bell*, 157 Cal. 528, 108 P. 497.

[4] Mere failure, however, to bring a condemnation action to trial for two years is not an abandonment within the meaning of section 1255a of the Code of Civil Procedure, and an allowance of attorneys' fees as costs in said judgment was erroneous. *City of Los Angeles v. Hannon*, 79 Cal. App. 669, 251 P. 247; *City of Los Angeles v. Abbott*, 129 Cal.App. 144, 18 P.(2d) 785; *City of Los Angeles v. Abbott*, 217 Cal. 184, 187, 17 P.(2d) 993; *City of Los Angeles v. Agardy*, 134 Cal.App. 69, 24 P.(2d) 915, 916; *City of Los Angeles v. Agardy*, 1 Cal. (2d) 76, 33 P.(2d) 834.

It follows from what has been said that the part of the judgment which provides for attorneys' fees is made void by the recitals upon the face of the judgment itself; the very recitals in the judgment showing that there was no such abandonment of the action as would permit a judgment for attorneys' fees under the terms of section 1255a of the Code of Civil Procedure. The judgment, however, in so far as it dismisses the action as to appellants is proper. The order vacating the entire judgment is therefore erroneous, and it is reversed. The order granting the motion to tax that portion of the cost bill requesting an allowance of attorneys' fees under section 1255a of the Code of Civil Procedure is proper, and it is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.

10 Cal.App.2d 578

BOESSOW v. JOHNSON, State Treasurer.
Clv. 5498.

District Court of Appeal, Third District,
California.
Dec. 11, 1935.

1. Taxation ⌚57

While there is no moral turpitude in arranging one's business so as to evade taxation, it must be a bona fide and not merely a colorable arrangement.

2. Automobiles ⌚102

Where truck operator as independent contractor had been collecting milk for milk company, in order to avoid expense of operation entered into agreements termed "Agreement of Employment" and "Bailment for Hire" with milk company, whereby milk company purported to employ operator and hire his trucks under terms by which results identical to those under which operator had been operating were attained, operator held an "independent contractor," not an "employee," and hence not entitled to recovery of transportation license tax paid under protest (St. 1933, p. 928).

[Ed. Note.—For other definitions of "Employee" and "Independent Contractor," see Words & Phrases.]

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by B. F. Boessow against Charles G. Johnson, treasurer of the state of California. From an adverse judgment, plaintiff appeals.

Affirmed.

Inman & West, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

By this action the plaintiff sought to recover from the defendant, as treasurer of the state of California, three separate sums of money alleged to have been paid under protest as a transportation license tax claimed by the defendant, as treasurer of the state of California, to be due the state under and in accordance with the provisions of chapter 339, Statutes of California, 1933, page 928. The defendant had judgment, and from this judgment the plaintiff appeals.

The record shows that for at least two years prior to the enactment of the Transportation License Tax Act just referred to, approved May 15, 1933, the plaintiff, as an independent contractor, had been collecting milk for the Sego Milk Products Company (hereinafter called "Milk Company"), operating a fleet of trucks bought by the plaintiff from the Milk Company. Prior to the year 1931, the plaintiff had been operating the same fleet of trucks as an employee of the Milk Company. About the beginning of 1931, the plaintiff entered into a contract, by the terms of which he purchased from the Milk Company the fleet of trucks theretofore owned and operated by the Milk Company. Beginning with the year 1931 the plaintiff thereafter continued to operate the fleet of trucks as an independent contractor, under an agreement with the Milk Company, receiving as compensation therefor 12½ cents per hundred-weight. The duties of the plaintiff, as independent contractor, were to go around through the farming country from which the Milk Company derived its milk products, collect the milk, and deliver the same to the Milk Company at its place of business in the town of Galt, county of Sacramento.

According to the testimony of the plaintiff, he paid to the Milk Company the sum of \$10,000 for the fleet of trucks referred to herein, payment being made by deductions from the compensation agreed to be paid for the collection and transportation of the milk products. The agreement between the plaintiff and the Milk Company to which we have just referred expired on the 31st day of December, 1933.

After the passage by the Legislature, and approval by the Governor, of the Transportation License Tax Act to which we have referred, it appears that the plaintiff had a conversation with two of the officers of the Milk Company in relation to the additional expenses which would be imposed upon him as an independent contractor in collecting milk products for the Milk Company. In this conversation it appears that the plaintiff stated, among other things, that the rate of his compensation policy had been raised from \$2.62 to \$7.81. He also mentioned the fact that the license tax would cost a considerable sum of money, which by the record is shown to have been in excess of \$1,000, being 3 per cent. on the gross income of his earnings as an inde-

pendent contractor. The plaintiff stated to the officers of the company that he could not operate under the agreement which expired, as we have stated, on December 31, 1933, and that he wanted some arrangement made by which his operating expenses could be reduced, or that he should receive additional compensation. The testimony of the plaintiff in this respect is as follows:

"A. It was along in the summer we talked about it, Mr. Reider and I, and I think it was brought to Mr. Meyer's attention, too; I know definitely that I brought it to Mr. Meyer's attention, and I wanted some action on it sometime in November.

"Q. You wanted action sometime in November? A. Yes, one way or the other, and when a new contract was to be drawn up by the first of the year, why, so I knew where I was standing.

"Q. Then did you arrange for this present January 1, 1934, contract? * * *

A. Well, I think I made some suggestions.

"Q. If you know of your own knowledge, who provided the terms of it? A. Well, it was Sego Milk Company had it drawn up; who drew it up I am not sure.

"Q. But it was the Sego Milk Company contract, was it? A. Yes, I think it was."

The president of the Milk Company, testifying as to how the operating expenses might be reduced, gave the following testimony: "Back in 1933, prior to this agreement here (to which we will hereinafter refer), it was shown by our insurance man that by our leasing or owning our own fleet of trucks we could reduce our insurance rates. Prior to this agreement the insurance rate was \$7.81 per hundred. After this agreement we cut the rate to \$1.62 per hundred, which meant a saving of a little over \$1100.00 per year. That was on the liability of our employees such as chauffeurs, etc."

Prior to the contract the witness testified that the plaintiff had to pay the insurance. This insurance was paid by the plaintiff, as well as other expenses, out of the 12½ cents a hundred compensation paid to him by the Milk Company for collecting milk products.

The record shows that in pursuance of the plan to reduce expenses two agreements were entered into between the plaintiff and the Milk Company, one purporting to be an agreement of employment of the plaintiff by the Milk Company, and the other called "Bailment for Hire," purporting to be an

agreement by which the Milk Company hired, for the period of three months, the fleet of trucks then and theretofore belonging to the plaintiff. The agreement purporting to employ the plaintiff to manage the fleet of trucks hired by the Milk Company from the plaintiff is dated January 1, 1934. It purports to employ the plaintiff by the Milk Company and to pay him therefor the sum of 12½ cents per hundredweight. The portion of the contract purporting to employ the plaintiff and fix his compensation and duties is set forth in the following language: "Second party has had years of experience in the operation and conducting of this business, and he hereby represents that he can efficiently operate said department at a cost of not to exceed twelve and a half cents per cwt. It is therefore agreed that the said sum of twelve and a half cents per cwt. for all milk or cream transported and delivered in good condition at said plant, as aforesaid, shall semi-monthly be set aside by first party as a fund to pay the cost of the operation of said department, which said fund shall be disbursed by first party in the following manner, to-wit: A. Pay the current rentals due for the use of all trucks rented by first party for the transportation of said milk and cream. B. Pay all wages due said truck drivers. C. Pay premiums on compensation insurance, public liability, property damage, fire and theft, and cargo insurance and other incidentals necessarily incurred in the operation of said department. D. Pay current bills incurred for gas and oil used in the operation of said trucks. E. Any and all funds remaining out of such funds shall semi-monthly be paid to second party as additional salary for the service rendered and to be rendered as such manager."

The instrument called "Bailment for Hire" also bears date of January 1, 1934. By its provisions the plaintiff purports to lease to the Milk Company the fleet of trucks owned by him for the period of three months, receiving therefor a rental of 4½ cents per hundredweight of milk hauled, the agreement being that the trucks are to be used solely for the purpose of collecting milk. The party of the first part in the "Bailment for Hire" instrument agrees to keep the trucks in good repair, furnish necessary tires, parts, and accessories, and to maintain fire and theft insurance, and to pay all taxes levied or assessed against the property. The "Bailment for Hire" contract appears to have been re-

newed from time to time as the three months' term expressed therein would expire.

The court found that the sum of 12½ cents per hundredweight, set aside as the fund for paying the plaintiff under the contracts of January 1, 1934, were overdrawn in the sum of about \$1,200 at the time of the trial of the action; that the plaintiff had been drawing down the sum of \$175 per month as salary, although the record failed to show any agreement as to the payment of any salary by the Milk Company to the plaintiff, it being provided that whatever was left of the 12½ cents per hundredweight compensation mentioned in the agreement should be and become the property of the plaintiff.

The court also found that the milk collected did not become the property of the Milk Company at the time it took charge of the same at the respective ranches where delivery of the milk was made by placing the same upon the trucks operated by the plaintiff. All the testimony in the record, however, is to the effect that the title to the milk vested in the Milk Company immediately upon its taking possession thereof and placing the same upon its trucks, whether operated by the plaintiff as an independent contractor or as an employee of the Milk Company, all the expenses of transportation being paid by the Milk Company, as well as cargo, insurance, etc.

The record shows that the same price was paid for all milk whether delivered by the farmers to the company at its plant in Galt, or whether collected by the plaintiff, and that there remained nothing to be done after taking possession of the milk save to weigh and test the same at its plant for the purpose of determining the price to be paid the producer therefor.

Under the provisions of sections 337 et seq., 55 C.J., page 537, where only the price to be paid is to be determined, it becomes a matter of intention of the parties as to when title passes, and the testimony in the record all being to the effect that title passed upon taking possession of the milk, it must be held that the finding of the court in this particular is not sustained by the testimony. However, we do not deem this material to a determination of the case, for the simple reason that if the plaintiff was an independent contractor, he would be liable for the payment of the license tax, irrespective of the ownership of the milk products that he was transporting.

The vital findings upon which the judgment of the court rests are numbered XIV and XV, which we here set forth in full:

"XIV.

"That the said agreements made by said B. F. Boessow and said Sego Milk Products Company, dated January 1, 1934, and marked 'Exhibit D' of the complaint herein, and also the agreements between said parties entitled 'Bailment for Hire' marked 'Exhibit D' of the complaint herein, and dated April 1, 1934, and July 1, 1934, were not executed, carried out, worked under, performed or observed by said parties thereto, and said parties did not operate or work in accordance therewith; that the rental charge in said agreements existed in form only; that plaintiff in said agreement was not an employee, but was in fact an independent contractor; that the relationship between the parties to said contract is the same as existed between them under the first contract executed by them in the year 1932, which was received in evidence and marked 'Plaintiff's Exhibit No. 8', and also hereinabove set forth; that said agreements entered into by said parties on January 1, 1934, April 1, 1934, and July 1, 1934, were made with the purpose and intent of avoiding payment of the tax provided for by said Statutes of 1933, Chapter 339, without in fact changing the relation of plaintiff B. F. Boessow with the said Sego Milk Products Company from that of an independent contractor engaged in the transportation of property for hire or compensation over the public highways of this State, to that of an employee of said Company; that said agreements of 1934 were mere subterfuges in form to avoid and circumvent the payment of said tax without in fact changing the relationship theretofore existing between said parties, and that said contracts were not made by said parties in good faith.

"XV.

"That the charges made in said contracts executed in the year 1934, as rentals and charges did not differ in result or effect from those made in the first contract, and were made for the purpose of appearing to make a change in the relationship of the parties thereto, and were executed by them with the intent of not performing or carrying out the terms thereof, but with the intent that said agreements should exist in form only."

Our attention has not been called to any testimony in the record indicating that the

foregoing findings of the court are not sufficiently supported, which, of course, would justify the conclusion that the arrangement between the plaintiff and the Milk Company was merely one of form and not of substance, and that the plaintiff still remained an independent contractor liable for the payment to the state of the license tax, as provided for by the act of the legislature, *supra*. It may be noted that the so-called "Employment Agreement" and the "Bailment for Hire" instruments provided, one for the payment of fire and theft insurance, by the plaintiff, and the other for the payment of fire and theft insurance by the Milk Company.

[1] While the courts hold, and the law seems to be well settled, that there is no moral turpitude in arranging one's business so as to evade taxation, it must be more than a mere colorable transaction. 61 C.J., p. 173, § 130.

In reading the whole of the transcript, including the agreements, the following excerpt which we take from the opinion of the trial court, sets forth what we think a correct statement of the situation:

"When we consider the terms of the previous written agreement between the parties whereby Boessow did the hauling of the milk on a basis of 12½ cents per cwt. and the present plan whereby the same result is accomplished through the bailment for hire agreements and the so-called employment agreement, we are constrained to wonder whether after all the relationship between the parties is not now exactly the same as it was when the written agreement of hauling existed between them, and if the plan set forth is not merely form rather than substance—in other words, whether it does not exist merely on paper rather than in fact. But it is argued that this is not a fact, for there is a rental of the trucks and, in fact, it is quite beneficial to both sides aside from the payment of the transportation tax, for a considerable saving is had on the matter of insurance, as heretofore indicated. Again, it is pointed out that even though it might be contended that the purpose was to avoid or dodge the transportation tax, still this is perfectly legitimate. In this regard plaintiff cites a number of cases, all being to the same effect, among which is *Helvering v. Gregory* (C.C.A.) 69 F.(2d) 809, 810, which illustrates the principle invoked. Therein the court states: 'We agree with the Board

and the taxpayer that a transaction, otherwise within an exception of the tax law, does not lose its immunity, because it is actuated by a desire to avoid, or, if one choose, to evade, taxation. Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes.'

"Correctly applied, there can be no just complaint of the rule so announced; however, the underlying facts, rather than the mere form of the transaction, must be given full consideration.

"It may be that some arrangement might be thought out whereby an employee could be paid a certain sum for his services based upon the amount of milk which was hauled by trucks under his management as such employee; but the agreements under consideration, under close analysis, do not seem to be of this nature. A fund equal to 12½ cents per cwt. of the milk hauled is set aside and out of this fund certain expenses are to be paid. Certainly it cannot be denied but that the 12½ cents covers hauling charges, although of course it takes care of other expenses, including the wages or profit of plaintiff. In view of the wording of this feature of the agreement it might well be contended that the parties have created a trust fund for certain purposes, which, as explained above, includes the hauling charges. If the plaintiff was merely an employee of the Sego Company why was it necessary to set up such a fund? Why did the Company itself not pay for 'wages' due said 'truck drivers', 'premiums, etc.' 'current bills incurred for gas and oil used in the operation of said trucks'? Agreement, pars. B, C and D."

[2] While, as we have said, one may, without moral turpitude, arrange his business so as to lessen the burden of taxation, it must be bona fide, and not merely colorable. Here, as stated by the trial court, the same results are sought to be attained as were achieved under the first contract which existed between the plaintiff and the Milk Company. The same duties were to be performed by the plaintiff for an identical compensation, and taken in connection with the testimony of the plaintiff himself that he was simply seeking an arrangement to avoid his expense of operation, we think the trial court was justified in coming to the conclusion that the con-

tracts referred to herein as the "Agreement of Employment" and the "Bailment for Hire" were matters of form and not of substance.

The judgment of the trial court is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



10 Cal.App.2d 666

BUTCHER et al. v. THORNHILL et al.

Civ. 1751.

District Court of Appeal, Fourth District,
California.

Dec. 17, 1935.

1. Appeal and error ⇨801(1), 1127

On motion to dismiss appeal or affirm judgment because questions are unsubstantial, Court of Appeal should carefully examine papers supporting and opposing motion, together with appellant's opening brief, and if it appears that appeal is without merit, motion should be granted, otherwise motion should be denied (Rules for the Supreme Court and District Courts of Appeal, rule 5, § 3).

2. Appeal and error ⇨801(1), 1127

In automobile accident case, motion to dismiss defendants' appeal or affirm judgment because questions were unsubstantial was denied, where defendants relied principally on errors in giving and refusing instructions, and decision of questions would require Court of Appeal to review entire record, including reporter's transcript of evidence (Rules for the Supreme Court and District Courts of Appeal, rule 5, § 3).

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Myrtle E. Butcher, by James R. Wilson, guardian of her estate and person, against G. W. Thornhill and another. Judgment for plaintiff, and defendants appeal. Motion to dismiss the appeal or affirm the judgment.

Motion denied.

Lasher B. Gallagher, of Los Angeles, for appellants.

Ben W. McLendon and Joseph A. Ball, both of Long Beach, for respondent.

MARKS, Justice.

This is a motion to dismiss the appeal or affirm the judgment upon the ground that the questions upon which the decision of the case depends are so unsubstantial as not to need further argument. The motion is made under section 3 of rule 5 of the Rules for the Supreme Court and District Courts of Appeal.

Respondent was injured in an automobile accident in Kern county. Appellants principally rely for a reversal of the judgment upon instructions given by the trial judge which they maintain are incorrect and upon instructions proposed by them which were refused.

[1] The members of this court have repeatedly announced their understanding of the proper application of the rule in question. We have concluded that we should carefully examine the papers filed in support of and in opposition to the motion and appellants' opening brief. If, after doing so, it appears to us that the appeal is without merit the motion should be granted; otherwise it should be denied. We have declined to consider the reporter's transcript or make a general careful investigation of the merits of the appeal on such a motion as it would be necessary for us to repeat this work when the cause is submitted on the merits if the motion be denied. Such procedure would also result in the practical advancement of the case on the calendar under guise of the motion. *Thompson v. Boyer*, 127 Cal.App. 149, 15 P.(2d) 541; *Brown v. Gow*, 126 Cal.App. 113, 14 P.(2d) 322.

[2] We have carefully examined the papers used on the hearing of the motion and the authorities cited, together with appellants' opening brief. After doing so, we have reached the conclusion that a decision on the questions presented in appellants' opening brief requires us to carefully review the entire record, including the reporter's transcript of the evidence, and that the questions presented for our decision are not so unsubstantial as to justify us in dismissing the appeal or affirming the judgment at this time.

Motion denied.

We concur: BARNARD, P. J.; JENNINGS, J.

10 Cal.App.2d 551

O'DEA v. LELAND et al.**Civ. 9770.****District Court of Appeal, Second District,
Division 1, California.**

Dec. 10, 1935.

**Hearing Denied by Supreme Court
Feb. 6, 1936.****1. Automobiles ⇨244(58)**

In action for injuries to pedestrian struck by automobile while crossing street outside crosswalk, evidence *held* to justify judgment for defendant on ground that accident was caused by concurring negligence of plaintiff and defendant.

2. Automobiles ⇨240(1)

In action for injuries to pedestrian struck by automobile while crossing street, allegation in defendant's special defense that collision occurred "as a proximate result" of specified acts of negligence *held* affirmative defense properly raising issue of contributory negligence, especially in absence of demurrer.

3. Appeal and error ⇨882(3)

Where findings indicated that automobile accident case was tried on theory that contributory negligence was involved, reviewing court would not hold that issue of contributory negligence was not involved.

4. Negligence ⇨117

Even if affirmative defense of contributory negligence is not pleaded, contributory negligence becomes issuable fact when evidence adduced by plaintiff discloses contributory negligence.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by M. F. O'Dea against Arthur R. Leland and another. From a judgment for defendants, plaintiff appeals.

Affirmed.

G. M. Grant, of Los Angeles, and B. F. Tyler, of San Diego, for appellant.

ROTH, Justice pro tem.

On November 26, 1931, plaintiff and appellant was struck by an automobile operated by defendant Arthur R. Leland, the minor son of defendant Lillie B. Leland, also known as Lillie B. Thompson; the latter defendant having signed her son's application for a license, she was joined as a party to the action. Judgment went for defendants. The court found from conflicting evidence: "That on or about the 26th day of November, 1931, Ocean avenue and Broadway were, and have been

at all times since, and now are, public streets in the city of Santa Monica, state of California, and intersect each other at right angles; * * * that on or about (said date) * * * at * * * 11 o'clock p. m. * * * Arthur R. Leland did have under his custody, management and was operating a certain automobile along said highway at and near the intersection of Broadway and Ocean avenue, along the westerly side of Ocean avenue, and in a southerly direction thereof.

"That at the time when defendant, Arthur R. Leland was driving said automobile along said Ocean avenue as hereinbefore found, the plaintiff, a pedestrian, was in the said Ocean avenue near its said intersection with Broadway; that said plaintiff had entered Ocean avenue just previously, having stepped off the sidewalk on the easterly side of said avenue for the purpose of crossing to the westerly side thereof; that while in said Ocean avenue the plaintiff conducted himself in a careless and negligent manner; that he carelessly and negligently failed to observe, and did not observe, the approach of the automobile driven by the defendant, although the headlights of said automobile were lighted and the approach of the automobile could have been observed for several hundred feet before it arrived at the aforesaid intersection had the plaintiff made any observations in a northerly direction after entering Ocean avenue; that while in said Ocean avenue and in the path of defendant's approaching automobile, and without making any observation in the direction of that approach, plaintiff suddenly stopped and turned for the purpose of returning to the easterly side of said avenue, making the turn in such a way that his line of vision was directed to the south, or southwest, away from the direction from which the approach of motor vehicles from the north might then have been reasonably expected; that although there was a clearly delineated pedestrians' crosswalk running easterly and westerly across said Ocean avenue, at said intersection, said crosswalk then being about eight feet in width and lying between two lines painted in white, said lines being virtually prolongations of the side lines of a sidewalk on the southerly side of Broadway, the plaintiff nevertheless carelessly and negligently failed to be in said pedestrians' crosswalk at the time of the accident hereinafter related, and im-

mediately preceding the same, but was carelessly and negligently outside of said pedestrians' crosswalk at a point some distance to the south thereof.

"That in the operation of said automobile at the time and place hereinbefore mentioned the said defendant, Arthur R. Leland was negligent in this respect—that he did not have said automobile under that degree of control which was reasonable and proper and in the exercise of ordinary prudence, under all the circumstances then and there existing.

"That as a proximate result of the negligent conduct of the plaintiff hereinbefore related, and the negligent conduct of said defendant, Arthur R. Leland, as hereinbefore related, the plaintiff was struck by the said automobile and injured, the negligence of both plaintiff and said defendant contributing as proximate causes to the happening of said accident and to the injuries and damage thus occasioned to the plaintiff."

[1] The record shows ample evidence to sustain said findings and they cannot, therefore, be disturbed by this court. The only question of importance raised is whether there was a plea of contributory negligence as a separate defense. Appellant contends there was none and that in the absence of such an affirmative plea that the trial court could not have validly made a finding on that issue.

Appellants filed their answer in propria persona. In their answer they denied generally and specifically the allegations of the complaint and as a separate defense alleged: "* * * The plaintiff so carelessly, negligently and unlawfully walked, proceeded and controlled his movements in and about said street that the plaintiff did then and there negligently place himself directly in the path of defendant's automobile and the said plaintiff did carelessly, negligently and unlawfully change the direction in which he was proceeding and as a proximate result of said negligence, carelessness and unlawful conduct on the part of the plaintiff a collision occurred between said plaintiff and the automobile being driven by the defendant Arthur R. Leland and said negligence, carelessness and unlawful conduct on the part of the plaintiff were and each thereof was a proximate cause of any injury or damage sustained by plaintiff." (*Italics ours.*)

[2,3] It will be noted that the excerpt from defendants' special defense charges

that "as a proximate result of said negligence (that of plaintiff) * * * a collision occurred. * * *" Such pleading is not to be commended, but even though ambiguously phrased, it is pregnant with the admission that the negligence of plaintiff was not the sole cause of the collision. In view of the liberality of the decisions on the subject of pleading contributory negligence, it may, in our opinion, especially in the absence of demurrer, be accepted as an affirmative defense which properly raises the issue of contributory negligence. It is not necessary, however, to decide this appeal on the ground alone that the affirmative defense as pleaded successfully raises the issue of contributory negligence. It has been thoroughly established that "if the case had been tried upon the theory that contributory negligence was involved, and the jury had been so instructed, this court would not upon appeal hold that the issue of contributory negligence was not involved. *Hughes v. Warman Steel Casting Company*, 174 Cal. [556] 562, 163 P. 885; *Schuh v. R. H. Herron Co.*, 177 Cal. 13, 18, 169 P. 682; *Busch v. Los Angeles Ry. Co.* [178 Cal. 536] 174 P. 665, 2 A.L.R. 1607." *Western States, etc., Co. v. Bayside Lumber Co.*, 182 Cal. 140, 149, 187 P. 735, 739.

[4] In the case of *Schuh v. R. H. Herron Co.*, supra, 177 Cal. 13, at page 18, 169 P. 682, 684, the court says: "In this case, however, the defense of contributory negligence was considered as properly pleaded throughout the trial. No objection was made at any time on the ground that it was not pleaded. A large part of the testimony on the trial was devoted to that subject, and the instructions of the court show that it was deemed a matter in issue to be submitted to the jury. Under these circumstances a defective plea cannot be made available in support of an erroneous ruling on the subject." It is also thoroughly established that even though there is no affirmative defense of contributory negligence pleaded, that when the evidence adduced on behalf of the plaintiff shows contributory negligence, contributory negligence then becomes an issuable fact in the action. *Cahill v. E. B. & A. L. Stone & Co.*, 153 Cal. 571, 96 P. 84, 19 L.R.A. (N.S.) 1094; *Martinelli v. Poley*, 210 Cal. 450, 292 P. 451; *Queirolo v. Pacific Gas & Electric Co.*, 114 Cal.App. 610, 300 P. 487.

We have not had the benefit of a brief for respondents, and the record is incomplete in some respects. A perusal of a rather long transcript indicates that the present appeal is from the third separate trial had on this action, new trials apparently having been granted in the first two. The present record is singularly clear from argument and nowhere does it affirmatively appear in so many words that defendants were relying upon contributory negligence. The evidence introduced for appellant and on his behalf is such, however, that a finding of contributory negligence would find support therein and there is nothing in the record which indicates that contributory negligence was not in issue, while the findings of the trial court demonstrate that the case was tried upon the theory that it was in issue. Because of this state of the record, and because appellant had an opportunity to demur to the separate defense pleaded by respondent, which is undoubtedly ambiguous, we feel that if we reversed the judgment at this late date it would place too great a premium upon a technical point of pleading.

The judgment is, therefore, affirmed.

We concur: YORK, Acting P. J.; DO-RAN, J.



10 Cal.App.2d 574

SUMMERHAYS v. SCHEU et al.

Civ. 5438.

District Court of Appeal, Third District,
California.

Dec. 11, 1935.

Hearing Denied by Supreme Court
Feb. 6, 1936.

1. Patents ☞183

Inventor has right to use and sell invention independent of any rights conferred by patent, and only effect of patent is to confer upon patentee right to exclude others from use of patented invention.

2. Patents ☞183

Purchaser of invention for which applications for patent were pending had no exclusive property right in the invention, and could not maintain suit against his assignor to restrain use thereof prior to issuance of patents.

3. Frauds, statute of ☞44(5, 6)

Oral agreement of assignor of invention to refrain from use of invention is within statute of frauds, because not performable within one year (Civ.Code, § 1624).

4. Contracts ☞117(7)

Agreement of assignor of invention not to enter into business of sale of heaters embodying invention held void as contract in restraint of trade, where not limited to particular city or county (Civ.Code, §§ 1673-1675).

5. Patents ☞183

Law did not imply covenant on part of inventor selling invention to refrain from use thereof pending issuance of patent, and transferee acquired only inchoate right to patent when and if issued.

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Action by Edgar J. Summerhays against W. C. Scheu and others. From a judgment of dismissal, plaintiff appeals.

Affirmed.

Lewis S. Riley, of Los Angeles, for appellant.

Leonard S. Lyon and Reginald E. Caughey, both of Los Angeles, and George W. Hellyer, of San Bernardino, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This appeal is from a judgment of dismissal following the sustaining of a demurrer to an amended complaint without leave to amend, and the denial of a motion to file a proposed second amended complaint.

The first amended complaint attempted to state a cause of action for equitable relief restraining defendants from manufacturing and selling orchard heaters which embodied inventions described and claimed in several applications for patents which were sold by defendant W. C. Scheu to plaintiff, and for an accounting for all of the profits derived from the sale of the heaters embodying said inventions.

The amended complaint alleges in brief the purchase by plaintiff from defendant W. C. Scheu, by an instrument in writing, of all patent applications pending owned by defendant Scheu, the consideration therefor, and performance by plaintiff. It

is then alleged that defendants have, for several months prior to the filing of the complaint, without the consent of plaintiff, been manufacturing and selling the heaters described and claimed in the various applications for letters patent. Upon the sustaining of the demurrer plaintiff submitted a proposed second amended complaint, which in addition to the matters contained in the first amended complaint alleged that plaintiff was induced to purchase the business of W. C. Scheu, including the various applications for patents and inventions upon the representation of Scheu that he desired to retire from the orchard heater business, and that he would give plaintiff his advice and assistance in the business for a period of four years, and orally agreed that he would never again enter into the orchard heater business at any place, especially in California.

It is the first contention of plaintiff that W. C. Scheu, having assigned the applications for patent, may not thereafter use the features covered by the applications during the period fixed in the agreement of sale. To sustain such right of action, however, it must be predicated either upon the fact or ownership of the invention in appellant, or by virtue of a contractual relationship between the parties.

[1,2] Counsel apparently agree that if a patent had been issued under the patent laws of the United States the exclusive jurisdiction as to infringements would vest solely in the United States courts. We are dealing here, however, with inventions before issuance of patent. Under the common law, which has not been changed by statute, an inventor has a natural but not an exclusive right to use and sell his invention, independent of any rights conferred by the issuance of a patent. The only effect of a patent is to confer upon the patentee the right to exclude others from the use thereof.

The Supreme Court of the United States, in *Marsh v. Nichols, Shepherd & Co.*, 128 U.S. 605, 9 S.Ct. 168, 170, 32 L.Ed. 538, considering the rights that may be assigned by an invention, said: "But the patent for an invention conveys nothing which the government owns or its predecessors ever owned. The invention is the product of the inventor's brain, and if made known would be subject to the use of any one, if that use were not secured to him. Such security is afforded by

the act of congress when his priority of invention is established before the officers of the patent-office, and the patent is issued. The patent is the evidence of his exclusive right to the use of the invention; it therefore may be said to create a property interest in that invention. Until the patent is issued, there is no property right in it; that is, no such right as the inventor can enforce."

No suit may be brought restraining the use of an invention until the patent issues, as there is no property right in the invention at common law which would enable the inventor to restrain others from using the invention after it has once been made known to the public. No cause of action exists therefore either at common law or by statute based upon an exclusive property right in an invention or in a patent application pending in the patent office.

[3,4] When we examine the contract between the parties, we find no language therein which imposes any obligation upon respondent to refrain from the sale or use of the invention in controversy. Neither can appellant rely upon any oral agreement to compel respondent to refrain from the use of the inventions. Such an oral agreement as here alleged, was obviously not to be performed within a year, and would fall within the provisions of section 1624 of the Civil Code, and therefore would be barred by the statute of frauds. Also, being a contract in restraint of trade, is likewise void under the provisions of section 1673 of the Civil Code unless it comes within the exceptions set forth in sections 1674 and 1675 of the Civil Code, which it does not. In *Diller v. Schindler*, 88 Cal. App. 250, 263 P. 277, the court said: "Under a bill of sale containing no restriction on the right of the seller to re-engage in the same character of business, no agreement not to so re-engage can be implied from the clause in such bill of sale by which the seller conveyed the good will of the business."

[5] Neither could the law imply a covenant on the part of the inventor who sells an invention to refrain from the use thereof pending patent. As has been pointed out, although an unpatented invention may be transferred, the transferee acquires no greater right than that held by the transferor, which is only an inchoate right to a patent when and if issued. *M. J. Lewis Products Co. v. Lewis* (D.C.) 57 F.(2d) 886.

It is therefore apparent that neither by virtue of ownership or by contract is appellant entitled to relief sought, and appellant having set out the facts upon which his right of action depends, and it clearly appearing that under such facts it is impossible to state a cause of action for the relief herein sought, the trial court did not abuse its discretion in sustaining the demurrer without leave to amend.

The judgment is affirmed.

We concur: THOMPSON, J.; PLUMMER, J.



10 Cal.App.2d 516

WITHROW v. SHAEFFER ASSOCIATES, Inc., et al.
Civ. 1902.

District Court of Appeal, Fourth District,
California.
Dec. 6, 1935.

Hearing Denied by Supreme Court
Feb. 3, 1936.

1. Appeal and error ⚡994(3), 1012(1)

Trial court is judge of weight and sufficiency of evidence and credibility of witnesses.

2. Appeal and error ⚡1010(1)

In creditor's suit to subject alleged corporate moneys in hands of secretary of corporation to payment of judgment against corporation, judgment for secretary would not be disturbed where there was evidence to support finding that secretary paid out all corporation funds which he had deposited in his personal account to certain creditors of corporation pursuant to directors' resolution, without intent to defraud other creditors.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action in the nature of a creditor's bill by Harry Withrow against Shaeffer Associates, Inc., and others. From the judgment, the plaintiff appeals.

Affirmed.

Bernard Potter, of Los Angeles, and Griffith & Thornburgh, of Santa Barbara, for appellant.

Fred A. Shaeffer and David F. Hart, both of Santa Maria, for respondents.

MARKS, Justice.

This is an action in the nature of a creditor's bill to recover from defendant Shaeffer money which was alleged to be in his possession and to have belonged to Shaeffer Associates, Inc., a judgment debtor of plaintiff. Judgment was rendered in favor of Shaeffer, the Security-First National Bank of Los Angeles, and a bank sued under the name of Bank of America of Santa Maria and named in the judgment as the Bank of America, a national banking association. The case was tried, and is argued here, upon the theory that Shaeffer alone received and retains the money in question. In this opinion we will disregard the causes of action alleged against defendants other than Shaeffer, and will consider the case as though he were the sole defendant.

The Metro Grande Oil Company became obligated to pay Shaeffer Associates, Inc., a considerable sum of money, and between March 1 and July 13, 1929, paid \$7,901.51 by checks which were cashed by Shaeffer and deposited in his personal bank account. Shaeffer was secretary of, and attorney for, Shaeffer Associates, Inc. On June 22, 1929, plaintiff commenced an action in the superior court of Los Angeles county against Shaeffer Associates, Inc., and others, not including Shaeffer, to recover \$35,000 alleged to have been paid by the Metro Grande Oil Company on its obligation to Shaeffer Associates, Inc. Judgment was rendered against that corporation for \$7,000. Execution was issued and returned unsatisfied and this action to subject the money of Shaeffer Associates, Inc., and received by Shaeffer, to the judgment was instituted on June 24, 1931.

The trial court found that judgment had been rendered on October 7, 1930, for \$7,000 in favor of Harry Withrow and against Shaeffer Associates, Inc.; that between January 3 and July 13, 1929, the Metro Grande Oil Company had paid Shaeffer Associates, Inc., \$7,950 (the evidence shows \$7,901.51 paid); that Shaeffer deposited the money in his own bank account; "that it is true that said Fred A. Shaeffer, an attorney for and Secretary of said Shaeffer Associates, Inc., was, prior to the date on which payments hereinafter mentioned were made by him to creditors of said Shaeffer Associates, Inc., specifically authorized by resolution of the Board of Directors of said Shaeffer Associates, Inc., to make payments, and that said payments were made pursuant

to such authority and not otherwise or at all or as alleged in said complaint"; "that pursuant to said resolution and authorization and order of said Board of Directors said Fred A. Shaeffer did pay out said sum of money, to-wit, the sum of Seven Thousand Nine Hundred Fifty Dollars (\$7,950.00) to the then existing creditors of said Shaeffer Associates, Inc.; that said Fred A. Shaeffer paid out of his account in the Security First National Bank of Los Angeles to the then existing creditors of said Shaeffer Associates, Inc., sums of money greatly in excess of said sum of Seven Thousand Nine Hundred Fifty Dollars (\$7,950.00) and paid out to said then existing creditors approximately Sixteen Thousand Dollars (\$16,000.00)"; that it is not true that Shaeffer received the money, deposited it in his own bank account, and paid it out to the creditors of Shaeffer Associates, Inc., to hinder, delay, or defraud plaintiff or any other creditor or creditors of Shaeffer Associates, Inc.

We have studied the record and find that there was evidence before the trial court supporting the foregoing findings. This evidence consists of the testimony of Shaeffer and of canceled checks and notes, together with some fragmentary memoranda of accounts produced by him.

[1,2] While plaintiff argues the cause from several angles, his real contention is that the evidence is not sufficient to support the findings and judgment. He is of the opinion that Shaeffer's evidence is not worthy of belief because of his manner of testifying, and for the further reason that he produced no books or records of Shaeffer Associates, Inc., nor any written evidence of the bills or accounts paid by his checks and notes. Shaeffer testified that he had given all the corporation records to Langdon, an officer and the manager of the corporation; that Langdon had disappeared and the record could not be found.

The trial judge accepted the evidence of Shaeffer as true. He is the judge of the weight and sufficiency of the evidence and the credibility of the witnesses. There being material and competent evidence in the record supporting the findings, and as the findings support the judgment, we cannot disturb it on appeal.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

Mortgages ⇨330

Statute limiting right to deficiency judgment after sale of real property under trust deed to excess of entire amount of indebtedness, due at time of sale, over fair market value of property at time of sale, held inapplicable to trust deed executed prior to effective date of statute (Code Civ.Proc. § 580a, as added by St. 1933, p. 1672, § 4).

Appeal from Superior Court, Los Angeles County; Harry F. Sewell, Judge.

Action by Joseph Smith, as executor of the last will and testament of Luzerne Britten Eaton, also known as Luzerne B. Eaton, and also known as L. B. Eaton, deceased, against Richard D. Davis and others. From a judgment for the plaintiff, the defendants appeal.

Affirmed. Attempted appeals from orders overruling demurrers of defendants Baker and Davis dismissed.

George W. Zent, of Hollywood, and Miller & Ellis, of Los Angeles, for appellants.

George M. Breslin, of Los Angeles, for respondent.

SHINN, Justice pro tem.

An appeal from a judgment in favor of plaintiff for the unpaid balance of a promissory note after sale of real property under a trust deed.

The sole question in this case is whether section 580a of the Code of Civil Procedure (Stats.1933, c. 642, p. 1672, § 4), by which the right to a deficiency judgment after sale of real property under a trust deed is limited to the excess of the entire amount of the indebtedness, due at the time of sale, over the fair market value of the property at the time of sale, applies to a trust deed executed prior to the effective date of the act. The sale here involved took place before the act went into effect.

The application of the section contended for by defendants has been denied in the recent cases of Bennett v. Superior

Court (Cal.App.) 42 P.(2d) 80; *California Trust Co. v. Smead Investment Co.* (Cal.App.) 44 P.(2d) 624; *Title Insurance & Trust Co. v. Kinkel* (Cal.App.) 46 P.(2d) 778; and *Wilson v. Superior Court* (Cal.App.) 47 P.(2d) 331.

The appeal from the judgments is affirmed. The attempted appeals from orders overruling the demurrers of defendants Baker and Davis to the complaint are dismissed.

We concur: HOUSER, P. J.; YORK, J.



10 Cal.App.2d 588

BAUM v. VANATTA et al. (two cases).

Civ. 1551, 1552.

District Court of Appeal, Fourth District,
California.

Dec. 11, 1935.

1. Trade-marks and trade-names and unfair competition ⇨93(3)

Evidence held to support finding that machine which plaintiff alleged he had invented had been invented and patented by defendant and that construction and sale of machine by defendant would not constitute such unfair competition as to entitle plaintiff to injunctive relief.

2. Patents ⇨211(2)

Where plaintiff bought patented machines from defendant for resale purposes and did not use invention until after defendant ceased to sell him machines, plaintiff obtained no irrevocable license to continue to use patent in absence of agreement giving any such right.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Two actions by Ernest Baum, doing business under the name and style of the Ernest Baum Products Company, against Willis N. Vanatta and another, individually and doing business under the name and style of the Vanatta Manufacturing Company. Judgment for defendants in each action, and plaintiff appeals.

Judgment in each action affirmed.

See, also, 2 Cal.App.(2d) 395, 37 P.(2d) 863.

Fred A. Wilson, of San Bernardino, for appellant.

Swing & Swing, of San Bernardino, for respondents.

BARNARD, Presiding Justice.

These two action were tried together and have been presented here upon one set of briefs. In the one action it was sought to enjoin the defendants from constructing or selling to any one other than the plaintiff any machines of a certain type to be used for the purpose of curling human hair, and, in the other action, the plaintiff sought to obtain possession of the dies used by the defendants in making these machines.

The plaintiff alleged that he was in the business of manufacturing and selling appliances and supplies for use in beauty parlors; that in September, 1927, he engaged the defendant Willis N. Vanatta, who will herein be referred to as the defendant and respondent, to construct a machine designed to produce the permanent waving of human hair by a method known as the "spiral method"; that the defendant constructed such a machine in accordance with ideas and specifications provided by the plaintiff; that the plaintiff then engaged the defendant to construct all of such machines which the plaintiff might require in his business under an agreement that the defendant would make and construct such machines exclusively for the plaintiff and in conformity with such improvements as thereafter might be specified by the plaintiff; that on July 1, 1928, the plaintiff engaged the defendant to make another machine for the permanent waving of human hair by the method known as the "croquignole method," to be made in conformity with the ideas and specifications provided by the plaintiff; that the defendant constructed and improved such a machine all in conformity with the ideas and specifications of the plaintiff; that the plaintiff paid for the dies necessary in the construction of such machines; that the parties then entered into an agreement by which the defendant agreed to make and construct such machines exclusively for the plaintiff and in conformity with any improvements, ideas, and specifications suggested by the plaintiff; that the defendant continued to construct said machines for the plaintiff until December, 1932, when he refused to make

any more machines for the plaintiff; that the plaintiff spent a large sum of money in advertising and developing his business; and that the defendant has been injuring said business by selling these machines to other persons.

The defendant, in his answer, denied that any ideas or specifications for any of these machines were furnished by the plaintiff and denied the existence of any contract or agreement under which the machines were to be exclusively constructed for and sold to the plaintiff. It is further alleged that these machines were constructed in accordance with a new method of applying heat in the curling of hair; that this method was originated by the defendant and developed by his experiments and with his ideas; that he had taken out and owned a patent on this improved heater; and that the dies belonged to him.

The court found in all respects in favor of the defendants and, among other things, found that the device which was here in question was designed, invented, and patented by the defendant; that he is the owner of such patent and has the exclusive right to make and sell such devices; that the plaintiff has no right, title, or interest in or to said patent; and that the plaintiff has no right to have such machines made and sold to him exclusively. From the judgments entered in the two actions, the plaintiff has appealed.

[1] The appellant contends that he was the inventor of the device in question; that he engaged the respondent to construct the machine in accordance with his ideas and specifications; that the respondent secretly took out a patent on the invention; that since he engaged and employed the respondent to construct the machine for him he is the equitable owner of the patent; and that it would constitute unfair competition to permit the respondent to make such machines and sell them to others.

Many cases are cited in which it has been held that equity will grant relief against unfair competition, and will compel the assignment of a patent, where the circumstances warrant such action. These cases have no application here if the court's findings are correct. These findings are

not directly attacked, and while the appellant points out certain portions of the evidence which tend to support his contentions along these lines, a reading of the transcript discloses that the court's full and complete findings, in favor of the respondent in all of these matters, are abundantly supported by the evidence.

[2] The appellant further contends that, in any event, he was permitted by the respondent to use this patent; that he built up his business of selling these machines at a large expenditure of money; and that under these circumstances he has a parol license to continue to use the patent which is irrevocable. Reliance is placed upon such cases as *Neon Signal Devices v. Alpha-Claude Neon Corporation* (D.C.) 54 F.(2d) 793, involving an acquiescence on the part of the inventor in the use of an invention by another. No such a situation appears here. The appellant bought machines from the respondent for resale purposes, and did not use this invention until after the respondent ceased to sell machines to him and then, as found by the court, he used it wrongfully and without authority. The doctrine of an irrevocable license to continue to use a patent cannot be sustained under the findings and evidence here. We are unable to find any evidence sufficient to show that the respondent permitted the appellant to use the patent, or the existence of any agreement between them giving the appellant the exclusive right to purchase the machines or making it incumbent upon the respondent to continue to manufacture and sell them to the appellant. It would appear from the evidence that the respondent conceived the idea which was new in this device long before he met the appellant; that he subsequently developed it himself; that there was no general agreement between the parties; that the respondent merely manufactured and sold machines to the appellant as they were ordered by him; and that the break in their relations came when the appellant failed to order any more machines and failed to pay for some he had already received.

The judgment in each action is affirmed.

We concur: MARKS, J.; JENNINGS, J.

10 Cal.App.2d 710

LAVIN v. FERERIA et al.

Civ. 9573.

District Court of Appeal, First District,
Division 1, California.

Dec. 10, 1935.

Rehearing Denied Jan. 18, 1936.

1. Negligence ⇨136(8)

Uncontroverted conclusion that injured person took no precautions for his safety makes contributory negligence of injured person a question for the court.

2. Negligence ⇨136(9)

Contributory negligence of injured person is question of fact for jury, where inferences from evidence concerning vigilance exercised by injured person are debatable.

3. Automobiles ⇨245(80)

Whether motorist who was injured in collision at intersection looked in direction from which defendant motorist was approaching, whether point from which motorist looked was prudently selected, whether motorist should have seen defendant's automobile, whether motorist should have looked in both directions, and whether motorist continuously observed due vigilance, *held* for jury.

4. Damages ⇨132(8)

\$6,500 award to injured motorist who suffered laceration in palm of right hand which resulted in severance of median nerve *held* excessive and reduced to \$2,500, where simple operation on hand would result in 80 per cent. recovery.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Chester C. Lavin against William C. Fereria and others. From a judgment for the plaintiff, the defendants appeal.

Reversed, and remanded for new trial on issue of damages alone unless plaintiff files a remittitur.

Decoto & St. Sure, of Oakland, for appellants.

Appelbaum & Mitchell, of Oakland, for respondent.

WARD, Justice pro tem.

This is an appeal by defendant from a judgment of \$6,500 rendered in favor of plaintiff for damages for personal injuries.

The pertinent facts may be briefly stated: Respondent was driving an automobile easterly on Twentieth street toward

the intersection of West street in the city of Oakland. Appellant was proceeding southerly on West street approaching the same intersection. The cars collided within the intersection area. As a consequence of the accident, respondent suffered a laceration in the palm of the right hand which, it is alleged, resulted in the severance of the median nerve.

Appellant contends that respondent by his own testimony was guilty of contributory negligence, and that the damages allowed by the jury were excessive.

Driving at a speed between fifteen and eighteen miles an hour at a point approximately twenty-five feet west of the intersection, respondent looked to the north, but was unable to see any approaching automobile within a distance of sixty feet; and he also looked towards the south. When he had proceeded a car length within the intersection, appellant's automobile was visible forty feet to the north, and a short distance further the accident occurred. On cross-examination, the testimony of plaintiff was contradictory and conflicting.

Appellant argues that the facts of this case fall squarely within the rule laid down in *Moss v. H. R. Boynton Co.*, 44 Cal.App. 474, 476, 186 P. 631, 632, and approved in *Bullock v. Western Wholesale Drug Co.*, 91 Cal.App. 369, 372, 266 P. 978, wherein the court said: "It was a duty devolving upon plaintiff, as the act of an ordinary prudent man, immediately before placing himself in a position of danger, to look in the direction from which danger was to be anticipated. This was a continuing duty, and was not met by looking once and then looking away." In the *Bullock* Case the driver failed to look in the direction whence danger might be anticipated until he was within the intersection. This testimony was uncontradicted, and hence presented a question of law. The rule set forth in *Moss v. H. R. Boynton Co.*, supra, does not mean that it is a duty to look one way and continue to so look, but rather to look in the direction or directions of anticipated danger, and to continue to be alert to safeguard against injury. There may be several directions from which danger might be anticipated which would necessitate vigilance as to each direction. In *Hamlin v. Pacific Electric Ry. Co.*, 150 Cal. 776, at page 780, 89 P. 1109, 1111, the court said:

"Manifestly it is impossible for one driving a vehicle along a street to look in both directions at once, and it should ordinarily be left to the jury to determine, under the circumstances of each particular case, what amount of vigilance was requisite in order to constitute due care."

[1-3] When a person takes no precautions at all for his own safety and is injured, and this conclusion is uncontroverted, contributory negligence is a question to be decided by the court. *White v. Davis*, 103 Cal.App. 531, 542, 284 P. 1086; *Stephens v. Kaufmann*, 137 Cal.App. 328, 331, 30 P.(2d) 536. If evidence is introduced relative to the degree of requisite vigilance, and the inferences therefrom are honestly debatable, it becomes a question of fact for the jury to determine. *Gore v. Market Street Ry. Co.* (Cal.Sup.) 48 P.(2d) 2; *Salomon v. Meyer*, 1 Cal. (2d) 11, 15, 32 P.(2d) 631; *Anderson v. Market Street Ry. Co.*, 116 Cal. 282, 285, 2 P.(2d) 529. In the instant case, whether respondent looked in the direction from which appellant was approaching, whether the point from which observation was made was prudently selected, whether respondent should have seen appellant's car within a distance of sixty feet, whether respondent should have looked north and south, or north alone, and whether due vigilance was observed continuously, were disputable questions of fact upon which reasonable minds might legitimately debate and honestly reach different conclusions. The question was properly submitted to the jury, and its finding under all the circumstances of the case is conclusive upon appeal.

[4] The injury to plaintiff's hand was minor in character; and the evidence shows that any ill effects resulting therefrom can be remedied by a simple operation, which will result approximately in an 80 per cent., recovery, conceding that there was a severance of the median nerve. Assuming that such operation and the special damage suffered by plaintiff will amount to \$1,500 (and no greater sum is claimed) the remaining portion of the verdict, amounting to the sum of \$5,000, is entirely disproportionate to the damage suffered, is manifestly excessive, and suggests at first blush passion, prejudice, or corruption. We are of the opinion that a verdict of \$2,500 would fully compensate

plaintiff for the alleged injury. See *Davis v. Renton*, 99 Cal.App. 264, 278 P. 442; *Hoover v. King*, 134 Cal.App. 16, 24 P. (2d) 871; *Aspe v. Pirrelli*, 204 Cal. 9, 266 P. 276.

The judgment is accordingly reversed, and the cause remanded to the lower court for a new trial on the issue of damages alone, unless within thirty days from the filing of the remittitur in the court below plaintiff shall remit from the judgment all except the sum of \$2,500 and the costs as at present adjudged therein; neither party to recover from the other costs on this appeal. If such remission be so made, then and in that event the judgment shall stand affirmed; otherwise it shall stand reversed, and the case shall be retried on the issue of damages alone.

We concur: TYLER, P. J.; CASH-IN, J.



10 Cal.App.2d 541

ROBINSON v. NELLE et al.

Civ. 10002.

District Court of Appeal, First District,
Division 2, California.

Dec. 10, 1935.

1. Venue ◊22(3)

Action for accounting and to impress trust upon mortgage against parties who were residents of Contra Costa county and corporation held improperly brought in Los Angeles county, where joinder of corporation as defendant was mere subterfuge to deprive parties of their right to be sued in county of residence.

2. Venue ◊5(2)

That mortgage, which was part of corpus of trust sought to be impressed, was lien upon realty in Los Angeles county, held insufficient to deprive action against defendants residing in Contra Costa county, for an accounting and to impress trust on mortgage, of its transitory character, and hence defendants were entitled to be sued in county of residence.

3. Venue ◊21

Where cause of action is both transitory and local, defendants may have venue changed to county of residence.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Suit by Iva Robinson against Frances R. Nelle, Clifford W. Nelle, and another. From an order denying named defendants' motion for change of venue, named defendants appeal.

Reversed, with directions to grant motion.

Walter E. Dorn, of San Francisco, for appellants.

Kemper Campbell, of Los Angeles, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for an accounting and to impress a resulting trust upon certain personal property and upon a mortgage executed upon certain real property. The gravamen of the suit is that the defendant Frances Nelle fraudulently procured the revocation of an express trust covering the personal property and the mortgage and that the property was thereafter left to her by will of the original trustor. Plaintiff was one of the beneficiaries under the express trust. In due time and form the defendants Frances and Clifford Nelle demanded a change of the place of trial to the county of Contra Costa, conceded to be their place of residence. The appeal is from the order denying this motion.

[1] The order has not a shadow to rest on. A corporation which had issued some of the stock involved was joined as a party defendant without a single allegation pretending to state a cause of action against it, and with no prayer for relief. No cause could be stated against it and no relief could be had either legal or equitable. The joinder was a plain subterfuge for the purpose of depriving the appellants of their right of trial in the county of their residence. *Sayward v. Houghton*, 82 Cal. 628, 629, 23 P. 120; *McClung v. Watt*, 190 Cal. 155, 160, 211 P. 17; *Freeman v. Dowling*, 219 Cal. 213, 25 P.(2d) 980; *San Francisco Milling Co., Ltd., v. Mordecai*, 134 Cal.App. 755, 760, 26 P.(2d) 669.

[2, 3] Respondent seeks to defend the order upon the statement that an "interest" in real property situated in Los Angeles county is involved in that the mortgage, which was a part of the corpus of the trust, was a lien upon real property in Los Angeles county. If this were such an interest in real property as the Code contemplates, the

action would nevertheless be a transitory one upon the well-settled rule that when plaintiff seeks relief on causes both transitory and local the defendant is entitled to have the venue changed to the place of his residence. *Howe v. Tucker*, 219 Cal. 193, 195, 25 P.(2d) 832; *Bardwell v. Turner*, 219 Cal. 228, 230, 25 P.(2d) 978.

The order is reversed, with directions to transfer the cause to Contra Costa county.

We concur: STURTEVANT, J.; SPENCE, J.



10 Cal.App.2d 527

PEOPLE v. JUEHLING.

Cr. 2794.

District Court of Appeal, Second District,
Division 1, California.

Dec. 7, 1935.

1. Receiving stolen goods ☞3

Mere possession by accused of a stolen article is not sufficient to prove commission of crime of receiving stolen property; guilty knowledge of accused being necessary (Pen. Code, § 496).

2. Receiving stolen goods ☞8(1)

Prosecution has burden to prove guilty knowledge of recipient of stolen goods, but actual and positive knowledge is unnecessary, and requirement as to guilty knowledge may be met by evidence from which element of guilty knowledge properly may be inferred (Pen.Code. § 496).

3. Receiving stolen goods ☞8(4), 9(1)

Failure of accused to satisfactorily explain his possession of stolen goods is sufficient upon which to base inference of guilty knowledge, and jury must decide whether possession by accused is satisfactorily explained.

4. Receiving stolen goods ☞8(3)

Evidence held to sustain conviction of receiving stolen property knowing it to have been stolen.

5. Criminal law ☞1053

Where accused took no exception to trial court's remark and did not avail herself of any other remedies to protect her rights, alleged impropriety of remark would not be considered.

6. Criminal law $\hookrightarrow$ 1044, 1054(1)

In prosecution for receiving stolen property, admission of evidence of accused's possession of rings not included in indictment against her *held* not reversible error, where objections or motion to strike were either not timely or not properly made.

7. Criminal law $\hookrightarrow$ 369(9)

In prosecution for receiving stolen property, evidence of accused's possession of ring not included in indictment against her but found with stolen watch which was included in indictment against her *held* admissible as tending to show watch had been in accused's possession.

8. Criminal law $\hookrightarrow$ 1169(2)

In prosecution for receiving stolen property, alleged error in admitting evidence of accused's possession of rings not included in indictment *held* cured, where on other occasions practically same evidence was properly received.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Hazel Juehling was convicted on two separate charges of receiving stolen property, and she appeals.

Affirmed.

Stanley Visel, Martin S. Ryan, and Edgar T. Fee, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Walter L. Bowers, Deputy Atty. Gen., for the People.

HOUSER, Presiding Justice.

From each of two several judgments of conviction on as many separate charges of receiving stolen property that theretofore had been preferred against her, as well as from an order by which her motion for a new trial was denied, defendant has appealed to this court.

As developed by the evidence adduced on the trial of the action, it appears that as to count I of the information, on or about January 22, 1935, in circumstances unnecessary herein to be set forth, a watch that was contained in a lady's handbag was stolen from an automobile at a time when it was being driven by its owner; and that as to count II of the information, on or about December 17, 1934, in similar circumstances, another watch was stolen. On May 29, 1935, which was several months

after the latter of the watches had been stolen, defendant was placed under arrest. At that time she was driving an automobile; and before having been taken to the police station, at her request she was taken to a certain gasoline filling station, where within the immediate presence, but outside the hearing and sight, of the arresting officer, that is to say, while the officer sat in the front seat of the automobile, and while defendant was outside the automobile and at the rear thereof, she had some conversation with the proprietor of the filling station and one of his employees, following which defendant went inside the office building of the filling station where she leaned against the jamb of one of the doorways therein, in which position she was in reach of a "pigeonhole" drawer in which the proprietor of the filling station was accustomed to file certain memoranda or invoices that related to charges which, from time to time, he had made against defendant on account of purchases made by her of gasoline from the proprietor of said filling station. On the way from the filling station to the police station, the arresting officer asked defendant what she had done with a diamond ring which he testified defendant had been wearing before she reached the filling station and which, at the time he asked the question, she was not wearing; to which query she replied that she had not been wearing any such ring. After the arrival of defendant at the police station, a search of a suitcase that was her property and which was then in the automobile, disclosed that, among other things, it contained not only the watch that was described in count I of the information, but also several diamond rings. On being questioned by the arresting officer as to her possession and ownership of such articles, she gave various answers, such as that she had acquired them "from different people—different places"; and that "I don't know; it doesn't matter." And with respect to the length of time that the watch and several rings had been in her possession, at first she said, "Oh, three months"; which later she changed to "Oh, ten years." On the day when the preliminary examination on the several charges against defendant was conducted, in reply to questions propounded to her with reference to a man named Benny Solis, who apparently was suspected by the police of

having stolen the watches and the rings, defendant replied: "Well, I would rather not say anything about it, but * * * you are on the right track. * * * For several months I have been trying to get out of this racket, trying to get away from this boy; anybody that knows me or knows him will tell you I have avoided him for quite a little while, but I believe I got out too late, looks like I got out of the racket too late. * * * Well, Benny Solis was, (the operator of the 'gang') he was small and could get around fast"; and that she "didn't think Joe operated at all, but that Benny was the actual operator of the bunch."

On the day following the arrest of defendant, the police officers again visited the filling station, at which time and place, on examination of the "pigeonhole" drawer in which were kept the invoices or charges against defendant, as aforesaid, two diamond rings, besides the stolen watch that was described in count II of the information, were found. However, on the trial of the action, the proprietor of the filling station testified that it was he who had placed the watch in the "pigeonhole" drawer; that he had received it from his employee on the day when defendant had been arrested; and that he did not place the diamond rings in the drawer. The arresting officer identified one of the rings as the one that defendant had been wearing at the time when she was arrested, and which she was not wearing after she had left the filling station. The employee of the proprietor of the filling station was not called as a witness; it appearing that at the time of the trial he was located in the state of Washington.

[1] The first point presented by appellant on her appeal is that the evidence was insufficient to support the judgment. In that regard, as to the first count, the fact that the watch was stolen and that afterward it was found in the possession of defendant is very clearly established; but for the purpose of proving the commission of the crime of receiving stolen property, by numerous decisions it has been held that mere possession by a defendant of a stolen article is not of itself sufficient. Indeed, in denouncing the offense of receiving stolen property in a situation such as herein is involved, the provisions of section 496 of the Penal Code include the requirement that the property must have

been received "knowing the same to have been stolen." It is particularly to the element of guilty knowledge on the part of defendant in that regard that the attention of this court is directed.

[2] The law seems well settled that although the burden is upon the prosecution, in order to prove guilty knowledge on the part of the recipient of stolen property, it is unnecessary to show his actual and positive knowledge in that respect. Of course, in returning a verdict of "guilty," a conclusion by the jury with reference to the pertinent inquiry may not rest upon conjecture or surmise; but the statutory requirement as to guilty knowledge may be met by admissible evidence from which the element of guilty knowledge properly may be inferred. *People v. Mercado*, 59 Cal.App. 69, 72, 209 P. 1035, and authorities there cited. In the instant case, the time that may have elapsed between the date when the property was stolen and the date when defendant was arrested constituted but a single item of evidence with reference to the question of guilty knowledge, to be considered with all the other evidence in the case for the purpose of eventually reaching a determination on that particular issue.

[3] It is also well established that evasive answers by a defendant to material questions with reference to the ownership of stolen property, or to the manner in which defendant claims to have acquired such property, or, as is generally stated, a failure on the part of the defendant to "satisfactorily" explain his possession (*People v. Jacobs*, 73 Cal.App. 334, 340, 238 P. 770, and authorities there cited; *People v. Cox*, 117 Cal.App. 254, 258, 3 P. (2d) 581), may be sufficient upon which to base an inference of guilty knowledge. And by a host of cognate authorities, it has been decided that what constitutes a "satisfactory" explanation of possession of the "fruits" of a burglary or a larceny is a question that primarily and impliedly must be answered by the jury in its verdict. But eventually in such cases, as is the situation here, the pertinent and final inquiry is whether the possession of the property by the defendant, together with other suspicious circumstances, is sufficient to support the judgment.

As to count I of the information, as hereinbefore has been set forth, in addi-

tion to her lack of frankness in some of her answers to questions, defendant not only refused to answer other questions, but as well gave an answer at one time that was contradictory to one which she gave to the same question on another occasion; she stated that she did not know where or how she acquired the property; she admitted that in seeking to solve the problem as to who had actually stolen the two watches that were the subject-matter of the investigation, the officers were "on the right track"; and that Benny Solis "was the actual operator of the bunch."

[4] Considering the foregoing, it is concluded that guilty knowledge was clearly inferable.

As to count II of the information, the situation is somewhat different. It may be remembered not only that the watch that was involved therein was not found in the physical possession of defendant, but also, that with an exception hereafter to be noted, all the incriminatory statements made by defendant occurred before that watch was located. The exception that was contained in testimony given by the arresting officer related to a conversation had between him and defendant on the day when her preliminary examination on the charge was conducted, and was as hereinbefore has been indicated.

Considering the question of possession of the watch that was described in count II of the information, from the facts that immediately after having been arrested, defendant requested that she be taken to the filling station; that while there, without the immediate presence or the hearing of the arresting officer, defendant had the opportunity to place the watch in the possession of the employee; that thereafter and on the same day, the employee gave the watch to the proprietor, who thereupon placed it in the "pigeonhole" drawer, to which reference hereinbefore has been had; and that on the day next thereafter a diamond ring that defendant had been wearing at the time when she was arrested was found in the same drawer, defendant personally having had opportunity to place the ring there, we think furnish sufficient foundation for the necessary inference of possession. Likewise as to guilty knowledge. Giving effect to the statements only made by defendant on the date when her preliminary examination was conducted, no reasonable conclusion other than that

she was fully aware that the watch in question had been stolen would seem possible. We conclude that the jury was entirely justified in reaching the implied conclusion not only that defendant had possession of the watch, but that she knew it had been stolen.

Appellant also complains of asserted lack of evidence to prove the fact that either of the watches that was the subject of the prosecution had been stolen. Without here relating the details of the evidence adduced on the trial of the cause in that regard, it may suffice to state that after a careful examination of such evidence, this court is of the opinion that the theft of each of the watches was clearly established.

[5] Further prejudicial error is predicated upon a remark made by the judge of the trial court within the presence and the hearing of the jury. From a consideration of the criticised language employed by the trial judge on the occasion to which appellant has directed attention, this court is convinced that, viewing such language coldly, as standing alone, and from one standpoint only, it was just possible that the jury might have gained the impression that the trial judge was insinuating that defendant had been engaged in an "unlawful vocation"; but considering the context with which such words were spoken and the general situation that is portrayed by the reporter's transcript of the proceedings then before the trial court, it becomes apparent that no such impression from the remark made by the trial judge might properly be received or entertained by the jury. In other words, that, although from a restricted standpoint, the remark of the trial judge might be regarded as objectionable, in its broad aspect, it is not subject to adverse legal criticism. But in addition to that situation, and even assuming that the remark made by the trial judge was prejudicial to the cause of defendant, nowhere in the record does it appear that defendant took any exception thereto, or that in any way she attempted to avail herself of any of the other remedies to protect her rights, if any, in the premises. Nor was the language of the judge of that character that a reference thereto by any of the interested parties might have emphasized its effect. In the circumstances it is obvious that defendant has no real cause for complaint. *People v. Mendez*, 193 Cal

39, 48, 223 P. 65; *People v. Albori*, 97 Cal. App. 537, 550, 275 P. 1017; *People v. Ball*, 102 Cal.App. 353, 358, 282 P. 971; *People v. Moreno*, 111 Cal.App. 52, 54, 295 P. 50; *People v. Henry*, 132 Cal.App. 557, 562, 23 P.(2d) 77.

[6-8] Finally, appellant presents the point that the trial court erred in admitting over her objection evidence that related to the possession by defendant at the time of her arrest of several diamond rings that were found in her suitcase. Of course, ordinarily speaking, any evidence that was confined to the unrelated acquisition by defendant of property that was not alleged to have been stolen and not knowingly received by her as stolen property, was not properly presentable for the consideration of the jury; and if timely and proper objections to questions had been made by defendant in that regard, the admission of answers to such questions, that were detrimental to defendant, might have constituted error on the part of the trial court. But herein the record of the proceedings had on the trial of the action discloses generally that appellant's criticism is unavailing because either no objection was interposed by defendant when the pertinent question was propounded to the witness; or, if any objection to the introduction of such evidence, or motion to strike it out, was made, that such objection or motion was too broad and general in its nature; or, if not within the latter classification, that the question related to the ring that was found with the watch described in count II of the information, and which evidence manifestly tended to show that the watch had been in the possession of the defendant. But in any event, assuming that on one or possibly on two occasions, the evidence regarding the diamond ring was improperly received it is obvious that since on other occasions practically the same evidence was not erroneously received, the errors of which appellant now complains could not have been prejudicial.

Each of the judgments and the order, by which the motion for new trial was denied, are affirmed.

I concur: YORK, J.

DORAN, J., being disqualified, takes no part in the foregoing decision.

10 Cal.App.2d 302

COX v. FIRST NAT. BANK OF BREA.
Civ. 1531.

District Court of Appeal, Fourth District,
California.

Nov. 21, 1935.

1. Banks and banking ⇨253

Vice president, cashier, and director are "officers" of a national banking association and their compensation must be fixed by board of directors or by duly authorized officers.

[Ed. Note.—For other definitions of "Officer," see Words & Phrases.]

2. Banks and banking ⇨253

In action by cashier of bank who was also vice president and a director to recover salary allegedly due, where record did not show that bank or its officers agreed to pay plaintiff any compensation as vice president, he was not entitled to any salary as such.

3. Banks and banking ⇨253

Term of office of bank cashier is not annual, and an incumbent duly elected and qualified holds office until he resigns, is removed, or his successor is appointed by board of directors.

4. Banks and banking ⇨253

Contract with cashier of national banking association appointing cashier for definite period at fixed salary is void and will not support action for damages for discharge nor permit recovery of salary accruing after discharge.

5. Banks and banking ⇨253

Where bank cashier drew regular monthly salary and made regular reports to board of directors of condition of bank, board ratified salary paid cashier prior to time board fixed salary.

6. Banks and banking ⇨253

Where board of directors delegated power to fix salaries of officers and employees of bank to president of bank, president had power to fix cashier's salary in first instance and reduce it thereafter.

7. Banks and banking ⇨253

As respects recovery of salary, cashier of bank who was also vice president was not an "employee" of bank, since both vice president and cashier are "officers" of bank (12 U.S. C.A. § 24).

[Ed. Note.—For other definitions of "Employee," see Words & Phrases.]

8. Banks and banking ⇨253

In action by cashier who was also vice president of bank for salary allegedly due,

testimony by former bookkeeper and assistant cashier of bank that she took annual vacations on pay *held* not to establish custom in regard to cashier as to whom evidence negatived supposition that such custom existed.

9. Banks and banking ⇨253

In action by cashier who was also vice president of bank for salary allegedly due, evidence *held* insufficient to sustain finding that cashier was granted a vacation with pay.

10. Banks and banking ⇨253

Employment of cashier of national bank was at pleasure of board of directors which could discharge cashier at any time, terminating his salary at time of discharge.

11. Evidence ⇨383(6), 389

Minutes of meeting of board of directors of bank are *prima facie* but not conclusive evidence of what they show, and in absence of estoppel, parol evidence may be introduced to show what actually took place at directors' meeting.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by John J. Cox against the First National Bank of Brea. From an adverse judgment, the defendant appeals.

Judgment reversed.

Joseph Lynn and Francis B. Cobb, both of Los Angeles, for appellant.

Head, Wellington & Jacobs, of Santa Ana, for respondent.

MARKS, Justice.

Plaintiff brought this action to recover \$1,266.67 for unpaid salary, and for salary during vacation periods. The complaint contains three causes of action. The first seeks to recover \$300 for salary for one year commencing May 1, 1931, during which time he was paid \$200 per month when it was alleged his salary had been fixed at \$225 per month. The second is to recover \$466.67 for salary from January 1 to October 10, 1933, during which time he was paid \$150 per month when it was alleged his salary was \$200 per month. The third is to recover \$500, at the rate of \$50 per week, for ten weeks' vacation with pay, following October 10, 1933. The trial court awarded him \$300 under his first cause of action, \$466.67 under the second, and \$325 under the third.

Defendant is a national banking association organized under the laws of the

United States. At all material times, W. D. Howard was its president.

On September 24, 1927, Howard, and perhaps two individual directors, employed Cox as cashier at a salary of \$225 per month. He became vice president, cashier, and a director of the bank. No minutes of any directors' or stockholders' meetings or other records of the bank were introduced in evidence. There is an intimation in the record that at a meeting in September, 1927, the board of directors fixed plaintiff's salary at \$225 per month. At a meeting held in May, 1932, that body fixed his salary at \$200 per month. Effective May 1, 1931, Howard reduced plaintiff's salary from \$225 to \$200 per month, and to \$150 effective January 1, 1933. As far as the evidence discloses, no action was taken by the board of directors as a board on plaintiff's salary other than at the meeting in May, 1932, and perhaps at the one in September, 1927. Plaintiff drew \$225 per month to May 1, 1931; \$200 per month to January 1, 1933; and \$150 per month to October 10, 1933. At the time of the two reductions by Howard, plaintiff maintained to Howard that he had no authority to reduce the salary without action by the board of directors and complained to the individual directors of the salary reductions. He did not bring the matter up in the meetings of the board of which he was a member, but drew and accepted the reduced salary without objections other than those we have mentioned.

We find in the federal laws the following pertinent provisions: "Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power— * * * Fifth. To elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places. * * * Seventh. To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on

the business of banking." Section 24, p. 13, title 12 U.S.C.A. 1932. *San Joaquin Valley Bank v. Bours*, 65 Cal. 247, 3 P. 864.

[1,2] The vice president, the cashier, and a director are officers of a national banking association and their compensation must be fixed by the board of directors or by duly authorized officers. In the absence of a governing statute, by-law, regulation, or contract to the approval of which his own vote as director was not essential, the vice president of a national banking association is not entitled to any salary as such. *Blue v. Capital National Bank*, 145 Ind. 518, 43 N.E. 655. As there is nothing in the record showing that the bank or any of its officers agreed to pay Cox any compensation as vice president, we will limit our examination of the case to his compensation as cashier.

[3,4] The term of the office of cashier is not annual. An incumbent duly elected and qualified holds office until he resigns, or is removed, or his successor appointed by the board of directors. *Westervelt v. Mohrenstecher (C.C.A.)* 76 F. 118, 34 L. R.A. 477. A contract with the cashier of a national banking association appointing the cashier for a definite period at a fixed salary is void and does not prevent his removal at any time by the board of directors. It will not support an action for damages for discharge nor permit recovery of salary accruing after such discharge. *Copeland v. Melrose National Bank of New York*, 229 App.Div. 311, 241 N.Y.S. 429; *First National Bank of Colquitt v. Miller*, 23 Ga.App. 441, 98 S. E. 402; *Van Slyke v. Andrews*, 146 Minn. 316, 178 N.W. 959, 12 A.L.R. 1068; *Rankin v. Tygard (C.C.A.)* 198 F. 795.

[5] If we assume from the indefinite and unsatisfactory evidence before us that prior to May, 1932, the board of directors did not fix plaintiff's salary, it is still clear that he acted as cashier of the bank and drew a regular monthly salary as such. He made regular reports to the board of directors of the condition of the bank and we assume from intimations in the record that these contained statements of the amounts of the various salaries paid. It is clear that the directors knew plaintiff was acting as cashier and the amounts he drew for his services as such. If the foregoing assumption is made, the most that can be said of this state of the record is that the board of directors each month ratified the salary paid plaintiff prior to the time the board fixed his salary in May,

[6] Howard testified, "The board of directors, I always talked about the salaries, and they always delegated to me, to handle the salary end of it." This testimony stands uncontradicted in the record. If it is true the board of directors delegated the power to fix salaries of the officers and employees of the bank to Howard, then he had power to reduce plaintiff's salary as well as to fix it in the first instance, if he did so.

If it be true that the board of directors at a meeting held in September, 1927, fixed plaintiff's salary at \$225, it is strange that the records of that meeting were not introduced in evidence. They would have furnished prima facie evidence that such action was taken. On the record before us, we cannot conclude that plaintiff is entitled to recover the \$300 salary from May 1, 1931, to May 1, 1932, or the \$466.67 salary from January 1, to October 10, 1933.

It is somewhat difficult to determine upon what theory plaintiff expects to recover for the vacation periods. It is alleged in the complaint that "on or about the 10th day of October, 1933, while plaintiff was still employed as vice-president and cashier of the defendant herein, the board of directors of said defendant, granted to plaintiff a ten weeks' vacation which was the time accumulated by plaintiff for a vacation for the years 1929, 1930, 1931, 1932 and 1933. That at the time the board of directors of defendant granted to plaintiff the said vacation, he had a fixed salary of \$200.00 per month. That the custom of the defendant herein, and the understanding between defendant and its employee has been that the employee of the defendant was entitled to two weeks' vacation each year on salary. That by reason of the time granted plaintiff herein to take his accumulated vacation, there became due to plaintiff for said time the sum of \$500.00, no part of which has been paid." The finding of the trial court in response to the foregoing allegation is as follows: "That on or about the 10th day of October, 1933, while plaintiff was still employed as vice-president and cashier of defendant herein, the board of directors of said defendant, granted to plaintiff an indefinite vacation, which was the time accumulated by plaintiff for a vacation for the years 1929, 1931 and 1932. That

during the years 1929 and 1931, plaintiff's salary had been fixed by the board of directors of defendant at \$225.00 per month. That during the year 1932, plaintiff's salary had been fixed by the board of directors of defendant at the sum of \$200.00 per month. That the custom of the defendant herein, and the understanding between defendant and its employee, has been that the employee of the defendant was entitled to two weeks' vacation each year on salary. That by reason of the time granted plaintiff herein, to take his vacation there became due to plaintiff for said time, the sum of \$325.00, no part of which has been paid."

[7] The plaintiff was never an employee of the bank. A vice president is one of the officers of a national bank. Section 24, title 12 U.S.C.A. The cashier is also an important executive officer. *Merchants' National Bank of Boston v. State National Bank of Boston*, 10 Wall. 604, 19 L.Ed. 1008; *Warner v. Penoyer* (C.C.A.) 91 F. 587, 44 L.R.A. 761; *U. S. v. City Bank of Columbus*, 21 How. 356, 16 L.Ed. 130.

If we assume that the allegations of the third cause of action attempt to plead a cause of action based on contract, and the quoted finding attempts to award damages for a purported breach of contract, we can discover no evidence either supporting the fact of a contract that plaintiff was to have two weeks' vacation each year with full pay, or that in October, 1933, he was granted a vacation with pay which pay was withheld from him.

According to the evidence, there was nothing said to plaintiff at the time of his employment by defendant about his taking two weeks' vacation with pay. This was not a part of his contract of employment. Plaintiff testified that about thirty days after his employment by defendant he had a conversation with Howard about vacations in which Howard said to him, "John, you will get your vacation of fifteen days every year." Nothing was said about a vacation with pay. Nowhere in the record is there any evidence that the bank or any of its authorized officers promised plaintiff an annual vacation with full pay.

[8] To support the recovery of money for vacation periods plaintiff seems to rely upon what he insists was a custom of defendant to give each of its employees two weeks' vacation with pay each year. To prove this custom, Mrs. Dinns, who was

first bookkeeper and later assistant cashier of defendant, testified that after discussing the matter with plaintiff she took her annual vacations on pay. This might establish a custom in so far as Mrs. Dinns was concerned, but it could hardly establish a custom affecting other employees or officers of the bank. The evidence is clear that plaintiff only took one vacation on pay during the six years he was an officer of the bank. This would seem to rather effectually negative the supposition that there was any such custom as to him.

[9, 10] There is no evidence in the record to suggest that at the time plaintiff left the bank, about October 10, 1933, he was granted a vacation with pay. All the evidence is to the contrary. He asked for a four weeks' vacation with pay, which was not given him. On the contrary, he was given an "indefinite vacation" with nothing said about pay and it would seem that his successor was immediately employed. This would seem to indicate that his "indefinite vacation" was in effect a discharge. As his employment was at the pleasure of the board of directors and that body could discharge him at any time (*Westervelt v. Mohrenstecher*, supra), his salary terminated at the time of such discharge.

We have purposely refrained from discussing the question of lack of consideration for any promise of defendant to give plaintiff two weeks' vacation with pay each year because we can find no evidence of any such promise.

Plaintiff was paid a salary for each month he served the bank. If the third cause of action be considered one for breach of contract, and upon another trial he can establish a valid contract which was breached by defendant, his recovery should be limited to "all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." Section 3300, Civ.Code.

We have not discussed the questions of estoppel, ratification, and the statute of limitations, because they were not raised by the pleadings and were not urged in the trial court or considered there.

[11] As the case must be tried again, and to avoid the recurrence of errors of the first trial, we deem it wise to call attention to the rule permitting the written minutes of meetings of the directors of a

corporation to be contradicted, varied, or enlarged upon by parol evidence. The minutes are prima facie but not conclusive evidence of what they show, and, in the absence of the element of estoppel, parol evidence may be introduced to show what actually took place at a directors' meeting. 6a Cal.Jur. 338 et seq., and cases cited.

Judgment reversed.

We concur: BARNARD, P. J.; JENNINGS, J.



10 Cal.App.2d 547

CURTIS v. SAN PEDRO TRANSP. CO. et al.
Civ. 9932.

District Court of Appeal, Second District,
Division 1, California.
Dec. 10, 1935.

1. Judgment ⇨256(1)

Trial court must make judgment conform to verdict when intention of jury is clear from language of verdict considered in connection with pleadings and evidence.

2. Judgment ⇨256(5)

Where verdict in ferry passenger's action for assault committed upon her by employee while acting within scope of employment was for passenger against owner for \$1,000 compensatory damages and against employee for \$2,000 compensatory damages, trial court, upon passenger's motion, properly entered judgment against both defendants for \$2,000, under rule that liability of joint tort-feasors cannot be segregated, irrespective of degrees of guilt.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Helen M. Curtis against the San Pedro Transportation Company and another. Judgment for plaintiff, and the named defendant appeals.

Affirmed.

David E. Hinckle, of Los Angeles, for appellant.

Anderson & Anderson, of Los Angeles, for respondent.

ROTH, Justice pro tem.

Respondent as plaintiff sued appellant company and one Christensen for an assault committed by Christensen on December 16, 1932. Respondent on such date was a passenger on a ferry owned by the company and operated by Christensen, its servant. The facts constituting the assault are not questioned, nor is any point raised as to the responsibility of the appellant company for the acts of its servant Christensen. The company, which is the sole appellant, contends that the judgment entered upon the verdict is invalid because it does not conform to the verdict. Appellant asserts that the trial court could have cured the defect in the verdict by following the procedure outlined in section 619 of the Code of Civil Procedure, and in no other manner.

The verdict of the jury was as follows: "We, the jury in the above entitled action, find for the plaintiff against defendant San Pedro Transportation Co., Ltd., and assess her compensatory damages in the sum of \$1,000. We further find in favor of the plaintiff against Karl Christensen and assess her compensatory damages in the sum of \$2,000. * * *"

[1] It has been uniformly held in this state that a trial court not only has the authority, but that it is its duty, to make a judgment conform to the verdict, when the intention of the jury is clear from the language of the verdict which it returns, considered in connection with the pleadings and the evidence. *Truebody v. Jacobson*, 2 Cal. 269, 284, 285; *Perkins v. Wilson*, 3 Cal. 137; *Johnson v. Visser*, 96 Cal. 310, 314, 31 P. 106; *Johnson v. Phenix Ins. Co.*, 152 Cal. 196, 200, 92 P. 182. This is the law as well in criminal cases. *People v. McCarty*, 48 Cal. 557; *People v. Morley*, 8 Cal.App. 372, 376, 97 P. 84. In the case of *Johnson v. Visser*, supra, 96 Cal. 310, at page 314, 31 P. 106, 107, the court says: "If the defendant was dissatisfied with the form of the verdict, he should have asked, at the time it was announced, that it be made formal and certain; otherwise it was the duty of the court to construe it so as to give it the effect intended by the jury, if the intended effect could be ascertained from its language, considered in connection with the pleadings and evidence; provided, however, that the intended effect was not unlawful and not irrelevant to the pleadings (*Truebody v. Jacobson*, 2 Cal. [269])

270; *People v. McCarty*, 48 Cal. 557; *People v. Perdue*, 49 Cal. 425; and, as a general rule, a party will not be heard to object to a verdict for the first time on appeal from the judgment, if it is susceptible of a construction which may have a lawful and relevant effect (*Douglass v. Kraft*, 9 Cal. 562); and this case does not appear to fall within any exception to the rule."

[2] From a layman's viewpoint, it is undoubtedly true, as appellant urges, that the verdict indicates that the jury intended to limit appellant's liability to \$1,000. Doubtless it is also susceptible to the interpretation that the jury intended a total verdict of \$3,000; \$2,000 against Christensen and \$1,000 against the company. The verdict, however, must be read in the light of settled principles of law. Appellant, itself, in its brief, quoting from 16 California Jurisprudence, 1098, contends:

"There is no proposition of law more firmly established than that known as the doctrine of respondeat superior, which declares that the master is responsible to third persons for the damage caused by the wrongful acts or omissions of its servants in the course of their employment." It is also thoroughly established that in an action against two joint tort-feasors, there can be but one judgment against both, and that the liability of such tort-feasors cannot be segregated, irrespective of their respective degrees of guilt. The case of *Washington Gaslight Co. v. Lansden*, 172 U.S. 534, at page 550, 19 S.Ct. 296, 303, 43 L.Ed. 543, cited by appellant, holds, the court speaking:

"Those of the wrongdoers who are sued together and found guilty in an action of tort are liable for the whole injury to plaintiff, without examining the question of the different degrees of culpability; and, if but one is sued, he is liable for all the damages inflicted by the most culpable. *Cooley*, Torts, 133, 135, 136; *Currier v. Swan*, 63 Me. 323; *Berry v. Fletcher*, 1 Dill. 67, Fed.Cas. No. 1,357; *Pardridge v. Brady*, 7 Ill.App. 639; *McCarthy v. De Armit*, 99 Pa. 63-72."

When the verdict is considered in the light of such well-settled principles, it being conceded that Christensen was acting

within the scope of his employment as he undoubtedly was, there can be no question that the measure of appellant's responsibility is coincident with that of Christensen.

Although plaintiff prayed for punitive damages, it is clear from the verdict that no punitive damages were assessed. If punitive damages had been assessed, appellant would then present a situation comparable to that treated in the case of *Washington Gaslight Co. v. Lansden*, supra, but the verdict by its specific language demonstrates that only compensatory damages were awarded. We therefore are not required to pass upon the hypothetical question suggested by appellant in that regard.

In the case of *Truebody v. Jacobson*, 2 Cal. 269, at page 284, the court says: "There is enough in the verdict as rendered to have enabled the Court to ascertain the intention of the jury, and it ought to have been supported. It was competent to the Court to instruct the jury to amend their verdict as to form, not affecting the substance, and in such manner as to be unexceptionable in law. That not having been done, the Court below ought to have conformed its judgment to the obvious intention of the jury. That could not have been mistaken." And at page 285 of 2 Cal. the same court says: "A wise and conservative policy has doubtless given occasion to the sound and excellent rule of law, by which appellate Courts have been guided in preferring to effectuate the ends of justice, where it has been practicable to do so by concluding the case, rather than to apply the strictest technicalities, and to send the parties back to the certainty of accumulated costs and injurious delays."

We are of the opinion that the action of the trial court in granting plaintiff's motion to enter judgment against both defendants for the sum of \$2,000 is supported by the language of the verdict, when considered together with the pleadings and evidence and when read in the light of settled principles of law.

The judgment is affirmed.

We concur: HOUSER, P. J.; YORK, J.

10 Cal.App.2d 634

MORRISON v. LANE.

Civ. 10603.

District Court of Appeal, Second District,
Division 2, California.

Dec. 16, 1935.

1. Physicians and surgeons ☞18(8)

Chiropractor's negligence in not taking due care to avoid injuring undiseased parts of patient's body may be proved without resorting to expert testimony.

2. Appeal and error ☞1010(1)

Finding of trial court sitting without jury, based on substantial evidence other than expert testimony that patient suffered injuries to undiseased portion of body due to chiropractor's negligence *held* binding on appellate court.

Appeal from Superior Court, Los Angeles County; Benjamin C. Jones, Judge.

Action by Margaret J. Morrison against C. B. Lane. Judgment for plaintiff, and defendant appeals.

Affirmed.

Edward A. Stuart, of Los Angeles, for appellant.

Armand H. Blum, of Los Angeles, for respondent.

McCOMB, Justice pro tem.

This is an appeal by defendant from a judgment in favor of plaintiff after a trial by the court without a jury.

Viewing the evidence most favorable to plaintiff (*Ah Gett v. Carr*, 3 Cal.App. 47, 48, 84 P. 458), the facts in the instant case are:

Defendant, a duly licensed chiropractor, was consulted by plaintiff relative to pains in her face solely. Defendant diagnosed the condition as *Tic douloureux*, inflammation of the fifth cranial nerve, which nerve originates in the brain and exits near a point where the lower jaw attaches to the skull. It is in no way connected with any portion of the vertebrae. October 13, 1934, defendant fractured plaintiff's twelfth rib, while adjusting her vertebrae in the region thereof.

The sole question necessary for us to determine on this appeal is:

Where a chiropractor has prescribed treatment for a specific ailment and injures an undiseased portion of his patient's body in no way related to the ailment, may the

court, in the absence of expert testimony, properly find that the chiropractor negligently injured his patient?

[1,2] Negligence of a chiropractor in failing to take due care to avoid injury to undiseased parts of his patient's body may be proven without resorting to expert testimony. *Brown v. Shortlidge*, 98 Cal.App. 352, 357, 277 P. 134; *Nicholas v. Jacobson*, 113 Cal.App. 382, 386, 298 P. 505. Hence in the instant case the finding of the trial court based on substantial evidence other than expert testimony that plaintiff suffered injuries to an undiseased portion of her body as a result of defendant's negligence is binding on this court.

The judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.



10 Cal.App.2d 519

STEINER v. DAVIS (two cases).

Civ. 1535, 1604.

District Court of Appeal, Fourth District,
California.

Dec. 6, 1935.

Rehearing Denied Dec. 21, 1935.

Hearing Denied by Supreme Court
Feb. 3, 1936.

Pleading ☞218(3)

Judgment for defendant purporting to dispose of entire case *held* improperly entered after plaintiff failed to amend petition upon sustaining of demurrer to first three causes of action stated therein, where demurrer had been previously sustained as to such causes of action, and answer had been filed in other causes of action stated in petition as to which issues had not been disposed of, since law contemplates but one judgment.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warner, Judge.

Two actions by Luna Kies Steiner, as executrix of the Estate of Sarah A. Kies, deceased, and Luna K. Steiner against Byron D. Davis, also known as B. D. Davis. Judgments for defendant, and plaintiff appeals.

Reversed.

E. W. Miller, of Los Angeles, and Lester G. King, of San Bernardino, for appellants.

Hert & Withington, of San Bernardino, for respondent.

BARNARD, Presiding Justice.

The appeals in these two actions were ordered consolidated and have been submitted upon one set of briefs. The legal principles involved in the two actions are identical and, for convenience, the facts in but one of the cases will be referred to.

In this case a second amended and supplemental complaint containing nine separate causes of action was filed on June 16, 1931. A demurrer was filed on June 22, 1931, alleging as to each of the nine causes of action that the same did not state facts sufficient to constitute a cause of action. On July 6, 1931, this demurrer was sustained as to the first three causes of action and overruled as to the other six. On July 23, 1931, an answer was filed to each cause of action from the fourth to the ninth, inclusive. On May 16, 1934, a purported demurrer to the first three causes of action was filed together with a stipulation that it be forthwith submitted. On the same day an order was entered sustaining this demurrer and giving the plaintiff 15 days in which to amend. On June 19, 1934, the judgment which is here appealed from was entered reciting that this demurrer had been filed with a stipulation that it be submitted forthwith, that the court had sustained the same on May 16, 1934, giving the plaintiff 15 days within which to amend, and that no amendment had been filed. It was then ordered, adjudged, and decreed that the plaintiff take nothing by her cause of action, and that the defendant recover his costs.

It would appear that there was no basis for the demurrer filed on May 16, 1934, since the court had previously sustained a demurrer to the first three causes of action which were alone mentioned and involved in the last demurrer. But an answer had been filed in the other six causes of action, the issues in which remained undisposed of at the time the purported final judgment was entered. The law contemplates but one final judgment in a cause, and the court erred in entering a judgment before the final disposition of the entire cause. *De Vally v. Kendall de*

Vally O. Co., Ltd., 220 Cal. 742, 32 P.(2d) 638. The judgment entered, purporting to dispose of the entire case, was both premature and erroneous.

For the reasons given, each of the judgments appealed from is reversed.

We concur: MARKS, J.; JENNINGS, J.



10 Cal.App.2d 509

OGILVIE et al. v. TURNER et al.

Civ. 1573.

District Court of Appeal, Fourth District,
California.

Dec. 5, 1935.

Judgment ¶720

Judgment in action for deficiency after trust deed foreclosure sale that trust deed had been obtained by fraud but that by failure to file action for rescission within reasonable time mortgagors had affirmed contract held res judicata as to issue of rescission, and to preclude cancellation of deed of trust in subsequent suit to quiet title in mortgagors.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Suit by James R. Ogilvie and another, husband and wife, against Scott Turner and another, husband and wife. Judgment for plaintiffs, and defendants appeal.

Reversed.

R. J. Welch, Jr., of Riverside, and Fred A. Wilson, of San Bernardino, for appellants.

James A. Hall, of Hemet, for respondents.

BARNARD, Presiding Judge.

On May 1, 1929, the defendants sold certain real property in Riverside county to the plaintiffs, taking a note secured by a trust deed on the property as a part of the purchase price. On September 30, 1932, the property was sold to the defendants under the deed of trust, and on October 5, 1932, these defendants brought an action to recover judgment for a deficiency. These plaintiffs filed an answer and cross-

complaint alleging certain fraudulent representations in connection with a well upon the premises and asking for a rescission of the sale and exchange agreement with the return of the property and money they had put into the deal or, if that could not be done, for a judgment in an amount equal to the value of the consideration paid by them. Upon the trial of that action the court found that notice of the trustees' sale had not been properly given and rendered judgment against these defendants on their complaint. The court also found that the misrepresentations had been made and that these plaintiffs were deceived thereby and further found that "having failed to file action for rescission or damages within a reasonable time after they discovered that fraud and deceit had been practiced upon them, they affirmed the contract, and are not entitled to a rescission or damages." As a conclusion of law, the court found that these plaintiffs "are not entitled to relief, for the reason that they failed to bring action on the grounds of fraud or deceit within a reasonable time." The judgment entered further provided that these plaintiffs take nothing on their cross-complaint. This judgment was not appealed from and has become final.

On October 2, 1933, another sale was held under the trust deed and the property was again brought in by these defendants, leaving another deficiency. On November 27, 1933, the plaintiffs brought this action seeking to quiet their title to the real property in question, to cancel the second trustees' deed, and to cancel the original note and deed of trust, alleging the same misrepresentations set forth in their cross-complaint in the first action. Among other things, these defendants set up the judgment in the first action as a bar to the plaintiffs' right to recover in this action. While the court found that the material and necessary issues tried in the first action were the same as those set forth in plaintiffs' complaint herein and that the parties to the two actions were identical, it was further found that the judgment in the first action was not a bar to the relief prayed for in this action and that the plaintiffs are not barred from the relief demanded in this action by any delay, lapse of time, or laches. From a judgment quieting title to the prop-

erty in these plaintiffs and ordering the second trustees' deed, the note and the deed of trust canceled, the defendants have appealed.

The respondents' position seems to be that the trust deed is entirely null and void, since it was found in the other action that it was obtained by fraud, that they are entitled to have the trust deed canceled, and that no further duty rested upon them. They overlook the fact that the trust deed was only a part of the transaction and that it was also found that because of this failure to act within a reasonable time they were not entitled to a rescission. The former judgment is conclusive at least in so far as the right to a rescission is concerned. Regardless of any other questions and if they had any further rights at all, the respondents must be taken to have affirmed the contract and to have been then limited to an action for damages, in which action the amount they still owed must be considered and offset against any damages they may have sustained. *Hines v. Brode*, 168 Cal. 507, 143 P. 729.

The respondents are in the inconsistent position of claiming the original contract is void, while at the same time they are relying on that contract and claiming the right to hold what they received under it. Having been refused relief in an action in equity, they have filed another equitable action to quiet title and to cancel certain instruments, with the result that after a rescission had been denied them and without completing their contract, they get the place for about \$7,100 less than they agreed to pay, without at any time alleging or proving the amount of their damage, without having any such amount found by any court, and without offsetting the balance they owed against any damages they may have suffered.

We are unable to see any theory under which this judgment may be affirmed. Even though some of the equities appear to have been in favor of the respondents, it was incumbent upon them to take the proper steps and to protect their interests by appropriate pleading and proof.

The judgment appealed from is reversed.

We concur: MARKS, J.; JENNINGS, J.

11 Cal.App.2d 21

In re HUNT'S ESTATE AND GUARDIANSHIP.

HALL et al. v. HUNT.
Civ. 10545.

District Court of Appeal, Second District,
Division 1, California.
Dec. 23, 1935.

Insane persons Ⓒ27

Order denying petition for appointment of guardian for person alleged to be incompetent could not be disturbed on appeal, where there was ample evidence to warrant decision either for or against guardianship (Probate Code, §§ 1460-1462).

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Proceedings by Isaac S. Hall and another for the appointment of a guardian of the person and estate of Laura S. Hunt, as an incompetent person, contested by Laura S. Hunt. From an order denying the petition, petitioners appeal.

Affirmed.

Edwin J. Miller and Ralph W. Miller, both of Los Angeles, for appellants.

Latham, Watkins & Bouchard, Dana Latham, and George Bouchard, all of Los Angeles, for respondent.

YORK, Justice.

This is an appeal from an order of the superior court denying appellants' petition under sections 1460 to 1462, inclusive, of the Probate Code, for the appointment of a guardian of the person and estate of respondent, Laura S. Hunt.

The question involved is: "Does the finding of fact by the trial court with respect to the competency of respondent totally lack the support of substantial evidence in the record so that its judgment must be reversed?"

The supplement attached to the "Brief and Argument for Appellants" does not show all of the material evidence introduced, and this has made it necessary for the writer of this opinion to make an examination of the entire record, which is a voluminous one.

The record discloses a very painstaking examination of the respondent by the trial judge himself, and, as stated by him at that

time, the record discloses that there were many transactions entered into by the respondent which did not show good judgment on her part. The record discloses ample evidence upon which the court could have made its order either granting or denying the petition herein involved, and that being so, the order of the trial court denying the petition for appointment of a guardian cannot be disturbed by an appellate court.

The order appealed from is affirmed.

I concur: DORAN, J.

I concur in the judgment: HOUSER, P. J.



10 Cal.App.2d 649

FREDERICK et al. v. LOUIS et al.
Civ. 9993.

District Court of Appeal, First District,
Division 2, California.
Dec. 17, 1935.

Rehearing Denied Jan. 16, 1936.

Hearing Denied by Supreme Court
Feb. 20, 1936.

1. Vendor and purchaser Ⓒ231(14)

Recorded instrument granting permit to dig through property of licensor and lay pipes for sewer connection, which was unacknowledged by licensor or licensee and contained no description of premises sought to be changed held insufficient notice of rights of licensees to grantees of licensor.

2. Nuisance Ⓒ25(1)

Permit to grantees of rear part of grantor's lot to dig through front part of lot to lay pipes for sewer connection for buildings to be erected on grantee's part of lot held insufficient to confer right on grantees to maintain nuisance on front part of lot by connection of sewer with sewer on front part of lot.

3. Nuisance Ⓒ15

Maintenance of sewer connection on property for five years after plaintiffs' knowledge thereof before commencement of suit to quiet title held insufficient to give prescriptive right to maintain nuisance on property by connection of sewers.

4. Easements Ⓒ18(2)

Where property owner sold rear part of lot and granted perpetual easement to grantees to maintain sewer pipes across front of

lot which sewer was necessary to proper use of granted premises, grantees held entitled to way of necessity across front of lot for connection of sewer pipes with main sewer.

Appeal from Superior Court, Los Angeles County; Georgia P. Bullock, Judge.

Suit by R. P. Frederick and Bertha E. Frederick against Fanny B. Louis, sometimes known as Fannie B. Louis and sometimes known as Fanny B. Louie, and another, wherein Fannie B. Louis filed a cross-complaint. Judgment for cross-complainant, and plaintiffs appeal.

Reversed with directions.

James E. Neville, of Los Angeles, for appellants.

John F. Poole, of Los Angeles, for respondent.

NOURSE, Presiding Justice.

Plaintiffs sued to quiet title to a designated lot of land, to enjoin the defendants from using a portion of the lot in the maintenance of a sewer line, for damages for injury to their property, and for general relief. The defendants had judgment, and the plaintiffs appeal on a bill of exceptions.

Lot 120 of the Mansfield's Lincoln tract in the city of Los Angeles was owned by one Bales who, in December, 1924, conveyed to the defendants the north 65 feet of the lot, retaining the south 85 feet. In April, 1925, Bales gave the defendants a written permit "to dig through my lot on 5703 Lexington Ave. to lay the pipes for sewer connection or water or gas for buildings which is going to be erected on her lot bought from me North 65 feet Lot 120. * * *" Mrs. Louis accepted "the above right of way," and, about two years later, acknowledged her own signature and caused the paper to be recorded. The signature of the licensor was not acknowledged. In 1925 the defendants erected a large apartment house on the lot purchased by them and ran an iron pipe sewer across a portion of the south 85 feet, connecting it with a terra cotta sewer running from the Bales' home. In December, 1927, the plaintiffs purchased from Bales the south 85 feet after a search of title failed to disclose the adverse interest claimed by the defendants. In February, 1926, the plaintiffs moved into the premises and, in July of that year, the sewer was blocked, causing an overflow in plaintiffs' premises and consequent damage.

Repairs were made, but, in May, 1933, another overflow occurred and plaintiffs then protested to defendants that their maintenance of the sewer was without legal right and this action was commenced.

[1] A number of legal questions are raised and discussed by both parties which we will generally leave unanswered. That the document of April, 1925, was not notice to plaintiffs must be conceded as it was not acknowledged by the licensor, or grantee, and contained no description of the premises sought to be charged. Thus, when plaintiffs purchased their lot, there was nothing of record which would give them any notice of defendants' claim against that lot.

Direct and positive evidence was given that the sewer pipe was underground and invisible from any portion of plaintiffs' premises. Some testimony was given, incredible though it may be, that some portion of the pipe was above ground or exposed to view at a point where the necessary fall of the pipe would have required it to be at least 18 inches below the surface. But the witnesses giving this testimony were indefinite as to the times when they saw the pipe exposed and were unable to say that it was so exposed prior to the trouble arising in July, 1928. The trial court did not find on this issue, but found that plaintiffs had notice from December 5, 1927, the date of their purchase, by reason of the unacknowledged permit.

[2,3] The equities of the controversy are so patent that a reversal for a further trial of the issues should be avoided if possible. The defendants were given a permit or easement to lay sewer pipes across the portion of the lot later purchased by the plaintiffs. They did not at any time, by permit, grant, or prescription, acquire the right to maintain a nuisance on plaintiffs' premises by connecting their sewer with that of the latter. No such right can be inferred from the paper of April, 1925. It is not controverted that plaintiffs did not learn of this connection until the overflow occurred in July, 1928; hence a prescriptive right to maintain the connection did not arise before the commencement of this action.

[4] The trial court found that plaintiffs' predecessor had granted a perpetual easement to the defendants to maintain a sewer across this lot and that such sewer was necessary to properly use the apartment house on the rear of the lot. But there is no find-

ing and no evidence that it was necessary to connect this sewer with the sewer of the plaintiffs. There is some evidence that defendants' pipe could have been carried on to the main sewer at a cost of less than \$100. Since this is the extent of the right which defendants can claim, and since the propriety of a way of necessity for that purpose cannot be denied, the judgment should be modified to limit their interest accordingly. The findings of fact are sufficient to support such modified judgment and a retrial will not be necessary.

The judgment is reversed with directions to enter a modified judgment and conclusions of law in accord herewith, the parties to bear their own costs.

We concur: STURTEVANT, J.;
SPENCE, J.



10 Cal.App.2d 738

GARRISON v. BOOTH et al.

Civ. 1587.

District Court of Appeal, Fourth District,
California.

Dec. 19, 1935.

1. Appeal and error ⇨1010(1)

Where there is material and competent evidence in record supporting findings and judgment, judgment must be affirmed.

2. Negligence ⇨136(26)

Generally question of contributory negligence of plaintiff is for trier of fact.

3. Appeal and error ⇨842(4)

When a law exists, imposing regulation on automobile driver for protection of pedestrian at the scene of accident, question of whether pedestrian, whose knowledge of such law may be considered in determining question of contributory negligence, took due precaution for his own safety, is usually question of fact for trial judge and not one of law for appellate court.

4. Appeal and error ⇨1008(1)

In pedestrian's action for injuries sustained when struck by automobile, whether plaintiff should or could have stopped or otherwise avoided collision was a question of fact for trial judge (St. 1931, p. 2127, § 131½).

5. Automobiles ⇨244(30)

In pedestrian's action for injuries sustained when struck by automobile, evidence that owner's stepson, who was driving automobile at time of accident, had his mother's permission to drive automobile and had on other occasions driven automobile without objection of his stepfather, justified finding that at time of accident driver was using automobile with implied consent of owner.

6. Damages ⇨62(2)

Plaintiff must act in good faith and exercise ordinary care and diligence in treating his wounds.

7. Damages ⇨185(3)

Evidence that plaintiff received slight abrasion on leg in accident which did not respond to plaintiff's treatment, and that plaintiff immediately went to physician, who found wound infected, and that plaintiff thereafter continued under care of physician, supported award of damages for blood poisoning which followed accident.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by N. H. Garrison against L. W. Booth and others. From an adverse judgment, the defendants appeal.

Judgment affirmed.

Lasher B. Gallagher, of Los Angeles, for appellants.

E. E. Morris and H. C. Ellis, both of Los Angeles, for respondent.

MARKS, Justice.

This is an action for damages suffered by plaintiff, a pedestrian, in a collision with an automobile at the corner of Euclid avenue and Fourth street in the city of Ontario. Plaintiff had judgment, and defendants have appealed.

[1] Defendants present the following grounds for reversal of the judgment: (1) That the evidence shows plaintiff guilty of contributory negligence as a matter of law; (2) that there is no evidence showing that the automobile was being driven by Robert Woods with the express or implied permission of L. W. Booth, its owner; (3) that the evidence is insufficient to support an award of damages for blood poisoning suffered by plaintiff following the accident. It will only be necessary for us to consider the evidence supporting the findings and judgment for, if there is material and competent evidence in the record supporting

the findings and judgment we must disregard conflicts and affirm the judgment.

Euclid avenue runs north and south and Fourth street intersects it at right angles. Sidewalks are constructed along the west side of Euclid avenue and a marked pedestrian crossing lane across Fourth street connects the ends of these sidewalks north and south of that street.

Robert W. Woods is a minor. Frances E. Booth is his mother and L. W. Booth is his stepfather. The minor had a motor vehicle operator's license, the application for which had been signed by his mother.

On the afternoon of March 28, 1932, plaintiff and Juanita Myers, now his wife, were walking south on the sidewalk on the west side of Euclid avenue. When they reached the Fourth street curb they paused, looked to the east and west for approaching vehicles, and proceeded into the pedestrian crossing of Fourth street. When they were about twelve feet from the curb, the front of an automobile suddenly appeared before them. Plaintiff was caught, probably by the handle of the right front door, and pulled several feet west on Fourth street. The automobile came south on Euclid avenue and made a right turn onto Fourth street.

Section 131½ of the California Vehicle Act (St. 1923, p. 517, as added by St. 1931, p. 2127), in force at the time of the accident, provided in part as follows: "The driver of any vehicle shall yield the right of way to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at the end of a block, except at any point where a pedestrian tunnel or overhead crossing has been provided."

The traffic at the intersection in question was not controlled by signals or police officers and no pedestrian tunnel or overhead crossing had been provided.

[2, 3] The question of contributory negligence on the part of a plaintiff is usually one for the trier of fact. *White v. Davis*, 103 Cal.App. 531, 284 P. 1086. The existence or lack of contributory negligence must be determined from all the facts of the case, one of which may be knowledge of a law imposing a regulation upon an automobile driver for the protection of the pedestrian at the scene of the accident. When such a law exists, the question of whether a plaintiff took due precaution for his own safety is usually a question of

fact for the trial judge and not one of law for the appellate court. *Mann v. Scott*, 180 Cal. 550, 182 P. 281.

[4] Independent of the statute, the question of contributory negligence was one for the trial judge sitting without a jury. Plaintiff and his wife testified that, when the front of the automobile appeared before them, it was less than one pace away. It was making a right turn at about fifteen miles an hour, and the rear of the car was traveling on an arc nearer plaintiff than its front. At fifteen miles an hour it would have taken but a fraction of a second for the few feet of the car between its front and the handle of its front door to pass plaintiff. Whether plaintiff should or even could have stopped or otherwise avoided the collision was a question of fact for the trial judge. His decision upon this question is final and cannot be disturbed by us.

[5] Booth testified that he purchased the automobile in question with his separate funds; that his wife had as much right to use the car as he had; that on the day of the accident he drove the car to his house and left it at the curb in front of his residence. Mrs. Booth testified that the automobile was used in her husband's business and for the pleasure of the family. Robert had previously driven the automobile with his mother or stepfather in it and also alone. On the day of the accident, he asked his mother's permission to drive the car. She did not object and knew he was using it. There is no showing that Booth actually knew that Robert drove the car on the trip in question. Robert had driven the car on other occasions with permission from his mother. There is no showing that Booth ever objected to Robert's use of the automobile without his actual knowledge or express consent. Robert was a member of the Booth family for whose use the car was kept. He had driven it on prior occasions with the express or implied consent of Booth. Under these circumstances, the trial judge was justified in drawing the conclusion that at the time of the accident Robert was using the automobile with the implied consent of Booth.

Defendants rely on the cases of *Bradford v. Sargent*, 135 Cal.App. 324, 27 P. (2d) 93, and *Howland v. Doyle* (Cal.App.) 44 P.(2d) 453, 454, as supporting the contention that the evidence does not show an implied consent by Booth to the use

of the automobile by Robert. In the Bradford Case the son had been forbidden the use of the family car by both his parents. He had not driven it for some time. During their absence, and without their knowledge or consent, he took the car and drove it on the ride during which the accident happened. In the Howland Case the owner of a truck placed it in the possession of one Fifield for the purpose of demonstration in hopes of a sale. Fifield permitted one Doyle to drive it without the knowledge or consent of the owner. The accident happened while Doyle was driving the truck. With these facts in mind the instant case is easily distinguishable from the cited cases. Both cases recognize the true rule governing the question of implied consent to be as follows: "The existence of such permission cannot be left to speculation or conjecture nor be assumed, but must be affirmatively proved as an essential element of the cause of action. Such proof must consist of facts and circumstances from which can follow the inference that the owner either expressly gave permission or that his acts and conduct were such that permission might be implied." *Howland v. Doyle*, *supra*.

When we apply this rule to the facts of the instant case, we find that it supports the conclusion of the trial court that Booth gave his implied consent to Robert's use of the car in failing to object to such use on occasions preceding the accident and by silence tacitly approving the acts of Mrs. Booth in giving Robert permission to drive it.

The final contention of defendants that the evidence is insufficient to support an award of damages for blood poisoning following the accident is without merit. The evidence shows that plaintiff received a slight abrasion on his leg during the accident. He treated this wound with mercurochrome immediately after the accident. This treatment was repeated several times. Four days after the accident he felt sick and commenced to have fever. He immediately went to a physician, who found the wound infected. From that time plaintiff continued under the care of a physician.

[6, 7] The rule governing care of injuries by a plaintiff requires that he act in good faith and exercise ordinary care and diligence in treating his wounds. *Marshall v. Ransome Concrete Co.*, 33

Cal.App. 782, 166 P. 846; *Hamelin v. Foulkes*, 105 Cal.App. 458, 287 P. 526; *Allred v. Orth*, 206 Cal. 494, 274 P. 955; *Benjamin v. Noonan*, 207 Cal. 279, 277 P. 1045. The abrasion on plaintiff's leg was slight, and there was nothing about it to indicate the necessity for immediate treatment by a physician. The application of mercurochrome was a usual and proper home remedy, according to the evidence of plaintiff's physician. As soon as plaintiff realized the serious nature of his injury, he secured professional treatment. There is nothing to indicate that he acted in bad faith or failed to exercise ordinary care or diligence in the treatment of his injury.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.



10 Cal.App.2d 743

PEOPLE v. HARMON.

Cr. 2797.

District Court of Appeal, Second District,
Division 2, California.

Dec. 20, 1935.

Hearing Denied by Supreme Court

Jan. 16, 1936.

Criminal law ⇨ 369(12)

Evidence that defendant had made similar false pretenses held admissible in grand theft prosecution to show felonious intent, where existence of such intent was material and disputed.

Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

Patrick Harmon was convicted of grand theft, and he appeals.

Affirmed.

William J. Clark, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

CRAIL, Presiding Justice.

Defendant was convicted of grand theft and he appeals from the judgment and

from the order denying his motion for a new trial. Only two points are raised.

Defendant first contends that there is an insufficiency of evidence to sustain the judgment. We have read the briefs and the record, and viewing the evidence in the light most favorable to the people, we find that there is substantial evidence to sustain the implied findings of the court.

Defendant finally contends that the court erred in receiving evidence of other similar offenses and in denying his motion to strike such evidence. It is settled law that evidence of the commission of similar offenses by a defendant is admissible for the purpose of showing felonious intent whenever in any case the existence of such intent is material and disputed, and under this rule evidence of prior similar offenses involving the making of similar false pretenses is admissible. 8 Cal.Jur. p. 66, § 171, and cases cited. The evidence complained of came within the rule and no reversible error was committed by the trial court in this regard.

Judgment and order affirmed.

We concur: WOOD, J.; McCOMB, Justice pro tem.



10 Cal.App.2d 511

PEOPLE v. COOK.

Cr. 1460.

District Court of Appeal, Third District,
California.

Dec. 6, 1935.

1. Rape ☞51(1)

Evidence held sufficient to sustain conviction for rape (Pen.Code, § 261, subds. 1, 3, 4).

2. Rape ☞14

"Resistance" of female essential to offense of rape must be proportioned to the outrage, and amount of resistance depends on relative strength of parties, age and condition of female, uselessness of resistance, and degree of force manifested, and female need only resist until resistance becomes so useless as to warrant its cessation (Pen.Code § 261, subd. 3).

[Ed. Note.—For other definitions of "Resistance," see Words & Phrases.]

3. Rape ☞14

Resistance of female, necessary to constitute offense of rape, need not continue after physical penetration occurs (Pen. Code, § 261, subd. 3).

Appeal from Superior Court, Lake County; Benjamin C. Jones, Judge.

Alexander Cook was convicted of rape, and he appeals.

Affirmed.

J. A. Ratchford, of Healdsburg, for appellant.

U. S. Webb, Atty. Gen., and Neal Chalmers, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

The defendant was found guilty of an offense based upon subdivisions 1, 3, and 4 of section 261 of the Penal Code. From the judgment of the court following the conviction and the order denying a new trial, the defendant appeals, assigning as causes therefor, two grounds: First, that the evidence is insufficient to support the verdict of the jury; second, that the trial court committed error in refusing to properly instruct the jury after retirement.

[1] That the evidence introduced at the trial is sufficient to support the verdict is beyond question, if believed by the jury. The prosecuting witness testified as follows: "He passed the store; I asked him if he was going to stop for the nickels; he said he would get them. He went up the road and stopped and asked for a kiss, and I said, 'No,' and he said, 'We will take a ride,' and he continued on and he went over a dirt road; he got stuck there and I begged him to go home and he said, 'No,' he said, 'No,' and he pulled me over towards him and told me what he was going to do. I cried; I said, 'I can't do it.' He said if I didn't do it he would take me over to Sulphur Banks and drown me, and he said he could bury me alive in the sand and nobody would ever find me. I begged him not to, not to do anything to me, to let me go; and he said, 'I'll let you go but you will have to walk home.' And I said, 'I will walk home or do anything.' And I went and ran up the hill. He yelled for me to come back, and he said, 'If you don't come back I will kill you.' He ran

after me and caught me; he twisted my arm back of me, and I said, 'Please let me go;' and he said, 'I will break it.' He said, 'I taught jujistics four years in the Fire Department; I can break your arm. Do you want to see me do it?' I said, 'No, please don't do it.' And he pulled me down the hill and put me in the machine; and I cried. He said, 'Please don't cry,' and he put his hand on my mouth, and said, 'Keep still or I will kill you.' He took a bottle from the back of the machine and said, 'I will hit you over the head if you don't keep still.' I begged and begged to please let me go. He said, 'Keep still or I will knock you out.' He said, 'I have a monkey wrench in the back of the car; I will smash your brains out with that;' and he shoved me down and started making the attack. I begged him to stop, it hurt so, and he wouldn't stop; and I begged him to let me go, to try and get me home, and he said, 'All right.' Then he tried to get the car started; he couldn't get it started; he told me to go out and put rocks under the wheels, but 'don't try to get away'; and I put some rocks under the wheel. He told me to get in and drive it. I didn't know how to drive; he told me how to put my feet on, and I tried to start it, but it wouldn't start; and then he got me in the machine again and tried to attack me; he said the first time wasn't good enough. I said, 'Please don't do it; it hurts terribly and pains'; and he said, 'That is because you didn't do enough the first time;' and he got out of the machine and tried to break a limb off a tree, and he picked up a rock and said, 'I will throw this in your face if you don't.' And then he got on top of me and did it again, and then I said, 'Let me go home; please let me go home;' and he said, 'You are not going to get out of here until I get the machine started.'"

The defendant, upon the witness stand, failed to contradict any of the statements of the prosecuting witness, but according to the testimony of the sheriff, told a rather fanciful story of the occurrence. We here set forth the testimony of the sheriff, to-wit: "Taylor A. Day, the sheriff of Lake county, testified that after he arrested the defendant, the defendant told him that when he and the prosecuting witness started out from Clearlake Park in the automobile, they were accompanied by another man, whose name was unknown to defendant, but that he wore a white shirt; that

after they had traveled some little distance, he, the defendant, got out of the car, whereupon the man with a white shirt and the prosecutrix drove away; that defendant followed them, and that he finally came upon the car stopped near the road, and that as he approached the car he could see that the prosecutrix and the man with the white shirt were engaged in an act of sexual intercourse; that he, the defendant, scared this man, and that he jumped up and ran away and has never been seen since."

Some additional corroborative circumstances appear in the testimony, but we think the foregoing sufficient to justify the verdict of the jury.

Upon this appeal it is urged that the action of the prosecuting witness was not sufficient to comply with the law relative to the necessity of resistance on the part of a female under such circumstances.

[2, 3] In the case of *People v. Cline*, 117 Cal.App. 181, 3 P.(2d) 575, 576, this court had occasion to review the authorities on the subject of resistance. We can do no better than to refer to that case and the authorities there cited, which show that the circumstances involved in this case comply with the law relating to resistance as now understood and declared in this state. In the *Cline Case*, we quoted from 52 C.J., page 1019, the following language which is pertinent here: "The female need not resist as long as either strength endures or consciousness continues. Rather the resistance must be proportioned to the outrage; and the amount of resistance required necessarily depends upon the circumstances, such as the relative strength of the parties, the age and condition of the female, the uselessness of resistance, and the degree of force manifested, which rule is in some jurisdictions expressly adopted by statute. Stated in another way, the resistance of the female to support a charge of rape need only be such as to make nonconsent and actual resistance reasonably manifest. The female need resist only until physical penetration occurs, when the crime is complete, and her failure to resist after that is immaterial; and she need only resist until resistance becomes so useless as to warrant its cessation."

Other cases cited in that opinion support the rule set forth in the foregoing quotation, as shown by the following ex-

cerpts, to wit: "In the case of *Bulls v. State*, 33 Okl.Cr. 64, 241 P. 605, 606, we find the following: 'The old rule of "resistance to the uttermost" is obsolete, and is repudiated by the more modern authorities. The law does not require that the woman shall do more than her age, strength, the surrounding facts, and all attending circumstances make it reasonable for her to do in order to manifest her opposition. In reference to the degree of resistance required the jury should be instructed that it is necessary, not that the prosecutrix should have made the uttermost resistance, but that she has made such resistance as she was capable of making at the time.' In *People v. Norrington*, 55 Cal.App. 103, 202 P. 932, 935, the Court of Appeal for the Second District, in this case speaking through Justice Finlayson, quoted the following from the supreme court of Idaho, which we think pertinent to this case, and when fully considered in connection with the facts set forth, shows that the jury was fully warranted in finding both of the defendants guilty. It must be borne in mind all the while that the defendants were acting in concert in their criminal endeavors. The quotation is as follows: 'A * * * number of authorities are cited by counsel for appellant to the effect that the state must show in such cases that the female "showed the utmost reluctance and used the utmost resistance." *Devoy v. State*, 122 Wis. 148 [149], 99 N.W. 455. To our minds the trouble with a number of these authorities is that they reverse the order of the inquiry. They go about inquiring into the kind, character, and nature of the fight put up by the woman, rather than the nature of the assault and evident and manifest purpose and intent of the assailant. For the purpose of reaching the conclusions announced in some of these cases it is necessary to assume that, in the first place, a man has a right to approach a woman, lay hold on her person, take indecent liberties with her, and that, unless she "kicks, bites, scratches and screams" (*People v. Morrison*, 1 Parker, Cr.R. [N.Y.] 625) to the "utmost of her power and ability," she will be deemed to have consented and indeed to have invited the familiarity. Such is neither justice, law nor sound reason.'"

The objection that the court erred in its instructions to the jury scarcely warrants consideration. It appears that after

the jury had retired, they returned into court and asked the court if the pleadings were to be considered as part of the evidence. This request was not answered by the court, but the court did read to the jury certain instructions which the jury indicated they desired to have read. Absolutely no error is shown on the part of the court relating to this assignment. A review of the instructions given by the court show that they were carefully and fully instructed as to the law involved in this proceeding.

Finding no merit in the appeal, the order and judgment are affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



10 Cal.App.2d 706
JENSEN v. EUREKA CASUALTY CO. et al.
 Civ. 9489.

District Court of Appeal, Second District,
 Division 1, California.
 Dec. 18, 1935.

1. Insurance ⇨514½

Violation by insured of co-operation clause in liability policy, where insurer is substantially prejudiced thereby, is valid defense in action by person injured, provided insurer diligently and in good faith complies with terms of policy.

2. Insurance ⇨665(3)

Finding, in action by person injured against tort-feasor's liability insurer, that there was no violation by insured of co-operation clause of policy, held justified under evidence, notwithstanding inability to locate insured, who was a traveling salesman at time when deposition was desired six or eight months after action was filed.

Appeal from Superior Court, Los Angeles County; Bertin A. Weyl, Judge.

Action by Andy Jensen against the Eureka Casualty Company and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Lee A. Solomon, of Los Angeles, for appellants.

DORAN, Justice.

One G. I. Abroms was a policyholder of appellant the Eureka Casualty Company. In an action for damages, resulting from a collision in which Mr. Abroms was involved, a judgment was obtained against him. The plaintiff in that action then made demand of the Eureka Casualty Company for payment of the judgment, which demand was refused; the present action followed, in which plaintiff prevailed, and defendant company appeals from the judgment.

The policy issued by appellant contained the following clause: "(16) Report of Accident, Claim and Suits, and Co-operation of Assured: Upon the occurrence of any loss or accident covered under Section 11 hereof, and irrespective of whether any injury or damage is apparent at the time, the Assured shall give immediate written notice to the company at its office in Los Angeles, California, or to the Authorized Representative who issued this policy, with the fullest information obtainable at the time. If a claim is made on account of any such accident the Assured shall give like notice thereof immediately after such claim is made, with full particulars. If thereafter any suit is brought against the Assured to enforce such claim, the Assured shall immediately forward to the Company every summons or other process as soon as the same shall have been served: Whenever requested by the Company, the Assured shall aid in effecting settlement, securing information and evidence, the attendance of witnesses and in prosecuting appeals, and at all times render all possible co-operation and assistance (not pecuniary) * * *."

The opening statement of appellants' brief presents the question raised by this appeal as follows: "Practically none of the facts were disputed and the whole question presented is one of law upon the circumstances herein; that is, the court is here called upon to determine whether the policyholder herein complied with the conditions of the policy so as to permit the plaintiff to recover against the company and its successor on that policy or whether the failure of the assured constituted a breach of the conditions and prejudiced the rights of the company to such extent that there is no responsibility upon the part of the carrier."

Under the heading "argument," the same brief contains the following declaration: "The whole question that follows, there-

fore, is whether the defendant here, through its agents and attorney, expended all the efforts that a reasonable, careful and prudent person would have used to locate another and if having done so they are to be held liable for the disappearance of the person on whom they were obliged to rely. Also whether the trial court was, in the face of the uncontradicted evidence given for the defendant, justified in making its finding number V."

In finding No. V, the court found that it was not true that said G. I. Abroms failed, neglected, or refused to perform the said conditions or any of them upon his part to be performed.

Respondent filed no brief.

The accident above referred to occurred September 13, 1929. The action for damages against Mr. Abroms was filed a few days after the accident. The answer, verified by Mr. Abroms, was filed September 28, 1929. The trial was delayed at the request of plaintiff and with consent of defendant, until the summer of 1932; judgment being entered July 23, 1932. Upon this judgment the present action is based.

[1] That the violation of the co-operation clause of such an insurance policy by the assured, where the insurer is substantially prejudiced thereby, is a valid defense, is well settled. *Hynding v. Home Accident Ins. Co.*, 214 Cal. 743, 7 P.(2d) 999, 85 A.L.R. 13. This rule, however, must be interpreted to assume that the insurer, diligently and in good faith, has complied with the terms and conditions of the policy. *Pigg v. International Indemnity Co.*, 86 Cal.App. 671, 261 P. 486, 487.

[2] The evidence and record reveal that on the day of the accident Mr. Abroms appeared at appellant's office and made a report of the accident; that when he was served with the complaint and summons he delivered them to appellant; that by occupation he was a traveling salesman and gave as his address the Alexandria hotel; that he responded promptly to the notice, sent to that address, to appear and verify the answer; that the case thereafter was set for trial and later went off calendar; that six or eight months after the action was filed when plaintiff's attorney desired to take Mr. Abroms' deposition, it was learned that he had gone.

It should be noted that the evidence reveals further that when Mr. Abroms called to verify the answer, the witness Letts,

adjuster for the company, testified: "I asked him where we would be able to get in touch with him when it was necessary to go to trial in this case, and at that time he gave me an address on Fuller street, * * * but he said 'not to be sure about that address,' because he says, 'I am at the Alexandria more than I am at home, and you can always get me by just phoning the hotel.'"

The case at bar is somewhat analogous to the case of *Pigg v. International Indemnity Co.*, supra; there the court, in referring to a similar situation, declared: "We may not say that under this evidence the court was not justified in concluding that the assured was not sufficiently advised by those whom the insurance carrier had employed to make his defense; that his going to Japan was in ignorance of any necessity for his remaining here until the trial, or in ignorance of the date set for the trial, or due to failure of counsel to advise him that it was necessary to keep in touch with the attorneys."

Certainly, in the instant case, the evidence does not warrant the conclusion that Mr. Abroms willfully failed to lend further co-operation. The foregoing references to the evidence and the record represent the sum total of appellants' activities in the premises; except that diligent effort was made to locate the traveling salesman after it was discovered that he was gone. Can the appellant escape responsibility, in the light of the record, because Mr. Abroms failed to do more?

Appellants' brief closes with the following paragraph: "We do not think that the law contemplates that the insurance carrier shall be responsible where the defendant takes no interest whatever in a lawsuit, or that the insurance carrier should be penalized under such circumstances where they have been definitely prejudiced by the failure of the assured to appear, as in this case." Such argument finds scant support in the evidence; but the finding of the trial court, that it was not true that said G. I. Abroms failed, neglected, or refused to perform the said conditions or any of them upon his part to be performed, is amply sustained by the evidence and under the law will not be disturbed on appeal.

The judgment is affirmed.

We concur: HOUSER, P. J.; YORK, J.

PEOPLE v. ROSA et al.

Cr. 323.

District Court of Appeal, Fourth District,
California.

Dec. 17, 1935.

Hearing Denied by Supreme Court
Jan. 16, 1936.

1. Kidnapping ☞5

Rape ☞51(1)

In prosecution for kidnapping and rape, evidence held to sustain conviction, in view of admissions of defendants and their unreasonable and contradictory explanations, as against contention that prosecutrix acted voluntarily and that her testimony was incredible.

2. Criminal law ☞1144(8)

Where it was contended that only one of three judges in county took prospective jurors' names from certain list, appellate court must assume that official duty was regularly performed, in absence of evidence that no other judge of county participated in selecting jurors' names (Code Civ.Proc. § 204).

3. Criminal law ☞1170(2)

In prosecution for kidnapping and rape, error, if any, in excluding prior lewd statements of prosecutrix held harmless, where it did not appear that defendants had any knowledge of such statements, and where essence thereof had previously been shown by other testimony.

4. Criminal law ☞829(1)

Refusing instructions on matters repeatedly and fully covered by instructions given held not error.

5. Criminal law ☞1186(4)

In prosecution for kidnapping and rape, instructions that defendant's admission or statement to officers should not be considered against codefendant held properly refused, where instructions, as offered, were incorrect, and, though correct instruction on subject-matter should preferably have been given, any error in not giving such instruction was harmless, where instructions given limited effect of such statement to defendant alone, and where evidence showed that gist of statement had been repeated in presence of codefendant, who made prompt denial (Const. art. 6, § 4½).

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Frank Rosa and Faustino Saucedo were convicted of rape, and the last-named defendant was also convicted on a sec-

and count charging kidnapping, and they appeal.

Affirmed.

N. D. Meyer and Leland S. Kepler, both of Santa Ana, for appellants.

U. S. Webb, Atty. Gen. and R. S. McLaughlin, Deputy Atty. Gen., for the People.

BARNARD, Presiding Judge.

The defendants were jointly charged with the crime of rape and, in a second count of the information, with the crime of kidnapping. A jury convicted the defendant Saucedo on both counts and convicted the defendant Rosa of the crime of rape. Judgments were entered, and this appeal followed.

[1] The main contention is that the evidence is not sufficient to support the verdicts. While it is conceded, as it must be, that the story told by the prosecuting witness is sufficient, if believed, to support the verdicts, it is contended that her testimony is so inconsistent, unreasonable, and improbable as to make it unworthy of any belief and that it was not corroborated by any other evidence. A reading of the transcript discloses that this contention is without merit, although it will serve no useful purpose to refer to the testimony here except in a most general way.

It appears without dispute that the complaining witness left a restaurant in the town of Westminster, in Orange county, shortly after 2 o'clock a. m. on June 23, 1935; that soon thereafter, and about a block away, she was taken into an automobile which was also occupied by the appellants and two other men; that the appellant Rosa drove this car some miles into the country; that Rosa stopped the car at the side of the road; that at least four of the party went a few feet into a beet field which adjoined the road; that there at least a part of the acts upon which the charges in the first count were based took place; that an hour or so later the four men returned to their homes, leaving the complaining witness in the field; that about 4 o'clock a. m. she appeared at a nearby house, where she aroused the occupants and told them her story; that they took her to the sheriff's office, after which she was taken to a hospital; and that

the appellants were arrested a few hours later.

With respect to the kidnapping charge, which affects only the appellant Saucedo, it is contended that the evidence is not sufficient to show that the complaining witness did not accompany the men voluntarily. Immediately after his arrest, Saucedo made a statement to the officers which was taken down by a court reporter and which was introduced in evidence against that appellant alone. A portion of this statement strongly corroborates the story told by the complaining witness to the effect that she was taken into the automobile and to the spot in question against her will. Even the testimony of an independent witness, upon which the appellants particularly rely, is to the effect that the complaining witness stated that she wanted to be taken home and that the two men who took her to the car promised to take her home. An inference may fairly be drawn from even this evidence that she was induced to enter the car upon a false representation and thereafter taken in another direction. The evidence was ample to sustain the verdict against Saucedo on the kidnapping charge.

With respect to the charge of rape as against the appellant Saucedo, the story told by the complaining witness is fully corroborated and the essential facts are freely admitted in the statement made by Saucedo. Further corroboration of the complaining witness' testimony, to the effect that she did not voluntarily submit to what took place in the beet field, is to be found in the condition of the ground and beets at that point, which indicated that a struggle of no small proportion had taken place, in the bruises and abrasions which were found on the body of the prosecuting witness, in the condition of her clothing, a part of which was found scattered around the place in question, and in the contradictory, inconsistent, and unreasonable statements made at the trial by that appellant in his attempted explanation of what had occurred.

While the appellant Rosa maintained at all times, and testified on the stand, that he merely drove the car, and that when they stopped beside the road he remained in the car and did not go into the field, the officers testified that they found the tracks of four men between the place

where the car stopped and the place in the field where the offenses charged in the first count are alleged to have occurred. The shoes worn by this appellant when he was arrested fitted one set of these tracks, and certain distinguishing and unusual marks on the heel of his shoes corresponded exactly with similar marks appearing on one set of tracks on the ground. While the appellant Rosa at first stated that he had gone to bed about 11 o'clock that night and that he had never seen the complaining witness, he later admitted and testified that he was present, and that he drove the car which was used.

It cannot be held that this story told by the prosecuting witness was so unreasonable or improbable as to be unworthy of belief, especially in view of the unreasonable and contradictory explanations made by the appellants, and she is not without considerable corroboration in the record. The evidence not only supports the verdicts, but we find difficulty in seeing how a jury could reasonably have found that the complaining witness either voluntarily accompanied the four men to the place in question or voluntarily submitted to what there occurred.

[2] The appellants contend that the jury panel was not selected in substantial compliance with the provisions of section 204 of the Code of Civil Procedure. A challenge to the panel had been interposed and was not sustained by the court. The contention is that one of the three judges in Orange county took the names of prospective jurors from a certain list, that in doing so he was not making a selection, and that neither of the other judges had anything to do with the matter, and therefore that a majority of the judges did not select the prospective jurors. Some evidence was taken in support of the challenge, but the appellants failed to introduce any evidence to show that no other judge of this county took any part in the selection of the names of prospective jurors, and, in the absence of any evidence to the contrary, we must assume that this official duty was regularly performed.

[3] It is next contended that the court erred in not permitting certain witnesses to testify as to statements made by the prosecuting witness. It is claimed that while in the restaurant in Westminster

she made certain lewd statements and accompanied the same with lewd actions, and that this constituted an invitation to the appellants. The court admitted testimony as to her actions, but sustained objections to questions calling for certain of the statements. Thereupon an offer of proof was made by the appellants as to what statements it was desired to have admitted in evidence. The appellants had at all times, and on the witness stand, denied that they were in the restaurant at all, and the offer of proof contains nothing to the effect that they had heard such statements or that they knew anything about their having been made. A further consideration is that the main statements referred to in the offer, and the essence of all of them, had previously been admitted without objection in the testimony of other witnesses. Anything else contained in the offer would have been merely cumulative. If it may be assumed that all offered statements should have been admitted, no reversible error appears.

[4, 5] The last point raised is that the court erred in refusing to give six instructions requested by the appellants. As to four of these the objection is entirely without merit, as the court, in several other instructions, repeatedly and fully covered the same matters. The other two rejected instructions were directed to the point that the admission or declaration made by the appellant Saucedo was not to be taken as an admission on the part of the appellant Rosa or to be considered against him. It may first be observed that the two instructions as offered by the appellants did not contain a correct statement of the law and, as offered, were properly refused. The statement made by the appellant Saucedo to the officers was admitted only as against him. It was in evidence that after this statement was made the appellant Rosa was brought into the presence of Saucedo, whereupon Saucedo repeated the gist of his statement, and the appellant Rosa immediately denied the same, except as to the fact that he had driven the car, and immediately stated that he remained in the car while the others went into the field. In three other instructions which were given the court referred to the statement made by Saucedo, and, in giving the law in connection therewith, left it to the jury as to

whether this purported admission on his part was voluntarily given, and limited its effect, if any, to the appellant Saucedo. While we think it would have been better to have given a correct instruction along the line suggested by these requested instructions, there was no error in failing to give the instructions as asked for, and any possible error in this respect could not be held reversible under the circumstances of this case, especially in view of section 4½ of article 6 of the Constitution.

The judgments appealed from are affirmed.

We concur: MARKS, J.; JENNINGS, J.



10 Cal.App.2d 407

McCANDLESS v. CITY OF LOS ANGELES.

Civ. 10241.

District Court of Appeal, Second District,
Division 2, California.

Nov. 27, 1935.

Hearing Denied by Supreme Court
Jan. 23, 1936.

1. Eminent domain ⇨106

Property of abutting owner in street is right of access and light and air, for infringement of which by acts of municipality for benefit of public, owner is entitled to compensation as "damage" to property within constitutional provision against taking or damaging of private property for public use without just compensation (Const. art. 1, § 14).

[Ed. Note.—For other definitions of "Damage; Damages," see Words & Phrases.]

2. Eminent domain ⇨307(3)

In abutting owner's action against city for damage to realty by construction of subway in street, instruction that municipality's right to regulate carries with it right to control and limit use of private property amounting to destruction, and that property owner is not entitled to damage to property arising from legitimate exercise of police power, held properly refused as contrary to law and irrelevant to facts (Const. art. 1, § 14).

3. Trial ⇨194(9)

In abutting owner's action against city for damage to realty by construction of subway in street, instruction that construction of

tunnel by city was for public use within constitutional provision against taking or damaging of private property for public use without just compensation therefor held not improper as telling jury that plaintiff's property had been damaged within constitutional provision (Const. art. 1, § 14).

4. Eminent domain ⇨277

Filing with city clerk of tort claim for damage to property of abutting owner by construction of subway in street, for incurring of which no previous authority had been specially granted, held filing of claim with subordinate "board, officer or employee" as required by city charter, for purposes of subsequent litigation, as against contention that claim was required to be filed with board of public works (St. 1925, pp. 1137, 1141, §§ 360, 361, 363, 376; Const. art. 1, § 14).

[Ed. Note.—For other definitions of "Board," "Employee" and "Officer," see Words & Phrases.]

5. Appeal and error ⇨1096(3)

In abutting owner's action against city for damage to realty by construction of subway in street, contention that presentation of claim for damages to board of public works was prerequisite to cause of action held not available on second appeal where not advanced in trial court or on first appeal, and Supreme Court on first appeal decided that complaint stated cause of action.

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action by Elizabeth McCandless against the City of Los Angeles. Judgment for plaintiff, and defendant appeals.

Affirmed.

Prior opinion, 47 P.(2d) 1103.

Hearing denied by Supreme Court; THOMPSON, J., dissenting.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Thatcher J. Kemp, Deputy City Atty., all of Los Angeles, for appellant.

Wendell W. McCanles, of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is an appeal from a judgment entered on a verdict in favor of the plaintiff in an action for damages to real property. The defendant city, through its city council at a regular meeting, passed a resolution adopting the report of its tunnels, bridges, and viaducts committee and instructed its board of public works "to prepare plans, consider and enter into a con-

tract" for the construction of an underground subway in the street in front of the plaintiff's property. This order was executed by its board of public works, by advertising for and receiving bids for such construction, awarding the contract, entering into the contract and accepting the work at its completion. The construction resulted in an obstruction in the parkway in front of plaintiff's property consisting of an open cut and stairway approximately 20 feet in length, paralleling plaintiff's front property line and about 7 feet distant therefrom, around which iron railings were constructed above the surface of the sidewalk. The stairway and railings were built opposite the center portion of the plaintiff's property.

[1] This is not the first trial nor the first appeal of the case, but the second. In the first trial a judgment was entered in favor of the defendant on the theory that the complaint did not state a cause of action. On appeal to the Supreme Court the decision of the lower court was reversed and the case remanded for further proceedings (*McCandless v. City of Los Angeles*, 214 Cal. 67, 4 P.(2d) 139, 140), and the opinion therein became the law of the case. In that opinion Mr. Justice John W. Shenk, who is especially learned in law affecting municipalities, speaking for the court, said:

"Section 8 of article 1 of the Constitution of 1849 provided that private property should not be taken for public use without just compensation. Section 14 of article 1 of the Constitution of 1879 enlarged this protection to the property owner by providing that private property shall not be taken or damaged for public use without just compensation. This enlargement of the constitutional provision first came before this court for consideration in *Rear-don v. San Francisco*, 66 Cal. 492, 6 P. 317, 56 Am.Rep. 109, wherein the term 'damaged' was held to assure a right to compensation in addition to that theretofore obtaining; that is, 'a guaranty against damage where none previously existed.' * * *

"In *Brown v. Board of Supervisors*, 124 Cal. 274, at page 280, 57 P. 82, 83, the court said: 'The property which an abutting owner has in the street in front of his land is the right of access and of light and air, and for an infringement of these rights he is entitled to compensation * * * and any infringement thereof

gives him a right of action. * * * Any act of the municipality by which that easement is destroyed or substantially impaired for the benefit of the public is a damage to the lot itself, within the meaning of the constitutional provision, for which he is entitled to compensation.'

"In the case at bar it cannot be questioned that the plaintiff, as an abutting property owner on Sunset boulevard, possesses not only the right to the use of the street in common with all other members of the public, but also a private right or easement for the purposes of ingress and egress to and from her lot, which right may not be taken away or destroyed or substantially impaired or interfered with for public purposes without just compensation therefor."

[2] It is the first and fundamental contention of the defendant that the trial court erred in refusing to give the following instruction: "You are instructed that though it is true that the power of a municipality to regulate is not the power to destroy in its absolute sense, it is nevertheless true that the right to regulate frequently and as a necessary sequence carries with it the right so to control and limit the use or enjoyment of private property as to amount to its destruction, and in such cases private interests must yield to the public advantage, and, accordingly, where the police power of the municipality is legitimately exercised, uncompensated submission is exacted of the property owner, if his property be damaged." It is obvious from what has heretofore been quoted from the language of the Supreme Court in the first appeal of this case that said instruction is not in line with the law of the case, and also it is obvious that the instruction has no relevancy to the facts which confront us.

[3] Appellant complains also of other instructions, some of which the court gave and some of which the court refused to give when requested so to do by the defendant. But its complaints in this regard, except as to one instruction, are built upon the same contention and are without merit.

This excepted instruction reads as follows: "The Court further instructs you that the Constitution of the state of California provides: 'that private property shall not be taken or damaged for public use without just compensation having first been made to or paid into Court for the

owner, * * * and the Court further instructs you that the construction of the tunnel in question by the City of Los Angeles is for public use within the meaning of the language of the Constitution above stated." The defendant contends that this instruction told the jury that the plaintiff's property had been damaged within the meaning of said constitutional provision. But, obviously there is no merit in this contention.

[4] The defendant's final contention is that a prerequisite to stating and also to sustaining a cause of action against the defendant under the facts of this case is an allegation and evidence to prove it, that a claim for damages has been presented to the board of public works of the defendant city. Sections 360 to 367, article 28, of the Charter of Los Angeles (Stats. 1925, pp. 1137, 1138), in so far as, if at all, they apply to this case, provide in effect that no payment shall be made out of the funds of the city unless the demand which is paid be duly audited (section 360); the term audited shall be understood to mean that there has been presented to or secured by the controller adequate evidence that the demand has been approved by every board, officer, or employee, required by the charter to approve the same (section 361); and every claim shall be first presented to and approved by the board, officer, or employee authorized by this charter to incur the expenditure or liability represented thereby (section 363); and no suit shall be brought on any claim for money or damages until such demand has been made (section 376). Appellant's contention in this regard has been so often and so repeatedly decided otherwise that the question is no longer an open one with us. *Musto-Keenan Co. v. City of Los Angeles*, 139 Cal.App. 506, 34 P.(2d) 506, 510; *Haigh v. City of Los Angeles*, 139 Cal.App. 595, 34 P.(2d) 779; *Robertson v. City of Los Angeles* (Cal. App.) 44 P.(2d) 461, 463; *Rogers v. City of Los Angeles* (Cal.App.) 44 P.(2d) 465; *Skinner v. City of Los Angeles* (Cal.App.) 44 P.(2d) 467; *Douglass v. City of Los Angeles* (Cal.App.) 44 P.(2d) 463. In the two cases last above cited hearings in the Supreme Court have been granted which are still pending. But regardless of the final outcome of those cases, the decision in this case should go for the plaintiff because of certain reasons hereinafter stated.

The statement of Mr. Presiding Justice Albert Lee Stephens in his concurring opinion in the case of *Robertson v. City of Los*

Angeles, supra, is significant: "It may be seen by referring to several other cases this day filed that the city itself is not strictly consistent in its construction of the ambiguous charter provision referring to notice before suit may be filed against the city." Where a somewhat similar claim for damages was filed with the board of public works, the defendant contended that the claim should have been filed with the city council. *Douglass v. City of Los Angeles*, supra. In the case of *Rogers v. City of Los Angeles*, supra, the city contended the claim should have been filed with its police surgeon.

In the case of *Musto-Keenan Co. v. City of Los Angeles*, supra, the court well said: "This court may take judicial knowledge of the area of the city of Los Angeles and the great diversity of proprietary and governmental interests with which it is concerned, and it would be a great hardship and inconvenience to demand that a citizen at his peril select from the great number of boards and commissions authorized by the charter the proper subordinate with whom to file his claim."

It is obvious that where, as in this case, a claim sounding in tort and not on contract and where no previous authority for incurring the liability has been expressly granted, has been filed with the city clerk, who is also the clerk of the city council, and such claim has been rejected after reference thereof to the city attorney for his opinion, no subordinate of the city would have either the courage or the authority to thereafter approve it. The presentation of such claim thereafter to a subordinate would be futile. The provisions of the city charter upon which the defendant relies were not intended as a trap in which to ensnare unwary citizens for the purpose of depriving them of their lawful claims. The office of the city clerk should be a clearing house for the filing of all such claims. Such claims, when filed, may easily be distributed and should be distributed to the subordinate which the city council may think is the proper one and whose approval the city council may desire; and the filing of such a claim with the city clerk is, for the purposes of subsequent litigation, the filing of the claim with such subordinate within the meaning of said charter provisions.

[5] It should be also said that this contention of the defendant was not urged at the first trial, nor on the first appeal, but was urged as a definite issue for the first

time on this appeal. The Supreme Court on the first appeal, in deciding whether or not the complaint stated a cause of action, said: "In addition to the foregoing, it was alleged in the amended complaint * * * that a demand for such compensation duly made to the city council was rejected. * * * We are satisfied that the complaint herein states a cause of action and that the extent of the alleged damages is a question of fact." In this connection it should also be noted that as late as the second trial the defendant formally stipulated that plaintiff's claim was filed in due time and form with the city council through the city clerk and was rejected. We find no merit in the appeal.

Judgment affirmed.

We concur: WOOD, J.; GOULD, Justice pro tem.



10 Cal.App.2d 543

GRIFFITHS et ux. v. CRAWFORD et al.
Civ. 10082.

District Court of Appeal, Second District,
Division 1, California.
Dec. 10, 1935.

Hearing Denied by Supreme Court
Feb. 6, 1936.

1. Automobiles ⇨226(2)

Pedestrian's violation of ordinance requiring pedestrians to cross street at intersections or on crosswalks would not bar recovery for injuries sustained by pedestrian when struck by automobile unless such violation contributed to the accident.

2. Appeal and error ⇨1008(1)

Whether pedestrian's violation of ordinance requiring pedestrians to cross street at intersection or on crosswalks proximately contributed to injuries when she was struck by defendants' automobile held for trial court in nonjury case (St. 1931, p. 2127, § 131½).

3. Damages ⇨185(1)

In pedestrian's action for injuries received when struck by defendants' automobile, evidence held sufficient to support implied finding that plaintiff's taste and smell were impaired by injuries received in accident.

4. Appeal and error ⇨1004(1)

Verdict awarding damages should not be set aside on appeal as excessive unless it

shocks sense of justice and raises presumption that it was result of passion, prejudice, or corruption.

5. Damages ⇨132(1)

\$5,000 held not excessive for substantial impairment of senses of taste and smell in addition to minor injuries, in absence of showing of passion or prejudice.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by Charles D. Griffiths and Edna Griffiths, husband and wife, against Paul R. Crawford and another. Judgment for plaintiffs, and defendants appeal.

Affirmed.

C. Ransom Samuelson, of Long Beach, for appellants.

Swaffield & Swaffield, Kenneth Sperry, and Joseph E. Madden, all of Long Beach, for respondents.

ROTH, Justice pro tem.

Edna Griffiths (who will be referred to herein as respondent) was struck by an automobile operated by appellant Crawford, an employee of appellant Melone Company, a corporation, as she was crossing Broadway from the north to the south between Locust street and Tribune court, all public streets in the city of Long Beach, at about 5 o'clock in the afternoon of September 2, 1933. In an action brought for personal injuries, the trial was commenced before a jury. The jury was thereafter, upon stipulation of counsel, dismissed, and the trial was finished by the court alone, which gave judgment to respondent in the sum of \$5,000, and to her husband, respondent Charles D. Griffiths, who was joined as plaintiff, in the sum of \$178.55, against both appellants.

[1,2] The judgment is attacked on two grounds: First, that the \$5,000 awarded to respondent is excessive; and, second, that the entire judgment is void because the evidence shows contributory negligence as a matter of law on the part of respondent. The record shows without dispute that respondent crossed Broadway between the two streets, and at the time mentioned it is admitted that there was no crosswalk at the point selected by respondent, and that her action in crossing at the place which she selected was in violation of a city ordinance of the city of Long Beach,

requiring pedestrians to cross at street intersections or at crosswalks provided for that purpose. Respondent admits the ordinance, but calls attention to the fact that section 131½ of the California Vehicle Act (St. 1923, p. 517, as added by St. 1931, p. 2127) does not make a crossing under such circumstances negligence per se, but merely requires a pedestrian who does cross under such circumstances to yield the right of way to vehicles using the street. Respondent's point in this regard is that even if such action on her part was negligent, it does not necessarily follow that such negligence contributed to the accident and the consequent injuries. This is, of course, the law. *Skaggs v. Wiley*, 108 Cal.App. 429, 433, 292 P. 132; *Crawford v. Southern Pacific Co.* (Cal.Sup.) 714, 45 P.(2d) 183; *Varner v. Hattenhaber* (Cal.App.) 42 P.(2d) 674; *Lorry v. Englander Drayage & Warehouse Co.*, 108 Cal.App. 116, 291 P. 467. The evidence on the subject of contributory negligence is, as might be anticipated, conflicting. Respondent's corroborated testimony shows that before she stepped off the north curb of Broadway, she was looking to observe the condition of the traffic and saw no traffic moving from east to west. She then stepped off between two parked automobiles, walking to the south as she cleared the automobiles, and before proceeding further to the south, she again looked to the traffic, particularly to the east, and seeing no traffic moving on the north side of Broadway from Locust to Tribune court, that is, from east to west, she continued at an ordinary pace to the south, paying particular attention to the traffic from the east. Her testimony further establishes that at no time did she see a car approaching from the east, and that just as she was about to reach an imaginary center line that separates the north half from the south half of Broadway, she looked to the west and observed no traffic. She then testified that just as she was about to cross to the south half of Broadway, she was struck by the automobile of appellants coming from the east. The finding of these facts in respondent's favor is sufficient to establish her freedom from contributory negligence. The language of the court in *Kienlen v. Holt*, 106 Cal.App. 135, 288 P. 866, is appropriate to and decisive of the facts in the case at bar. In

the *Kienlen* Case the court says, 106 Cal. App. 135, at page 140, 288 P. 866, 868: "The trial court might have easily found that both parties were negligent in the operation of their automobiles. * * * However, the trial court found that the respondents were free from any negligence, and that appellant was guilty of the negligent operation of his automobile and solely responsible for the accident and the ensuing damage. If there is any evidence in the record, or any reasonable inference to be drawn from such evidence, to sustain the findings of the trial court they cannot be disturbed here. *Witherow v. United American Ins. Co.* [101 Cal.App. 334], 281 P. 668."

[3-5] The evidence on the issue of damages does not show any grave injuries except a substantial impairment of the senses of taste and smell in addition to the minor injuries of a demonstrative physical character. On the question whether respondent's taste and smell were impaired, the evidence was conflicting and entirely subjective. It is evident from the record that the trial court believed respondent on that issue. There is sufficient evidence in the record given by respondent and two experts, who testified in her behalf, to sustain the trial court's implied finding in that regard. Other than the amount of the verdict, there is no evidence of passion or prejudice. Since we must assume that the trial court came to the conclusion that respondent's senses of taste and smell were permanently impaired, it cannot be said that the amount alone indicates that the judgment is excessive or gravely disproportionate. It is settled that, "Unless we are able to say that the award of damages made by the jury and sustained by the trial court were grossly disproportionate to any compensation reasonably warranted by the facts as presented to us on appeal as to shock the sense of justice and raise at once a presumption that it was the result of passion, prejudice, or corruption, rather than an honest and sober judgment, this court may not exercise the power of revision." *Kelley v. Hodge Transportation System*, 197 Cal. 598, 610, 242 P. 76, 81. We find nothing in the record to indicate passion or prejudice.

The judgment is affirmed.

We concur: HOUSER, P. J.; YORK, J.

10 Cal.App.2d 610

WEBSTER v. GARRETTE.

Civ. 5227.

District Court of Appeal, Third District,
California.

Dec. 12, 1935.

Rehearing Denied Jan. 11, 1936.

Hearing Denied by Supreme Court
Feb. 10, 1936.**1. Landlord and tenant ☞184(2)**

In lessee's action against lessor after expiration of lease for deposit made as guarantee of performance of lease, evidence *held* insufficient to support finding that lessor had not declared deposit forfeited pursuant to lease and had accepted deposit in lieu of performance by lessee of provisions of lease.

2. Damages ☞77

Whether provision in contract is for penalty or for liquidated damages depends on intent of parties, which, when ascertained, will be given full effect, unless contrary to law.

3. Landlord and tenant ☞184(2)

In lessee's action to recover deposit made under lease provision for forfeiture thereof as liquidated damages for nonperformance of lease, evidence as to financial condition of lessee at time of lease, and reason for requiring security from lessee, and whether deposit was properly forfeited *held* inadmissible on issue whether provision was for liquidated damages or for penalty (Civil Code, § 1671).

4. Landlord and tenant ☞184(2)

Lease provision for forfeiture of deposit made by lessee for nonperformance of lease is presumed void, in absence of pleading or proof that actual damages would be impractical or difficult to ascertain (Civil Code, § 1671).

5. Damages ☞78(7)

Where fixed sum is covenanted to be paid for any one of several breaches of contract of varying importance and differing widely in injuriousness, inference arises that penalty was intended and not liquidated damages (Civil Code, § 1671).

6. Landlord and tenant ☞184(2)

Lease provision for forfeiture of lessee's deposit for nonperformance of lease as liquidated damages for use of premises and for expenses and inconvenience to lessor *held* void as "penalty," in absence of evidence that actual damages would be impossible or extremely difficult to ascertain, since upon breach by lessee lessor had right to terminate lease, and no presumption existed that amount of damages for breach of covenant to pay rent is impossible to fix (Civil Code, § 1671).

[Ed. Note.—For other definitions of "Penalty," see Words & Phrases.]

7. Landlord and tenant ☞184(2)

Where lease had ended by expiration of term and all rents had been paid and no damage sustained by lessor, lessor *held* not entitled to retain deposit made by lessee to guarantee performance of lease to be forfeited for breach of conditions of lease as liquidated damages (Civil Code, § 1671).

8. Limitation of actions ☞51(1)

Lease provisions for deposit by lessee of guarantee of performance of lease and for forfeiture of deposit upon lessee's breach as liquidated damages *held* severable so as to entitle lessor to hold deposit as guarantee for performance of lease until expiration thereof, notwithstanding attempted forfeiture of deposit under void provision for liquidated damages, and hence lessee's cause of action for recovery of deposit was not barred, since it did not accrue until after expiration of lease (Civil Code, § 1671).

Appeal from Superior Court, Yolo County; Neal Chalmers, Judge.

Action by W. Stuart Webster against J. F. Garrette. Judgment for plaintiff, and defendant appeals.

Affirmed.

Joseph H. Huberty, of San Andreas, for appellant.

Huston, Huston & Huston, of Woodland, for respondent.

PULLEN, Presiding Justice.

Appellant and respondent entered into a lease in 1922 for a building to be remodeled for a theater or moving picture purposes, for a term of years at a specified monthly rental. This litigation involves a deposit of \$2,500 made by respondent with appellant under the following provisions of the lease:

"First: The party of the second part agrees that he will, as soon as said building is completed, place therein good substantial furniture of a value of not less than Twenty Thousand (\$20,000.00) dollars.

"Second: It is agreed that upon the execution of this agreement the party of the second part has paid to the party of the first part the sum of \$2500.00 as a guarantee on the part of the party of the second part to fulfill the obligations contained in this agreement, the receipt whereof is hereby acknowledged by the party of the first part.

"Third: And in the event that said party of the second part shall fail, neglect or refuse to comply with the terms of this agreement or to fulfill any of the covenants or conditions thereof then the said sum of \$2500.00 shall immediately become forfeited to the party of the first part as liquidated damages for the use and occupation of said premises and for the expense and inconvenience occasioned to the party of the first part.

"Fourth: As soon as said party of the second part has placed in said premises good and substantial furniture of a value of not less than \$20,000.00, this contract shall operate and be construed to create a lien in favor of the party of the first part and against the party of the second part upon all of said furniture for the faithful performance by the party of the second part of all of the terms, covenants and conditions herein expressed, said lien to continue during the full period of this lease and as soon as said lien attaches the party of the first part will refund to the party of the second part the said sum of \$2500.00 guarantee aforesaid."

Respondent admittedly never installed \$20,000 worth of furniture or fixtures in which he had an unincumbered title. The complaint alleges that notwithstanding the failure of lessee to install said furniture as in the lease provided, lessor accepted all rents accruing under the lease, and that lessee continued in the uninterrupted and undisturbed possession of the premises, and that in 1923, lessee, with the consent of the lessor, assigned his interest therein to National Theaters Syndicate of California, a corporation, who thereafter occupied said premises until the expiration of said lease in April, 1932.

The answer alleges that plaintiff, the lessee, failed to install the furniture and fixtures free of incumbrance as provided in the lease, and that in 1923 lessor declared the sum of \$2,500 forfeited pursuant to the lease and accepted the \$2,500 in lieu of the performance of said clause. Thereafter, plaintiff, acting upon the declaration of forfeiture by defendant, commenced an action in 1927 to recover the deposit, which action was in December, 1927, dismissed by plaintiff. In July, 1928, plaintiff made a written demand upon defendant for the payment of said \$2,500, and commenced another action for the recovery of that amount, which action was also later dismissed.

The present action was commenced in 1932 after the expiration of the lease, and an amended complaint filed in January, 1933. Defendant also pleaded the various statutes of limitations to the action by plaintiff. The court found the allegations of plaintiff's amended complaint to be true, and also found it was untrue that upon plaintiff's failure to install \$20,000 worth of furniture free of incumbrance, defendant declared said deposit forfeited. The court also found that the action set forth in the amended complaint of plaintiff was not barred by the statute of limitations, and accordingly gave judgment to plaintiff for \$2,500, with interest from the date of the expiration of the lease.

[1] As to the findings by the court that it was untrue that upon plaintiff's failure to install furniture in the building that defendant declared said deposit forfeited pursuant to the terms of the lease and accepted said sum in lieu of the performance by plaintiff of the provisions of the lease, we find no support in the record. The only witnesses called were the two parties to the lease, plaintiff and defendant herein. Garrette, defendant and lessor, testified on direct examination as follows:

"Q. Mr. Garrette, you received the \$2500.00 mentioned in the lease, did you?
A. Yes.

"Q. And did you ever declare to Mr. Webster that that sum was forfeited?
A. I did.

"Q. When, as best you can recall? A. About the time that the theater was opened and the furniture supposedly in there. I went to Webster and I said '* * * this money is forfeited.'"

Webster, called in his own behalf, testified as to the forfeiture that he and Garrette several months after the theater opened were discussing the repayment of the \$2,500; the witness then in answer to a question as to the conversation on the subject, said: "A. Yes, I went to him again at that time and at that time he told me that the amount had been forfeited." That appears to be the only evidence in the record upon the subject of forfeiture, and we can therefore find no evidence in the record to support the finding that the appellant did not declare the deposit forfeited. That fact, however, makes no difference in the conclusion to which we had arrived.

Appellant makes two points: First, that he had a right to retain the \$2,500 as liquidated damages; and, secondly, that the action was barred because of the length of time between the failure of lessee to show title in the furniture and the commencement of this action. In determining whether a provision in a contract is for liquidated damages or for a penalty, depends upon the intention of the parties, which, when ascertained, will be given full effect unless contrary to law.

[2,3] We are here limited in our investigation of the intent of the parties to a study of the lease itself. Appellant claims he attempted to offer certain testimony as to the intention of the parties and upon objection the court improperly sustained the objections thereto. The questions asked of Mr. Garrette on direct examination were as to the financial condition of Mr. Webster at the time of entering into the lease; as to any particular reason for insisting upon the installation of \$20,000 worth of furniture in the building at the time of executing the lease; of any particular reason the witness may have had for insisting upon a lien upon \$20,000 worth of furniture prior to executing the lease; whether Webster was ever in a position to give security for the performance of the lease and if the witness believed he was entitled to declare the \$2,500 forfeited under the contract. The trial court was correct in holding the questions immaterial, and sustaining the objection thereto. The only question involved in this case is that referred to in section 1671 of the Civil Code which involves the impracticability or extreme difficulty in fixing the actual damage. To be admissible the evidence would have to show that the failure to fulfill the contract would result in such damage or injury as could not be readily ascertained by any pecuniary standard, and the questions submitted to the witness did not comply with these requirements.

[4] If the trial court was correct in sustaining the objection to the foregoing questions, then appellant failed to establish the validity of the provisions by proof, and, furthermore, he failed entirely to plead in his answer that actual damages would be impractical or extremely difficult to ascertain. Without such pleading or proof, the presumption is that the agreement is void. 8 Cal.Jur. 854, citing numerous authorities.

[5-8] An examination of the lease itself leads to a like conclusion that a penalty was intended and not liquidated damages. The lease provided that in the event the lessee failed to comply with the terms of the agreement, or to fulfill any of the conditions or covenants thereof, the sum of \$2,500 should immediately become forfeited as liquidated damages for the use and occupation of the premises and for the expense and inconvenience occasioned by the lessor. "Where a fixed sum is covenanted to be paid for any one of several breaches of the contract of varying importance and differing widely in injuriousness the inference arises that a penalty was intended and not liquidated damages." 8 Cal.Jur. 849. Also as a matter of law we find nothing in the situation that would make it impractical or difficult to fix the actual damage if the lessee failed to comply with the terms of the lease. Upon the breach by lessee, lessor had the option to immediately terminate the lease or to waive the breach. There seems to be no different situation here than exists in any agreement for the leasing of real property. In the case of *Redmon v. Graham*, 211 Cal. 491, 295 P. 1031, such a provision in a lease was held to be a penalty within the meaning of section 1670 of the Civil Code, and therefore void. There is no presumption that the amount of damages which arose from the tenant's breach of covenant to pay rent is impossible or difficult to fix, hence the provision for the payment of liquidated damages in such cases is void. 8 Cal.Jur. 858. Furthermore, as the lease has ended by expiration of the term and all rents have been paid and no damage sustained, there is nothing upon which to base a presumption that defendant has sustained any damage. *Leslie v. Brown Brothers Incorporated*, 208 Cal. 606, 283 P. 936. Neither is the action barred by any of the various statutes of limitations pleaded. The deposit here contained two stipulations; one as to liquidated damages and the other as to a guarantee for the performance of the various terms and conditions of the lease. The two provisions were severable and the lessor could hold the deposit as a guarantee for the performance of all of the terms and conditions of the lease until the expiration thereof. *Green v. Frahm*, 176 Cal. 259, 168 P. 114. Apparently appellant does not question this, but he argues that lessor, having declared the de-

posit forfeited as liquidated damages, his cause of action matured at that time; but the provision for liquidated damages being void, lessor had no cause of action until the lease had expired.

The judgment is affirmed.

We concur: PLUMMER, J.; THOMPSON, J.



10 Cal.App.2d 523

**IRONS v. SUPERIOR COURT IN AND FOR
AMADOR COUNTY et al.**

Civ. 5485.

District Court of Appeal, Third District,
California.

Dec. 7, 1935.

1. New trial ⇨136

Order allowing new trial *held* invalid as against defendant, where granted without notice or knowledge of hearing thereof on part of such defendant (Code Civ.Proc. § 661, as amended by St. 1933, p. 1881).

2. New trial ⇨165

Where order granting new trial was invalid as to defendant because of lack of notice or knowledge of hearing, trial court had full authority to set it aside on timely motion therefor (Code Civ.Proc. § 473, as amended by St. 1933, p. 1851, and § 661, as amended by St. 1933, p. 1881).

3. New trial ⇨165

When trial court regularly makes valid order granting or denying motion for new trial, its jurisdiction is exhausted in that regard, and such order may not subsequently be modified or vacated by that court.

Certiorari proceeding by Robert I. Irons to review an order of the Superior Court in and for Amador County vacating a former order granting a new trial in an action by Robert I. Irons against the Pioneer Lucky Strike Gold Mining Company and others.

Order vacating former order granting a new trial affirmed.

Snyder & Snyder, of Jackson, and Irons & Greene, of Los Angeles, for petitioner.

Horowitz & McCloskey, of Los Angeles, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

By means of a writ of certiorari, the petitioner seeks to review an order of the superior court of Amador county vacating a former order of that court granting a new trial on the ground that the court was without jurisdiction to allow the new trial, since the motion therefor was presented without notice and without the knowledge or presence of the respondent, the Pioneer Lucky Strike Gold Mining Company.

The petitioner brought suit in Amador county against the Pioneer Lucky Strike Gold Mining Company and other defendants. The cause was tried by the court sitting without a jury. Findings were adopted favorable to the defendant, and judgment was rendered accordingly. Notice of intention to move for a new trial was filed. Without the knowledge of this gold mining company, the motion for a new trial was set for hearing for September 17, 1934. No notice of the time for presenting that motion for a new trial was served upon the gold mining company. It had no knowledge of that hearing, and was not present when the motion was presented. October 2, 1934, the motion for a new trial was granted. Subsequently, upon due notice and upon affidavits filed in support thereof, the gold mining company moved the court pursuant to the provisions of section 473 of the Code of Civil Procedure, as amended St. 1933, p. 1851 to vacate the previous order granting a new trial on the ground that it was invalid and void for lack of notice and opportunity to be heard. This motion was granted and the previous order allowing a new trial was set aside. The petition for a writ of certiorari was then filed in this court.

It is contended the court exhausted its authority by granting a new trial and that the subsequent order was therefore void for lack of jurisdiction. It is also asserted a writ of review will not lie under the circumstances of this case for the reason that the petitioner had a complete remedy on appeal from the special order which was made after final judgment had been rendered as provided by section 963 of the Code of Civil Procedure, as amended by St.1933, p. 2472.

[1] The order allowing a new trial was invalid as to the Pioneer Lucky Strike Gold Mining Company, for the reason that it was granted without notice or knowledge of the hearing thereof, on its part. Section 661, Code Civ.Proc., as amended by St.1933, p. 1881; *De Gaze v. Lynch*, 42 Cal. 362; *People v. Carpenter*, 3 Cal. App.(2d) 746, 40 P.(2d) 524; *Armstead v. Jackson*, 100 Cal.App. 725, 280 P. 1028. Section 661, supra, specifically requires the clerk of court to give the respective parties to an action five days' notice of the time set for the hearing of a motion for new trial.

[2] Since the order granting a new trial was invalid as to the Pioneer Lucky Strike Gold Mining Company, the court had full authority, upon motion therefor, pursuant to the provisions of section 473 of the Code of Civil Procedure, to set it aside, and the subsequent order vacating the order allowing a new trial was therefore properly granted. When an order granting or denying a motion for a new trial has been irregularly made through inadvertence, mistake, or a lack of jurisdiction, the court has authority in a proper proceeding to set it aside. *Drinkhouse v. Van Ness*, 202 Cal. 359, 369, 260 P. 869, 872; *Robson v. Superior Court*, 171 Cal. 588, 154 P. 8, 9; *Middleton v. Finney*, 214 Cal. 523, 6 P.(2d) 938. The *Robson Case*, supra, contains an elaborate review of the authorities upholding the principle that a court has full power to vacate an order granting or denying a motion for new trial which has been made inadvertently or without jurisdiction. In the case last mentioned the court quotes with approval from *Stewart v. Taylor*, 68 Cal. 5, 8 P. 605, as follows: "There is no doubt that the court in which an irregular order is made and entered may, where the irregularity is apparent, on suggestion, motion, or ex mero motu, set it aside at any time before an appeal is taken from it."

[3] It is undoubtedly true that, when the trial court regularly makes a valid order granting or denying a motion for new trial, its jurisdiction is exhausted in that regard, and such an order may not subsequently be modified or vacated by that court. *Compton v. Northwest Engineering Company*, 116 Cal.App. 523, 2 P.(2d) 1014, 1015; *Lang v. Superior Court*, 71 Cal. 491, 12 P. 306, 416; 20 Cal.Jur. 204, § 134. But the inadvertent making of an invalid order granting or denying a motion

for new trial when the court lacks jurisdiction of the parties is a recognized exception to the general rule previously stated. The *Drinkhouse Case*, supra, says in that regard: "When a motion for a new trial has been made in due form, upon a settled statement, and the court has passed on the motion, the order regularly made is conclusive so far as the court making it is concerned. It cannot afterwards even on motion, vacate the order and decide the matter anew. *Coombs v. Hibberd*, 43 Cal. 452; *Dorland v. Cunningham*, 66 Cal. 484, 6 P. 135. There are, of course, exceptions to the general rule. An order irregularly made is not subject to it, and may be set aside on a proper showing, if application is made therefor. *Holtum v. Greif*, supra [144 Cal. 521, 524, 78 P. 11]; *Morris v. De Celis*, 41 Cal. 331."

The present case is a clear example of an invalid order granting a new trial which was made without notice or knowledge of the hearing on the part of the Pioneer Lucky Strike Gold Mining Company. This case therefore falls within the previously stated exception to the general rule regarding the power of a court to set aside its valid order granting or denying a motion for a new trial, and the court properly vacated that erroneous order.

In the *Lang Case*, supra, relied upon by the petitioner, the court had jurisdiction and made a valid order based on due notice of the hearing. It is said in that regard: "Said motion was, on due notice given, stricken off the calendar. This was equivalent to a denial of the motion."

In the *Compton Case*, supra, the court likewise had jurisdiction and the motion was heard upon due notice thereof. It is said in that regard: "It was not contended the motion was denied through inadvertence or mistake. * * * In truth, the record which is presented by the bill of exceptions appears to affirmatively indicate that the order was duly and regularly made."

The other cases relied on by the petitioner may be likewise reconciled with the preceding principle upon which this proceeding is determined.

Since we have held that the order of court granting a new trial was invalid as against the Pioneer Lucky Strike Gold Mining Company for lack of notice of the hearing, and that the court was therefore authorized to set it aside upon timely motion therefor under the provisions of sec-

tion 473 of the Code of Civil Procedure, it is not necessary to pass on the respondents' further contention that certiorari will not lie under the circumstances of this case, for the reason that the petitioner had an adequate and speedy remedy by appeal from the challenged order.

The order vacating the former order granting a new trial is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



10 Cal.App.2d 567

YEOMAN v. SHERRY et al.
Civ. 9915.

District Court of Appeal, Second District,
Division 1, California.
Dec. 11, 1935.

1. Brokers ⇨4

In customer's action against broker and her surety for damages resulting to customer because of broker's alleged fraudulent misrepresentation of value of property in real estate transaction, evidence held to support finding that broker acted as customer's agent in transaction.

2. Brokers ⇨34

Misrepresentation of value of realty may be misrepresentation of fact and not merely broker's opinion, so as to render broker liable therefor.

3. Vendor and purchaser ⇨37(4)

When value of realty is represented as positive affirmation of fact, intended as such by party making it, and reasonably so regarded by parties to whom representation is made, representation becomes one of fact and may be a fraudulent representation warranting rescission.

4. Judgment ⇨256(1)

Trial court must make judgment conform to verdict when jury's intention is clear from language of verdict when considered with pleadings and evidence.

5. Appeal and error ⇨218(1)

Generally, verdict susceptible of construction which may have lawful and relevant effect may not be objected to for first time on appeal.

6. Appeal and error ⇨1149

Where jury in customer's action against broker and her surety found for customer and assessed her damages at \$3,800, and further found for customer against surety for \$2,000, judgment was corrected to give customer total judgment for \$3,800, and to make surety liable for \$2,000 thereof.

7. Appeal and error ⇨110

Order denying motion for new trial is not appealable.

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action by Iva Poorman Yeoman against Gertrude May Sherry, Great American Indemnity Company, and others. From a judgment for plaintiff, named defendants appeal.

Affirmed, with directions. Appeal from order denying new trial dismissed.

Will H. Winston, of Long Beach, for appellants.

James D. Randles and F. Ray Risdon, both of Los Angeles, for respondent.

ROTH, Justice pro tem.

The complaint in this action charged several defendants in a number of counts with conspiracy to defraud. As a result of one trial and an order of nonsuit made in the instant proceeding, the action narrowed itself down to those causes of action which charged appellant Gertrude May Sherry with fraud, while acting in the capacity of a real estate broker for respondent, in the exchange of certain properties owned by respondent for two several deeds of trust secured by 320 acres of land located in Glenn county; and a cause of action against Great American Indemnity Company, based upon its liability upon the bond of appellant Sherry posted with the real estate commissioner, pursuant to law. Appellants deny that appellant Sherry acted as a broker for respondent in the transaction mentioned, and also deny that there was any misrepresentation in connection with said transaction.

The evidence shows that, pursuant to an advertisement inserted in a newspaper by respondent which disclosed that she had certain real property to exchange, Mrs. Sherry contacted respondent and consum-

mated for her an exchange of certain parcels of real estate owned by respondent for an equity in a duplex situated in Long Beach. This first transaction was finished on April 28, 1931. Less than two full months thereafter, Mrs. Sherry consummated an exchange of the duplex equity acquired by respondent in the first transaction for an equity in a 4-family flat, also located in Long Beach. Thereafter, on October 5th of the same year, appellant Sherry consummated an exchange of the equity acquired by respondent in transaction No. 2 for two promissory notes for \$7,500 and \$8,000, respectively, each secured by one deed of trust upon the acreage in Glenn county. Appellant Sherry admitted that she represented respondent as a broker in the first two transactions, but denied that she acted in that capacity in the third, out of which this action arises.

Some of the evidence in connection with this transaction is as follows:

"She (Mrs. Sherry) telephoned me to come down to her office and see the Trust Deed that she had been able to get * * * it was about the middle of September." There was some conversation with reference to the trust deeds at that time, respondent continuing her testimony asserted that she called at Mrs. Sherry's office the second time "about the second of October, 1931," at which time the following took place: "I said, 'I don't know anything about them.' And so she said, 'Well, here is a guarantee,' * * * 'This is a guarantee for these Trust Deeds. * * * This paper guarantees these deeds for \$16,000.00 and if they are not good the Land County Title Company would have to pay you \$16,000.00. * * *' I said, 'Mrs. Sherry, would you take these Trust Deeds yourself?' And she said, 'I wish I had enough to get them with.' And then I said, 'But what do you really think about it, Mrs. Sherry?' She said, 'you are going to like these. Ask Mr. Sherry if he does not think they are good.' * * * I said, 'Where is this property that these Trust Deeds were on?' She said, 'Up at Willows, about 90 or 100 miles from Sacramento.' I said, 'How much is the property worth?' She said, '\$30,000.00.' I said, 'What if they don't pay the interest?' * * * Yes I signed every paper that she put before me. They were already prepared and ready for me to sign. Yes, I suppose I signed the deed, and whatever belonged to the others.

* * * I said, 'Mrs. Sherry, my name isn't on these Trust Deeds anywhere. What if I lose them?' She said, 'You don't want to lose them. They are just as good as \$15,500.00 cash to you and don't you worry until the interest is due on them.'"

A witness, H. F. Jones, who executed the trust deeds in question, testified in effect concerning the acreage in part as follows: "* * * I was the owner of the property just for that. It never cost me anything, and I never paid a nickel on it at any time. * * * I never paid any interest on the notes. * * * I never saw the property until something like a year after when they sent me up there. I never saw it until that time."

In view of the fact that each of the notes at the time they were transferred to respondent had indorsements on the back showing all interest paid to date, the testimony of witness Jones that he never paid any interest is of significant importance.

As to the value of the acreage, an expert testified, in substance, as follows: "I live at Willows, Glenn County, and have lived there for 52 years. * * * I am a farmer and have farmed for something like 40 years, and I am familiar with real estate values in and around Willows. I know the value of the land in question. * * * As to the reasonable market value of it, in my opinion \$5.00 an acre would be a big price for it. * * * Yes, that would be a peak price."

The papers "she put before me," signed by respondent and referred to in the foregoing excerpts from respondent's testimony, were as follows:

"Loans Hotels Apartments Appraisals.

"G. M. Sherry Licensed and Bonded Broker Telephone 667-98 Long Beach, Calif. 132 W. Ocean Blvd., October 5, 1931.

"For equity in 4-flat; Lot 6 Block 7 Willow Jct. Tract, Long Beach, California I hereby accept deal from Walter Gates, of two Trust Deeds, namely 1st. Trust Deed for sum of \$7,500.00 from H. F. Jones to John W. Forsyth dated April 11-1930 for 3 yrs at 7% interest semiannually and a 2nd Trust Deed from J F Jones to Joe Mernstein and Sarah Mernstein payable on or before 3 yrs from April 11-1930 at 7% and secured by Land at Willows, Calif.

"The above mentioned Trust Deeds are for the sum of Fifteen Thousand five hundred dollars are accepted & taken at my own personal risk as I have no available money to Escrow or pay investigating charges. As G M Sherry suggested my having any one I care to have investigate for me, as G. M. & W. H. Sherry made it plain to me that they had neither saw the land or surrounding locations, and they would take no responsibility as to the true value of the Security, neither did they by act or deed persuade me to accept this deal, or make any representations whatsoever regarding property or notes. I am therefore making this deal with Walter Gates at my own risk and I have not paid any commission to the Sherry's for this deal.

"(Signed) Iva Poorman Yeoman."

"Glendale, Calif October 5th, 1931.

"This is to certify that I have received from Walter Gates Two Trust Deeds amounting to the sum of \$15,500.00 for my equity in the Four flat located at 2472 Chestnut Ave Long Beach Cal.

"That G. M. Sherry has done her work satisfactory in all detail and is therefore liberated from other work on this deal. She has fulfilled the terms of her agreements, and has finished her work as my Broker herein; and completed same and I am perfectly satisfied therewith in every and all respects and have given her a note for the commission and is secured by real property on any property that I may own at due date."

"(Signed) Iva Poorman Yeoman."

[1-3] We are satisfied that the foregoing recitals of what the evidence was and the excerpts therefrom are sufficient to have warranted the jury in finding that the relationship of principal and agent existed between respondent and Mrs. Sherry at the time the transaction in question was negotiated and consummated. It is settled also that a misrepresentation of value may be a misrepresentation of a matter of fact, and not the mere opinion of a broker. In the case of *Reton v. J. D. Millar Realty Co.*, 132 Cal.App. 708, at page 711, 23 P.(2d) 419, 420, the court says: "Appellant contends that the representations as to value were merely matters of opinion, and hence not actionable. It is true that a bare and naked statement as to value is ordinarily deemed the opinion of the party-making the representation. *Meeker v. Cross*, 59 Cal.App. 512, 211 P. 229. On the other hand, such

statement may be a positive affirmation of a fact, intended as such by the party making it, and reasonably regarded as such by the party to whom it is made. When it is such, it is like any other representation of fact, and may be a fraudulent representation warranting rescission. *Crandall v. Parks*, 152 Cal. 772, 93 P. 1018. The representations as to value in the instant case are very similar to those made in the latter case. For instance, Nolan, the agent for appellant, stated to plaintiff: 'I can assure you that I know that it is a fact that this property is priced very very reasonable, and in fact it is worth more than the company is asking for it.' Such representations as to value will warrant a rescission." We feel that the foregoing statement of the law is decisive of the question in this case.

The final point urged by appellants is that the judgment is invalid and must be set aside, because it is entered upon an erroneous and ambiguous verdict. The verdict in the case was as follows: "We, the jury in the above entitled action, find for the plaintiff Iva Poorman Yeoman and against the defendant Gertrude May Sherry and assess her damages in the sum of \$3,800.00. We further find for plaintiff and against the defendant Great American Indemnity Co. in the sum of \$2,000.00.
* * *"

The judgment entered upon this verdict is as follows: "Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that said plaintiff Iva Poorman Yeoman have and recover from said defendant Great American Indemnity Co. the sum of \$2,000.00 and from defendant Gertrude May Sherry the sum of \$3,800.00.
* * *"

[4, 5] The record discloses that the jury first brought in a verdict of \$3,800 against both defendants. The court instructed the jury that it could not find against defendant Great American Indemnity Company for more than \$2,000. Pursuant to the court's instruction, the verdict herein quoted was returned, upon which the judgment was entered. It is settled law in this state that a trial court has the authority and that it is its duty to make a judgment conform to the verdict, when the intention of the jury is clear from its language, considered in connection with the pleadings and evidence. *Johnson v. Visser*, 96 Cal. 310, 314, 31 P. 106; *Johnson v. Phenix*

Ins. Co., 152 Cal. 196, 200, 92 P. 182. In the Visser Case, supra, 96 Cal. 310, at page 314, 31 P. 106, 107, the court says: "And, as a general rule, a party will not be heard to object to a verdict for the first time on appeal from the judgment, if it is susceptible of a construction which may have a lawful and relevant effect."

[6] The jury in this case undoubtedly intended to render a total judgment of \$3,800 and to make appellant indemnity company responsible for \$2,000 thereof. The judgment is not consistent with the verdict, but it can be modified so as to make it consonant with the verdict.

[7] The judgment is affirmed, with directions to the trial court to modify the same so that the total principal amount thereof will be \$3,800; appellant Sherry to be responsible for the full amount thereof, and appellant Great American Indemnity Company to be responsible for \$2,000 of the same. The appeal from the order denying a motion for a new trial is dismissed, as no appeal lies from such an order.

Respondent to recover costs on appeal.

We concur: HOUSER, P. J.; YORK, J.



LA FRANCHI v. CITY OF SANTA ROSA
et al. *
Civ. 5400.

District Court of Appeal, Third District,
California.
Dec. 7, 1935.

Rehearing Denied Jan. 6, 1936.

Hearing Granted by Supreme Court
Feb. 3, 1936.

1. Action ☞6

Under declaratory judgment act, court has power to determine rights or duties of litigant with respect to property, even though determination involves constitutionality of statute or ordinance (Code Civ.Proc. § 1060).

2. Constitutional law ☞240(1)
Food ☞1

Municipal ordinance prohibiting sale of pasteurized milk in municipality unless milk was pasteurized within corporate limits of municipality held valid exercise of police power and not unconstitutionally discriminatory

(St. 1933, p. 130, § 451 et seq.; Const.U.S. Amend. 14; Const.Cal. art. 1, §§ 1, 11, 21).

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Action by M. J. La Franchi against the City of Santa Rosa and another. From an adverse judgment plaintiff appeals.

Affirmed.

J. N. DeMeo, of Santa Rosa, for appellant.

Edward T. Koford, of Santa Rosa, for respondents.

H. B. Churchill, of Santa Rosa, amicus curiæ.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiff has appealed from a judgment which was rendered against him pursuant to an order sustaining a demurrer without leave to amend his complaint which applied for declaratory relief under the provisions of section 1060 of the Code of Civil Procedure. The plaintiff sought a decree declaring an ordinance of the city of Santa Rosa unconstitutional and void as unreasonable and discriminatory. It prohibits the sale of milk in the city of Santa Rosa, unless it is pasteurized within the corporate limits of that city.

The complaint alleges that Santa Rosa is an incorporated city operating under a freeholders' charter. Under the police powers conferred upon it by charter, an ordinance was adopted in 1932, prohibiting the sale of pasteurized milk in Santa Rosa unless it is pasteurized within the corporate limits of that city. It is alleged the plaintiff owns and operates a dairy which is located five miles west of Santa Rosa; that his dairy contains adequate, approved equipment by means of which milk is pasteurized at his plant outside of the city of Santa Rosa; that his dairy, milk products, and appliances are periodically examined by a duly appointed milk inspector of Santa Rosa; and that his pasteurized milk conforms in grade and score to the requirements of the statutes of California, including that portion of the Agricultural Code which applies to dairy products (St. 1933, p. 60, 130, § 451 et seq. Act 144, Deering's Supp.Laws of Calif. of 1933, p. 796, at 876); that since the adoption of the ordinance the plaintiff has been denied the privilege of selling his pasteurized milk in the city of Santa Rosa,

until it is first pasteurized in some plant which exists within the corporate limits of that city; that a controversy has arisen between the plaintiff and the city of Santa Rosa regarding the validity of said ordinance, and it is asserted the ordinance is unreasonable, oppressive, discriminatory, and void. The city of Santa Rosa filed a demurrer to the complaint on the ground that it fails to state facts sufficient to constitute a cause of action. The demurrer was sustained, and leave to amend the complaint was denied. Judgment was rendered accordingly. From that judgment the plaintiff has appealed.

The appellant contends that the ordinance is unconstitutional and void as an unjust discrimination against the owners of dairies located outside of the city of Santa Rosa who desire to sell pasteurized milk to the inhabitants thereof. It is asserted the ordinance is in conflict with article 14 of the Federal Constitution and violates the provisions of article 1, §§ 1, 11, and 21, of the Constitution of California.

The respondents insist that the ordinance is a valid exercise of the police powers of the city in the interest of the health and general welfare of its inhabitants. It is also suggested that the court is without authority or jurisdiction to determine the constitutionality of an ordinance or statute under the provisions of section 1060 of the Code of Civil Procedure, for the reason that declaratory relief is confined to the construction of private documents which are contractual in their nature.

[1] Section 1060 of the Code of Civil Procedure authorizes a court to grant declaratory relief by construing not only a deed, will, contract, or other written instrument, but also by determining the rights and duties of litigants with respect to any property interest, even though it may involve the constitutionality of a statute or an ordinance. *Andrews v. City of Piedmont*, 100 Cal.App. 700, 281 P. 78. Section 1060, *supra*, provides that: "Any person interested under a deed, will or other written instrument, or under a contract, or *who desires a declaration of his rights or duties with respect to another, or in respect to, * * * property * * ** may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an action in the superior court for a declaration of his rights and duties."

The language of the statute which we have italicized for emphasis clearly author-

izes the determination of the rights or duties of a litigant with respect to any property, even though that determination involves the constitutionality of a statute or an ordinance.

[2] We are of the opinion the ordinance of Santa Rosa which prohibits the sale of pasteurized milk in that city unless it has been first pasteurized within the corporate limits thereof is not unconstitutional or void. On the contrary, we are convinced it is a valid exercise of the police powers of the city in the interest of the health and general welfare of its inhabitants. The very question of the constitutionality of a similar ordinance was determined adversely to this appellant in *Witt v. Klimm*, 97 Cal.App. 131, 274 P. 1039, 1040. The *Witt* Case appears to have determined all of the constitutional questions which are presented on this appeal. In that case the petitioner owned and operated a dairy with a pasteurizing plant incident thereto in San Mateo county of the value of \$100,000. He supplied the market with pasteurized milk, complying with the requirements of law in all respects. An ordinance of the city of San Francisco prohibited the sale of pasteurized milk in that city unless it was first pasteurized within the corporate limits of that city. In a petition for a writ of mandamus it was sought to have the court determine that the ordinance was an unjust discrimination against those who operated dairies outside of the city limits. The court said:

"The provisions of the ordinance requiring that the milk be pasteurized within the city and county of San Francisco is simply a new and additional and more stringent regulation than that contained in the state law on the same subject.

"These requirements of the ordinance are not in themselves unreasonable or discriminatory and do not conflict with the state law, therefore, both may stand."

The ordinance which is involved in the present case does not discriminate against individuals belonging to the same class. It applies to all individuals of a particular class; namely, those who operate dairies and produce pasteurized milk outside the city limits. It does not discriminate against the outside owners of dairies regarding the necessity of having the milk pasteurized within the city, for the ordinance prohibits all persons from selling milk therein unless it is pasteurized within the city.

Under the police powers authorizing the regulation of business for the benefit of the

health or the general welfare of a community, a municipal ordinance may provide for the inspection of milk within its corporate limits, and it is not discriminatory merely because those who operate dairies outside of the city may also be required to submit to the pasteurizing of their milk within the limits of the city. It is not necessary that such ordinances shall apply uniformly to all persons, regardless of the location of their dairies or pasteurization plants. It is sufficient if it applies to all persons of a particular class; namely, to all persons who desire to sell their products within the city. 5 Cal.Jur., p. 826, § 189. In 3 McQuillin's Municipal Corporations (2d Ed.), p. 418, § 1067, it is said: "Milk inspection ordinance may prescribe different police regulations touching the sale and distribution of milk produced from cows beyond the municipal area and that produced from cows within the corporate limits. Such classification is justified because of the difference in the opportunity or facility for inspection inherent in the two classes."

It is argued that because the milk inspector of Santa Rosa actually inspects the dairy of the appellant for sanitary conditions, together with other dairies outside of the city, it would require no more time or expense on the part of the city to inspect and approve his pasteurizing plant and milk at his dairy five miles west of that city. It is obvious that the inspection of a dairy and its appliances for sanitary conditions may be made periodically, while the inspection of the equipment, method, and standards of producing pasteurized milk require daily or at least more frequent visits and investigation. The city of Santa Rosa certainly has the authority under its police power, in the interest of sanitation and health, to require a standard method of pasteurization of all milk which it permits to be sold within the city. It may reasonably require this pasteurization to be performed within the city limits for the purpose of economy, thorough daily inspection and the convenience of its officers. If the city is not authorized to prohibit the sale of milk within its borders without pasteurization at some accessible plant in the city, but on the contrary must permit the appellant to sell milk within its corporate limits because his dairy is located only five miles away, then it will be required to permit the sale of all milk which may be pasteurized at remote dairies in the coast coun-

try or from the distant dairies of Humboldt county. It would be impossible for the milk inspector of Santa Rosa to visit and inspect all dairies in numerous remote places whose owners may desire to ship and sell pasteurized milk within the city.

On the authority of *Witt v. Klimm*, supra, and on principle, we are satisfied that the challenged ordinance is not discriminatory, unconstitutional, or void; nor is it in conflict with article 14 of the Federal Constitution, or article 1, sections 1, 11, or 21 of the Constitution of California. On the contrary, it is a valid exercise of the police powers of the city of Santa Rosa.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



10 Cal.App.2d 394

DUNTLEY v. KAGARISE.

RUSSELL v. SAME.

Civ. 9984, 9985.

District Court of Appeal, Second District,
Division 1, California.

Nov. 26, 1935.

1. Contracts ⇨107

Contract founded upon act for which penalty is imposed by statute is void.

2. Licenses ⇨39

Where permit of Commissioner of Corporations for issuance of stock prohibited sale of stock without commissioner's consent, sale of such stock without procuring commissioner's consent *held* void, precluding recovery by sellers on notes received in part payment of purchase price (Gen.Laws 1931, Act 3814).

3. Contracts ⇨134, 136

Doctrines of estoppel and ratification have no application to contracts which are void because contrary to statute or to good morals.

4. Licenses ⇨39

Where sale of stock was void because made without consent of Commissioner of Corporations, subsequent consent given by commissioner *held* insufficient to show existence of new agreement which would entitle sellers to recover upon notes received in part payment, where no communication with buy-

er was shown, and buyer did not seek authority to transfer stock until some months after giving notes (Gen.Laws 1931, Act 3814).

Appeal from Superior Court, Los Angeles County; Isaac Pacht, Judge.

Actions by G. M. Duntley and Fred A. Russell against L. R. Kagarise. Judgment for defendant in each case, and each plaintiff appeals.

Affirmed.

Hugh Gordon, of San Francisco, and C. W. Byrer and Arlo D. Poe, both of Los Angeles, for appellants.

Athearn, Chandler & Farmer and Edward G. Chandler, all of San Francisco, for respondent.

EDMONDS, Justice pro tem.

These cases raise the same question. Each action was brought upon a promissory note given in part payment of the purchase price of certain stock of Inter-City Parcel Service, Inc., a California corporation. The defense in each case is that the notes are void because at the time of the execution and delivery of the notes, the stock was in escrow under a permit of the Commissioner of Corporations, and that his consent to the sale was not obtained. The trial court decided that the notes are void, and each plaintiff has appealed from the judgment entered against him.

Respondent Kagarise was one of the original incorporators of Inter-City Parcel Service, Inc., which in 1925 was authorized by the Commissioner of Corporations to issue certain shares of its capital stock. The permit therefor provided that all certificates evidencing the shares authorized to be issued "shall be forthwith deposited with a depository * * * to be held as an escrow pending the further order of said Commissioner; * * * and that while said certificates shall be so held, the holder of the shares evidenced thereby shall not sell, or offer for sale, or otherwise transfer, or agree to sell, or transfer such shares, until the written consent of said Commissioner shall have been obtained so to do."

In 1928, each of the appellants was the owner of 100 $\frac{1}{2}$ shares of the capital stock of the corporation, and each was a director therein. Each gave to the respondent an option on the stock owned by him. These options were later exercised by the

respondent, who executed the notes sued upon and received from each appellant an assignment of the stock owned by him. These instruments, identical in form, recite that the "stock is now held in escrow pursuant to previous orders of the Commissioner of Corporations of the State of California, and I hereby authorize and instruct said Commissioner of Corporations to deliver said stock certificate to L. R. Kagarise on presentation of this order." Subsequent to the delivery of the assignments, respondent exercised the right of dominion and control over the stock, and appellants took no further part in the management of the business.

In January, 1929, appellants filed with the Commissioner of Corporations a request for his consent to the transfer theretofore made. In this application appellants stated that the transaction with respondent was consummated in ignorance of the terms of the permit under which the stock was held in escrow, and that they assumed that respondent would see that all legal requirements were complied with. The application was granted with the requirement that certificates evidencing the shares authorized to be transferred should continue to be held in escrow in accordance with the terms of the original permit.

Shortly thereafter, respondent made a further application to the Commissioner of Corporations in which he represented that he desired to transfer the stock acquired by him from appellants and another person not a party to this litigation, together with his own stock, in escrow, except for four shares to be released and to be used as directors' qualifying shares. This application was granted.

Appellants seek to avoid the effect of the Corporate Securities Act (Deering's Gen. Laws, 1931 Ed., Act 3814), and the restrictions of the permit of the Commissioner of Corporations made thereunder, by taking either of two positions. In the first place, they assert that there is a distinction between sales of stock on the original issue thereof and sales of stock which has been validly issued and impounded in escrow. As a second point they maintain that the parties adopted the terms of the original transaction after the consent of the Commissioner of Corporations had been obtained, thereby creating a new agreement which the court may enforce.

Considering the first point presented, a sale of stock originally validly issued may

be void. This was pointed out in *Otten v. Riesener Chocolate Co.*, 82 Cal.App. 83, 254 P. 942, 943, where the court said that it was "the illegality of the sale of the stock and not the illegality of the issuance of the stock which justifies the judgment in respondent's favor for the return of the purchase price paid." That is exactly the situation here. It is not claimed that the stock for which respondent's notes were given was originally issued in violation of any provision of the Corporate Securities Act. On the contrary, the record shows that it was issued and placed in escrow pursuant to the provisions of a permit of the Commissioner of Corporations authorizing the same. Under the Corporate Securities Act, the Commissioner may require stock to be placed in escrow (*Agnew v. Daugherty*, 189 Cal. 446, 209 P. 34), and there is nothing in the conditions of the permit impounding the stock here in question which appear unreasonable. Moreover, there is no issue presented raising that question.

[1,2] But the act provides that any person who willfully violates or fails to comply with any of the provisions of the act or who neglects to obey or comply with any permit of the commissioner made thereunder, is guilty of a public offense. "The imposition by statute of a penalty implies a prohibition of the act to which the penalty is attached, and a contract founded upon such act is void." *Smith v. Bach*, 183 Cal. 259, 191 P. 14, 15. It follows, therefore, that the attempted sales made by the appellants are void because made in violation of the provisions of the permit of the Commissioner of Corporations. *Gridley v. Tilson*, 202 Cal. 748, 262 P. 322; *Imperial Livestock, etc., Co. v. Tracy*, 208 Cal. 205, 281 P. 50; *Herkner v. Rubin*, 126 Cal.App. 677, 681, 14 P.(2d) 1043.

[3,4] In urging their second point appellants concede "that the rule has been announced repeatedly that the doctrines of estoppel and ratification have no application to contracts which are void by reason of statutory prohibition, or their being contrary to good morals." This is unquestionably the law. *Herkner v. Rubin*, supra. But they insist that the terms of the original transactions were impliedly adopted by the parties thereto after the consent of the Commissioner of Corporations had been obtained for the transfer of the stock in escrow. For support of their position

they rely upon *Moore v. Moffatt*, 188 Cal. 1, 204 P. 220, 223; and *Waring v. Pitcher*, 135 Cal.App. 493, 27 P.(2d) 397, 398. Each of these cases, however, rests upon facts which do not appear in the case at bar.

Moore v. Moffatt is an action brought by the trustee of a bankrupt corporation to recover under the trust fund theory an amount equal to the difference between the sums paid on a subscription agreement for stock and its par value. It was conceded that the subscription agreement was void because it was executed prior to authorization for the sale of the stock as then acquired by the Investment Company's Act. Stats. 1913, p. 715. The Supreme Court in affirming a judgment in favor of plaintiff pointed out that the stock was not issued until after a permit had been issued. "This being so," the court said, "the subscription agreement, even though it may have been void and incapable of acceptance in the first instance, should, in the light of the subsequent conduct of the parties to the transaction, be considered and construed as a continuing offer to subscribe for the stock in question, pending the procurement of a permit from the corporation commissioner, which ultimately became the embodiment and expression of a new agreement to purchase the stock entered into at a time when the only legal obstacle in the way of a valid agreement had been overcome."

This decision is based upon the conduct of the parties with relation to the subscription agreement after the issuance of the permit. The court said: "Of course, the parties to the transaction could not, nor did they, as a matter of law, by their adoption of the agreement ratify and thereby validate as of the time of its original making or any time thereafter an agreement which may have been void in the first instance. But the parties could, and we think they did, when the bar of the statute to the making and acceptance of a valid agreement had been removed, elect to adopt and accept and stand upon the subscription agreement already signed as embodying—even though it may have been ineffectual at the time it was signed—the terms and conditions of a new agreement by which their future dealings were to be governed."

The decision in *Waring v. Pitcher* was an action to recover upon the liability of a stockholder, and is based upon *Moore v.*

Moffatt. It also allowed a recovery, but upon the ground "that as the corporation was in existence when the certificate was delivered to plaintiff and held a valid permit to issue stock at that time, appellant's act of accepting and retaining the certificate had the same legal effect as a new and independent contract for the sale of the stock as of the time of such delivery."

It was "the terms and conditions of a new agreement" which the court in the first case found that the parties had made by their acts and conduct, and "the new and independent contract" created by the delivery and acceptance of the stock in the second case upon which recovery was allowed. This is emphasized in *Imperial Livestock, etc., Co. v. Tracy*, supra, where the court, in discussing *Moore v. Moffatt*, pointed out that the holding in the latter case was "that the acts of the parties were tantamount to an adoption by them of the terms and conditions of the subscription agreement as of the date of its ultimate acceptance. * * * The contract, which really was a contract created by law to pay the unpaid portion of capital stock issued to, and accepted by the defendants, * * * only, was involved, whereas in the instant case the attempt is made to give vitality and validity to tainted and void contracts by renewals thereof." 208 Cal. 205, 211, 213, 281 P. 50, 53, 54. Also in *Walker v. Harbor Realty, etc., Corporation*, 214 Cal. 46, 48, 3 P.(2d) 557, 558, the court cited *Moore v. Moffatt* as one of a group of cases "where rights of others than the parties to the void sale or contract were involved and the buyer had by his own conduct made himself answerable to the claims of such third parties."

Appellants' actions are brought upon the notes delivered as part consideration of the stock and given at a time when they were prohibited from transferring it. It was not brought upon assumpsit or upon any other agreement of the parties than the promissory notes. Furthermore, there is no factual basis shown for a recovery upon the theory of a new agreement made after the notes were given. So far as the

record shows, there was no communication between the parties relating to the transaction after the notes were given. The belated application of appellants to the Commissioner of Corporations for his consent to the transfer of their stock in escrow was made, according to the undisputed evidence, at their own instance, and after they themselves had found such consent to be necessary. There is nothing to show that respondent took any part in this or knew that it was being done. Apparently he did nothing with the assignments which he procured from appellants at the time he gave his notes until some months later when he filed his application with the Commissioner of Corporations for authority to transfer it and other stock. There was no conduct of the respondent which may be said to provide the basis of new agreements with appellants adopting the terms and conditions of the original ones. Appellants therefore cannot recover upon their notes, and the judgment must be affirmed.

Although it appears that respondent acquired the stock of appellants who were his business associates and now refuses to pay for it, even though he apparently received all of the benefits of the transaction, a question of public policy is involved. As was said in the case of *Imperial Livestock, etc., Co. v. Tracy*, 208 Cal. 205, 213, 281 P. 50, 54, "The issues presented in this cause relate to matters of public policy. If no other persons were involved, and the principle reached no farther than the respective parties to this cause, we might consider seriously the contention of the appellant that the renewal notes, instead of being considered on the same basis, should be treated as a new subscription for the shares of stock in the plaintiff corporation, and valid and enforceable obligations. To do so, however, would be to open the door to all the illegal practices condemned by the Corporate Securities Act."

Judgments affirmed.

We concur: YORK, Acting P. J.; DORAN, J.

11 Cal.App.2d 32

BRAINARD et ux. v. WHITMAN et al.

Civ. 5437.

District Court of Appeal, Third District,
California.

Dec. 24, 1935.

1. Mortgages ⇨415(1)

In action to foreclose recorded mortgage which gave mortgagee right to enter on mortgaged property to protect security, it was no defense that mortgagee had posted notice on premises warning all persons to refrain from wrecking or removing buildings until mortgage had been satisfied, and that by reason thereof defendant was unable to sell mortgaged premises.

2. Abatement and revival ⇨8(1)

Pendency of condemnation suit against mortgagor involving part of premises described in mortgage held not ground for abatement of subsequent mortgage foreclosure action.

3. Abatement and revival ⇨8(1)

Plea of another action pending will be sustained only when plaintiffs are the same and cause of action is the same in each suit.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by Ben R. Brainard and wife against Frances E. Whitman and others. Judgment for plaintiffs, and defendant named appeals.

Affirmed.

Elon G. Galusha and Porter C. Blackburn, both of Los Angeles, for appellant.

W. C. Petchner, of Los Angeles, for respondents.

Mr. Justice pro tem. JAMISON delivered the opinion of the court.

Plaintiffs commenced this action to foreclose a mortgage executed to them by defendant Frances E. Whitman, the complaint therein containing the usual allegations in a foreclosure proceeding. Defendant Frances E. Whitman answered, setting up two defenses in said complaint.

Plaintiffs filed a general demurrer to said answer, which was sustained, and said defendant was given leave to amend her answer. Said defendant having failed and refused to amend her answer, judgment was rendered against her, foreclos-

ing the mortgage, and from this judgment she has appealed.

[1] The first of said separate defenses alleges that Ben R. Brainard, one of the respondents, unlawfully entered upon the mortgaged premises and posted a notice warning all persons to refrain from wrecking or removing any of the buildings thereon until the mortgage has been fully satisfied. It is further alleged in said separate answer that said defendant had contracted to sell to one in possession of land upon which said notice was posted, being a part of said mortgaged premises, but by reason of the posting of said notice the said party refused to purchase said land, and that others have refused to purchase any of the said mortgaged premises by reason of said notice, and by reason of verbal statements of said respondent that the mortgaged premises were not clear, all to appellant's damage in the sum of \$10,000.

The allegations of this separate defense constituted no defense to respondents' action. The prospective purchasers of portions of the mortgaged property had constructive notice of the existence of the mortgage. The mortgage was executed on August 31, 1928, and a few days thereafter was recorded.

[2,3] The mortgagee was given the right by the terms of the mortgage to enter upon the mortgaged property to protect the security and his entry upon the mortgaged property when in his opinion a necessity arose to protect the security was not a trespass. The second separate defense attempts to set forth a plea in abatement. It merely alleges "that there is now pending and undisposed of a condemnation suit to condemn part of the land described in said mortgage herein and owned by the said answering defendant, and that said action has not been tried and that plaintiffs are defendants in said action."

A plea of another action pending will be sustained only when the plaintiffs are the same, and when the cause of action is the same in each suit. *Smith v. Smith*, 134 Cal. 117, 66 P. 81; *Felch v. Beaudry*, 40 Cal. 439; *Fresno Investment Co. v. Russell*, 55 Cal.App. 496, 203 P. 815.

There is no showing that the former action involved the same issues, the same properties, the same parties, and the same remedies, and therefore the pendency of one would not be a defense to the main-

tenance of the other. *Capuccio v. Caire*, 189 Cal. 514, 209 P. 367.

We are of the opinion that this separate answer failed to state facts sufficient to constitute a defense and therefore the judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



10 Cal.App.2d 652

WOOD v. COX et al.
Civ. 10285.

District Court of Appeal, Second District,
Division 1, California.
Dec. 17, 1935.

Hearing Denied by Supreme Court
Feb. 13, 1936.

Municipal corporations ☞747(3)

Municipality could not be held liable for negligent acts of its police officers who, while acting in governmental capacity, incarcerated another on charge of being drunk on public street, although he was unconscious and remained in that condition until his death after three hours' confinement (Code Civ.Proc. § 377).

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by A. B. Wood against E. E. Cox and others. From an adverse judgment, plaintiff appeals.

Affirmed.

Henry C. Huntington, of Los Angeles, and Louis Budway, of Huntington Park, for appellant.

Delbert A. Hessick, City Atty., of Huntington Park, and Chalmers L. McGaughey, of Los Angeles, for respondents city of Maywood and city council thereof.

ROTH, Justice pro tem.

John W. Wood, now deceased, on December 31, 1933, was arrested in the city of Huntington Park by two of its police officers, after a collision with another automobile. He was charged with being drunk on a public street, in violation of an ordinance of the city of Huntington Park, and was lodged in the jail of the city of Maywood. At the time of incarceration, he was unconscious and remained in that

condition for a period of three hours while in confinement, and then died. An autopsy showed that death was caused by a ruptured blood vessel in his pancreas. During the time of confinement, inmates of the same jail repeatedly requested that a doctor be called. No doctor was called, and no medical assistance was rendered. Plaintiff and appellant is the wife of deceased, who, within a year, pursuant to section 377 of the Code of Civil Procedure, brought this action for wrongful death. The defendants named are the cities of Maywood and Huntington Park, the respective councilmen and chiefs of police of said cities, and the two arresting officers. The general demurrers of the two cities and the respective councilmen thereof were sustained without leave to amend, and a judgment of dismissal as to said cities and said councilmen was entered thereon. This appeal is from that judgment.

The sole question presented is whether a municipality can be held liable in damages for the negligent acts of its police officers acting in a governmental capacity. We are compelled by the authorities to answer the question in the negative. *Chafor v. City of Long Beach*, 174 Cal. 478, 487, 163 P. 670, L.R.A. 1917E, 685, Ann.Cas. 1918D, 106; *Davoust v. City of Alameda*, 149 Cal. 69, 70, 84 P. 760, 5 L.R.A.(N.S.) 536, 9 Ann.Cas. 847; *Dobbins v. City of Arcadia*, 44 Cal.App. 181, 182, 186 P. 190; *Miller v. City of Palo Alto*, 208 Cal. 74, 280 P. 108; *Hilton v. Oliver*, 204 Cal. 535, 536, 269 P. 425, 61 A.L.R. 297; *Sievers v. City and County of San Francisco*, 115 Cal. 648, 47 P. 687, 56 Am.St.Rep. 153; *McQuillin's Municipal Corporations* (2d Ed.), p. 405, § 2591; *Nisbet v. City of Atlanta*, 97 Ga. 650, 25 S.E. 173. In *McQuillin's Municipal Corporations*, § 2591, it is said: "A municipality is not liable for false imprisonment by police officers; illegal arrest or wrongful acts in making an arrest; unjustifiable assault in making an arrest; arresting and carrying to jail a person too sick to bear the removal. * * * on the same theory, a municipality is not liable to prisoners for injuries received during imprisonment from the negligent or malicious acts of police or other officers, such as failure to provide a convict with proper medical attention."

In the case of *Nisbet v. City of Atlanta*, supra, the court says: "The question involved in this case has been too often

passed upon by this court to require further elaboration. Neither the law of master and servant, nor the doctrine of respondeat superior, applies in a case where a prisoner undergoing punishment for a violation of a municipal ordinance is injured or killed in consequence of the negligence or misconduct of the officer having the custody or control of such prisoner."

The judgment is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.



10 Cal.App.2d 535

**MARTIN v. BANK OF AMERICA NAT.
TRUST & SAVINGS ASS'N et al.**
Civ. 9999.

District Court of Appeal, First District,
Division 2, California.

Dec. 9, 1935.

Hearing Denied by Supreme Court
Feb. 6, 1936.

Mortgages ⇐86(3)

Evidence that no representations were made to maker of renewal note, secured by trust deed, that certain bonds, deposited as security for note which had been renewed, would be returned to maker on execution of renewal note and deed held to support finding that maker, to whom bonds were not returned, was not entitled to cancellation of note and deed on ground of fraud in inducing execution of instruments by such representations.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Ada Scarborough Martin against the Bank of America National Trust & Savings Association and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

See, also, *Martin v. Bank of America Trust & Savings Ass'n*, 4 Cal.App.(2d) 431, 41 P.(2d) 200.

Bernard Potter and C. A. Doody, both of Los Angeles, for appellant.

Freston & Files and Ralph E. Lewis, all of Los Angeles, for respondents.

NOURSE, Presiding Justice.

Plaintiff sued to cancel a promissory note and trust deed on the grounds of fraud and deceit. Judgment went for defendants upon findings that neither fraud nor deceit entered into the execution of the documents.

The appeal, stripped of all its side issues, presents the single question of the sufficiency of the evidence to support these findings. In 1923 plaintiff executed her unsecured promissory note in favor of the bank's predecessor in the principal sum of \$30,000. This note was successively renewed by the execution of new notes for ninety-day periods until the year 1926 when \$6,000 was paid on the principal. Similar notes for \$24,000 followed until July, 1927. At that time a trust was created with the bank as trustee whereby plaintiff became obligated as one of the trustors for a portion of the sum of \$150,000. She deposited with the trustee, as security for this obligation, bonds of the face value of \$36,000. She agreed further to a lien upon these bonds as security for her \$24,000 note, and her renewals from that time until December, 1928, carried that security. From that date until October 22, 1929, all these renewals were unsecured.

On the date last mentioned plaintiff executed a new note in the sum of \$30,000, which represented the \$24,000 then due and an advance of \$6,000 in cash. This note was secured by a deed of trust on real property. It is plaintiff's claim that this note and this deed were both procured by the false representation that the bank would return to her the bonds mentioned upon execution of the note and trust deed, and that she later learned that this promise was impossible of performance because the bank had previously delivered the bonds to a bondholders' committee for adjustment of the obligations under which they had been deposited. It is this note, and the trust deed supporting it, which the plaintiff seeks to cancel in this proceeding.

The adverse finding is fully supported by direct testimony that no such representations were made, and by the indirect testimony, or inference, which the trial court was justified in drawing from the conceded facts, that the independent obligation for which the bonds had been deposited was still unsatisfied and that the bank could not have returned them to the plaintiff because of the terms of that trust, of which

the plaintiff was fully aware. In view of all the circumstances proved and the financial conditions existing in December, 1929, the trial court might have further concluded that the plaintiff's testimony of the alleged promise to release this security was inherently improbable. But the direct evidence is alone sufficient to support the finding. All the arguments of plaintiff relating to the duties of a trustee and of one in a confidential relation are beside the issue because those relations existed in a wholly independent transaction. Here the salient fact is that plaintiff has \$30,000 of the defendants' money. If she has any claim for a breach of the trust, that is the subject of another action; one which, it is stipulated, has been instituted for the trial of that issue and has gone to judgment.

The judgment is affirmed.

We concur: STURTEVANT, J.;
SPENCE, J.



10 Cal.App.2d 537

I. ROKEACH & SONS, Inc., v. KUBETZ.
Civ. 9983.

District Court of Appeal, First District, Division 2, California.
Dec. 10, 1935.

1. Trade-marks and trade-names and unfair competition ¶70(4)

Where in general form, size, design, wording, meaning, use, and combination of expressions, defendant's labels on jars of cooking fat were identical with plaintiff's labels, except that shades of red and blue, which were same as shades on other, did not always appear in same places, and names of respective manufacturers were different, plaintiff, who was first user, *held* entitled to injunction restraining defendant from using labels.

2. Trade-marks and trade-names and unfair competition ¶70(4)

Where defendant leaving plaintiff's employ commenced manufacture of line of soap so made that colored material was stamped through each cake as to make three Hebraic characters spelling word "Kosher" which was so similar to soap made by plaintiff that customers using ordinary care were imposed on in purchasing cakes of soap, plaintiff *held* en-

titled to injunction on ground of unfair competition.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by I. Rokeach & Sons, Incorporated, a corporation, against S. Kubetz, sometimes known as Samuel Kubetz. From an adverse judgment, plaintiff appeals.

Reversed.

Elias Mansfield and Gibson, Dunn & Crutcher, all of Los Angeles (Ira C. Powers and Arthur E. Pennekamp, both of Los Angeles, of counsel), for appellant.

Edwin W. Taylor, Stanley Howell, and Irwin H. Roth, all of Los Angeles, for respondent.

STURTEVANT, Justice.

In an action brought to obtain an injunction, the trial court made findings in favor of the defendant, and from the judgment entered thereon the plaintiff has appealed.

The plaintiff framed its complaint in two counts. In the first count it alleged a cause of action for wrongful infringement of certain trade-marks. In its second cause of action it alleged facts showing unfair competition. In view of the conclusions we have reached regarding the second count, we do not deem it necessary to discuss the contentions made under the first count.

Commencing as early as 1884, the plaintiff, or its predecessors in interest, engaged in manufacturing and selling certain articles to the Jewish trade. It commenced doing business at Kovno, Lithuania, and later transferred its business to New York, where it continued to manufacture and sell. From time to time it commenced the manufacture and sale of different articles. At the time this action was commenced, September 19, 1932, the plaintiff was continuing its manufacture in the state of New York and selling in interstate commerce and particularly in the city of Los Angeles. Among other things, it was so engaged in the manufacture of a cooking fat and also of a line of soaps. In about the year 1925 the defendant accepted employment by the plaintiff and acted as a general mechanic in its factory down to the year 1931. At about that time the defendant stopped working for the plaintiff, moved to Los Angeles, and there he commenced to manufacture and sell a cooking fat and a line of soaps. The

issues presented in this case involve his method of vending those articles.

[1] The record discloses that both parties prepared and packed in glass jars their cooking fats. The jars are identical in size. On each jar there is a label. It was the contention of the plaintiff that the defendant adopted and used a label that was so closely similar to the label used by the plaintiff as to work a fraud on the latter. The two labels are almost exactly the same size. The plaintiff's label has circular sides which are truncated. The defendant's label is of the same identical shape except that it has four ears as though a square were superimposed on a circle in such a position that the four corners would slightly project. From the top of the label to a point slightly below the middle of it appears a design which may be said to be the body of the label. In the center appears a six-pointed star. In the middle of the star appear Hebrew characters spelling the word "Kosher" which means "to prepare in conformity with Jewish laws as meat." Except as we have indicated, all lines and all dimensions are exactly the same. On plaintiff's label its name written in Yiddish characters appears at the very top. The characters are in white located in a blue background. Immediately below the star are Yiddish characters spelling the word "Nyafat." Those characters are white in a blue background. On the top of defendant's label appears the defendant's name written in Hebrew characters. The letters are white resting in a red background. Immediately below the star appears in Yiddish "Nufat." "Nufat" means the same as "Nyafat." The letters are white in a red background. The star on the defendant's label has a blue background, whereas the star on the plaintiff's label has a red background. Printed matter in the Yiddish language appears at the right and also at the left of the star on each label. On the plaintiff's label that printing is in blue; on the defendant's label it is in red. The expressions translated are identical. Below the design so described, in Yiddish appears, "It can be used for milk and not for meat." Still lower down on the plaintiff's label appears its name and address which is printed in blue. In the same position on the defendant's label appears his name and address printed in red. To one who can neither read nor write Yiddish or Hebrew, all words and letters except the name of the manufacturer appear to be nothing but lines and dots. Each label is

bordered by a broad line of gold. Each label is divided into three subdivisions, each of which is bounded by lines of gold. The name of the manufacturer written in Hebrew characters appears at the very top of each label, in a space of considerable size; and being a rectangular crescent in form. The words "Nyafat" and "Nufat" appear written across the middle of the label in a rectangle the ends of which are bent backwards. The words last mentioned are the prominent expressions on both labels. The star on each label is constructed by so imposing one isosceles triangle upon another as to make six sharp points. Each of these divisions is bounded by gold. As one looks at the two jars, sitting side by side, the very first impression is that they are the labels of one manufacturer varying in color only. Certain purchasers entertained the same views and were imposed upon in making their purchases. That evidence was not controverted. Some other purchasers did not make the same error, but such fact in no way controverted the testimony of those who were imposed upon.

In general form, size, design, wording, meaning, use, and combination of expressions the two labels are identical except that the shades of red and blue, which are the same as the shades on the other, do not always appear in the same places and the names of the respective manufacturers are different. It is settled law that the variation in the use of the identical colors is not controlling. *Schmidt v. Brieg*, 100 Cal. 672, 681, 35 P. 623, 22 L.R.A. 790. The difference between the names of the manufacturers and their addresses is buried by other features in the design.

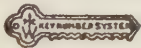
[2] As to the soap, the case is not so clear, but nevertheless we think it fully sustained the allegations of the plaintiff. The cakes of soap are rectangular, about twice as long as wide. Each cake is so made that a rim extends entirely around the cake. The rim is perhaps twice as thick as the inside of the cake. The substance of each cake is so made that colored material is stamped through each cake. That colored material is so stamped as to make three Hebrew characters spelling the word "Kosher." The plaintiff used red as a coloring material; the defendant sometimes used red and sometimes used blue. The lines of the letters spelling "Kosher" may be seen forty or fifty feet away. On one side of a cake of soap made by the plaintiff appears its name and the words "Kosher Soap." In

letters identical, the same size, on a cake of soap made by the defendant appears his name and the words "Kosher Soap." The prominence of the Hebraic letters throws into shade the English letters, and, if one does not have his attention specially called to the matter, he assumes the two cakes of soap are the product of the individual who uses the scrolls which the Hebraic letters appear to be. That the customers using ordinary care were imposed upon in purchasing cakes of soap was the uncontradicted evidence in the case.

From what we have said, we think it is clear that all findings should have been made in favor of the plaintiff, as its proof was complete. *Banzhaf v. Chase*, 150 Cal. 180, 88 P. 704, and cases there cited. The defendant cites *Southern Cal. F. Co. v. White Star C. Co.*, 45 Cal.App. 426, 187 P. 981. But in that case the facts were quite different. The court said, 45 Cal.App. 426, on page 428, 187 P. 981, 982: "Except that both labels have substantially the same blue-colored background, the figure of a fish, designated [designed] to represent the 'tuna,' and truthful printed descriptions of the contents of the packages, the labels of the two competitors differ in almost every respect." They also cite and rely on *American Automobile Ass'n v. American Automobile O. Ass'n*, 216 Cal. 125, 13 P.(2d) 707, 83 A.L.R. 699. That was a contest between two rival organizations seeking members. In no way did it involve packages of merchandise with labels attached thereto.

The judgment is reversed.

We concur: NOURSE, P. J.;
SPENCE, J.



10 Cal.App.2d 630

KAPPER v. HARRIS et al.
Civ. 10605.

District Court of Appeal, Second District,
Division 2, California.
Dec. 16, 1935.

1. Appeal and error ⇨930(1)

On appeal from judgment for defendants, appellate court would view evidence most favorable to defendants.

2. Appeal and error ⇨1001(1) Automobiles ⇨245(6, 72)

In action for injuries sustained by pedestrian who was struck by rear of truck in private driveway, defendants' negligence and plaintiff's contributory negligence held for jury whose finding would not be disturbed by reviewing court if there was substantial evidence in support thereof.

3. Automobiles ⇨160(3), 216

While driver of vehicle has duty to look out for pedestrians, it is equally duty of pedestrians to use care before entering on driveway where vehicles frequently pass and repass.

4. Automobiles ⇨246(30)

In action for injuries sustained by pedestrian who was struck by rear of truck in private driveway, instruction that notwithstanding driver was allegedly negligent, if pedestrian attempted to cross alleyway in negligent manner and negligence proximately contributed to accident, pedestrian could not recover held proper.

5. Automobiles ⇨246(30)

In action for injuries sustained by pedestrian who was struck by rear of truck in private driveway, instruction that if pedestrian saw or should have seen truck, and heard or should have heard starting up and running of truck, and there was sufficient room between truck and wall for pedestrian to have stood or moved, but proceeded to walk or stand in driveway to rear of truck, pedestrian was contributorily negligent and could not recover held proper.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Bessie Kapper against H. A. Harris and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

George N. Foster, of Los Angeles, for appellant.

Leonard E. Thomas and Alfred Testa, both of Los Angeles, for respondents.

McCOMB, Justice pro tem.

This is an appeal from a judgment in favor of respondent after a trial before a jury.

[1] Viewing the evidence most favorable to respondent [*Demers v. Sutherland*, 117 Cal.App. 489, 493, 4 P.(2d) 187], the facts in the instant case are:

Appellant stepped into a private driveway ten feet wide bounded on one side

by an apartment house and on the other by a stone wall. She saw a 1929 Ford delivery truck owned by respondent at the south end of the driveway. Aware that the driveway was used by both pedestrians and vehicles, she started to walk in a northerly direction on it. The driver of the truck, after appellant entered the passageway and before backing in a northerly direction, started his motor, sounded his horn, and looked to the rear along the driver's side of the conveyance, but did not see appellant, as she was out of the range of his vision. Shortly thereafter the rear end of the truck struck appellant and she was injured.

Appellant relies for reversal of the judgment on two propositions:

First. There was not any substantial evidence to sustain the implied findings of the jury that:

(a) Respondent was not negligent in the operation of its truck.

(b) Appellant was guilty of contributory negligence.

Second. The trial court committed prejudicial error in instructing the jury as follows:

(a) "While it is the duty of the driver of a vehicle to look out for foot travelers, it is equally the duty of the foot travelers to use care before entering upon a driveway where vehicles frequently pass and repass, and see that they are not in immediate danger from the near approach of any of them.

"It is as much the duty of foot travelers attempting to cross the driveway or alleyway to look out for passing vehicles as it is the duty of drivers to see that they do not run over foot travelers.

"I instruct you that if you find that, at the time of the accident, defendant's agent, Wm. Grove, was driving his automobile in a negligent, reckless or careless manner, out if you also find that plaintiff was attempting to cross the alleyway in a negligent, reckless and careless manner, and that her said negligence, recklessness and carelessness proximately contributed in some way to the accident, you cannot attempt to determine which party was the most negligent, but your verdict must be for the defendant."

(b) "If you believe from the evidence introduced that the plaintiff, on leaving

the El Royale Apartments, saw or should have seen the truck belonging to the defendant and located in the driveway, and if you believe from the evidence introduced that the plaintiff heard, or should have heard the starting up and running of the aforesaid truck, and if you believe from the evidence introduced that there was sufficient room and space between the west side of the truck and the east wall of the El Royale Apartments in the walk provided therefor for the plaintiff to have stood or traveled, but that on the other hand the plaintiff, through absent-mindedness, forgetfulness, negligence or carelessness, proceeded to walk or stand in the driveway north of the said truck, you are then instructed that the plaintiff was guilty of contributory negligence and your verdict should be for the defendant."

[2] Appellant's first proposition is answered by an unbroken line of decisions in this state holding negligence on the part of defendant and contributory negligence on the part of plaintiff questions of fact for determination by the trial jury, whose findings will not be disturbed by this court, if there is substantial evidence in support thereof.

An examination of the record in the instant case discloses substantial evidence considered in connection with such inferences as the jury may have reasonably drawn therefrom to sustain the implied findings of the jury that (a) respondent was not negligent in the operation of its truck, and (b) appellant was guilty of contributory negligence. We therefore refrain from further discussion of the evidence. *Leavens v. Pinkham & McKevitt*, 164 Cal. 242, 245, 128 P. 399; *Koeberle v. Hotchkiss* (Cal.App.) 48 P.(2d) 104.

[3-5] The instruction set forth in paragraph (a) of appellant's second proposition is an accurate statement of the law. *Niosi v. Empire Steam Laundry*, 117 Cal. 257, 260, 49 P. 185. Likewise the instruction included in paragraph (b) of appellant's second proposition is a correct statement of the principles of law embodied therein. *Young v. Southern Pacific Co.*, 189 Cal. 746, 754, 210 P. 259. Both instructions were based upon substantial evidence educed at the trial.

The judgment is affirmed.

We concur: CRAIN, P. J.; WOOD, J.

**PAPINEAU v. DISTRIBUTORS PACK-
ING CO.**
Civ. 10101.

District Court of Appeal, Second District,
Division 1, California.

Dec. 11, 1935.

Rehearing Denied Dec. 31, 1935.

Hearing Denied by Supreme Court
Feb. 6, 1936.

1. Negligence ⇨32(1), 48

Property owner's sole duty is to warn invitee of latent defects on portion of premises where it is reasonably contemplated that invitee might go, and such duty obtains only in case latent defect is known or in exercise of ordinary care should be known to owner.

2. Negligence ⇨134(3)

In action for injuries sustained by employee of company which had contracted to erect cooling plant on roof of owner's building when one of series of cleats forming incomplete ladder on upright of water tank tower broke, permitting employee to fall while employee was using ladder to attach guy wire to upright, as requested by owner's superintendent, evidence *held* to justify jury's finding that owner had assumed responsibility for safety of ladder and was negligent in maintenance thereof.

3. Negligence ⇨136(26)

In action for injuries sustained by employee of company which had contracted to erect cooling plant on roof of owner's building when one of series of cleats forming incomplete ladder on upright of water tank tower broke, permitting employee to fall while employee was using ladder to attach guy wire to upright, as requested by owner's superintendent, whether employee was contributorily negligent *held* for jury.

4. Negligence ⇨136(9)

When more than one rational conclusion can be drawn from evidence by reasonable men, question of contributory negligence is one of fact and not of law.

5. Damages ⇨132(3)

\$20,000 damages for injuries, including paralysis of and inability to raise left arm, paralysis of left side of face, which resulted in talking with a lisp, scar seven inches long from front to back on right side of scalp, shrinkage of muscles and tissues of left leg, impairment of hearing and vision, pain and sensitiveness of left shoulder joint, broken neck, and broken fifth, sixth, and seventh cervical vertebrae bodies, *held* not excessive.

6. Appeal and error ⇨1004(3)

Mere fact that verdict was reduced by trial court is not evidence of passion and prejudice.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Lawrence Papineau against the Distributors Packing Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Hearing denied by Supreme Court; THOMPSON, J., dissenting.

A. G. Allen, of Pasadena, and Jennings & Belcher, of Los Angeles (Louis E. Kearney, of Los Angeles, of counsel), for appellant.

J. M. Clements, of Los Angeles, for respondent.

ROTH, Justice pro tem.

Respondent, Papineau, was an employee of the Pacific Tank & Pipe Company, which had contracted to erect a cooling plant on the roof of one of the buildings located on the premises of appellant, Distributors Packing Company. North of the building in question, and almost adjoining it, was a water tower which consisted of four upright posts held in juxtaposition by two sets of crossbars or girders completely encircling the uprights and appropriately spaced between the bottom and top of the uprights. At the top of the uprights was constructed an octagonal platform with a railing; resting on this platform was a water tank. The southwest upright had a series of wooden cleats running from the ground up to the water tank platform, which were nailed on and extended beyond each side of the upright. These were attached to the south face of the southwest upright on the side closest to the building, upon the roof of which the cooling plant was to be constructed, and formed a continuous ladder from the ground to the platform upon which the water tank rested. The northwest upright had a series of wooden cleats also of the same nature on the west face of the northwest upright, distributed all the way up, but not from the ground, as will hereinafter be made more clear, and not at the same regularly spaced intervals as were the cleats on the southwest upright. The accident, which resulted in the injuries for which damages were obtained in the instant action, occurred in the use of this northwest upright as a ladder. It differed from the ladder described on the face of the southwest upright in that there was, on the north side of the water tank tower and adjacent to it, and particularly contiguous to the northwest and northeast uprights, at

the bottom, a low shed with a roof just below the first crossbar or girder which embraced the four uprights. At the base of the water tower and to the west of it there was a pigpen. Because of this shed and the pigpen, the wooden cleat on the northwest upright closest to the ground was 9 feet 8 inches above it. From this cleat to the next above was a distance of 4 feet 9 inches; then followed six cleats spaced at approximately regular intervals, and from the topmost of these six to the next above was approximately 6 feet 8 inches. Between the second crossbar or girder above the ground and the platform built, as aforesaid, at the top of the uprights were four cleats, the topmost of which was 6 feet 4 inches below the bottom of said platform. The entire structure was of wood.

On April 28, 1932, one Huston, appellant's superintendent, in respondent's presence, requested a guy wire to be placed on the northwest upright of the water tank tower just above the lowest crossbar or girder. In order to get the end of this guy line fastened there, respondent started to climb the ladder on the northwest upright of the water tank tower. One of the cleats between the two crossbars or girders, specifically the fourth cleat in the series of six first mentioned, split in two when he grasped it with his left hand, whereupon he fell first to the roof of the little shed and then on to the ground, suffering injuries which will be mentioned more in detail hereinafter. The fourth cleat in question cracked on the grain of the wood, which was not straight, and part fell to the ground, and part remained on the upright. The nails which had held the cleat were almost rusted through. Respondent sued appellant on the theory of negligence, obtained a judgment for \$30,250, which, on motion for new trial on consent of respondent, was reduced to \$20,000, in which latter amount judgment was finally entered. From that judgment appellant takes this appeal.

[1] Appellant contends in its brief that its "sole duty was to warn plaintiff of latent defects upon that portion of the premises where it was reasonably contemplated he might go—and that duty obtained only in case the latent defect was known or in the exercise of ordinary care should have been known, to defendant." *Hall v. Southern California Edison Co., Ltd.*, 137

Cal.App. 449, 30 P.(2d) 1013; *Baddeley v. Shea*, 114 Cal. 1, 45 P. 990, 33 L.R.A. 747, 55 Am.St.Rep. 56; *Thompson v. California Construction Co.*, 148 Cal. 35, 82 P. 367. This contention seems to be upheld by the authorities cited, and we accept it as the law. In order to determine the question of appellant's negligence, therefore, it becomes necessary to decide whether appellant, as a reasonable person, was chargeable with notice that respondent would use said upright as a ladder, and whether appellant knew of the defect or, in the exercise of ordinary care, was chargeable with knowledge of circumstances which placed appellant on notice as to the condition of the northwest upright and its safety for use as a ladder. The evidence shows that Huston had been superintendent of appellant corporation for five years; that he had general charge of the maintenance of appellant's premises, looked after general repairs and had a crew of repair men and engineers working under his supervision, assisting him in properly maintaining the plant and keeping it in repair. He admitted that he inspected the premises for run-down conditions every day, but asserted that he never inspected the northwest upright of the water tank. He also asserted that the employees of the defendant corporation never used the cleats on the northwest upright of the water tower to ascend the tower. There is no evidence, however, that they were never used for any purpose, nor is there any evidence that he or any one on appellant's behalf or any one for appellant ever advised respondent or any of respondent's superiors that the northwest upright was never used as a ladder, or that it had never been inspected. Whether Huston directed Papineau to use either or both ladders on the southwest and northwest uprights can be ascertained only by inference from the evidence. The day prior to the commencement of work, respondent went to appellant's premises and inquired of Huston, the superintendent, how the roof of the building on which the cooling plant was to be installed could be reached. The following conversation then took place:

"Q. You came over there the day before you commenced work on the tower?
A. Yes.

"Q. And looked at the water tank tower at that time? A. I just looked at it, yes, sir.

"Q. Where were you at the time you looked at it? A. I came down and inquired for Mr. Huston how I could get up there on the roof and he brought me down to the alleyway, which is to the north of the picture here, and we stopped outside the gate, and he pointed to the tower and said, 'That is where you get up on the roof.'

"Q. In other words, you looked at that tower at that time and saw there on the ground just about the same view that we get here when we look at the picture? A. Yes, sir, just about the same view.

"Q. When you looked at this water tank tower, you observed a ladder running up the side of the building? A. Yes.

"Q. And you observed that this tower had four corner posts? A. Yes, sir.

"Q. And you observed some cleats on the northwest post? A. I remember seeing the cleats there.

"Q. And you saw that it was something over nine feet from the ground to the first cleat on the northwest post? A. I did not pay any special attention to that at that time.

"Q. You did observe gaps in between some of the cleats on the northwest corner? A. I did not pay any special attention to that at that time.

"Q. Didn't you observe at that time that there was not a complete ladder on the northwest post? A. No, I didn't pay any attention to it at that time.

"Q. You did, however, observe that this was a complete ladder on the southwest post? A. Yes.

"Q. But you paid no particular attention to the northwest post? A. No, no more than to look at it in a general way.

"Q. You did not at that time contemplate using the northwest upright at all, did you? A. No."

The evidence shows, in addition, that, on the day when the accident occurred, Huston directed the attachment of a guy wire to the northwest upright. A portion of the evidence in that respect is as follows: " * * * Repeat what you said. A. Mr. Huston said he wanted another guy line placed on the north side, on account of the north winds, and Mr. Obert said, 'Well, we have four guy lines on there now.' And Mr. Huston said, 'Yes, but you don't know how hard we get these north winds up here.' And Mr. Obert said,

'I can show you numbers of jobs where we have no guy lines at all, merely attached to the foundation.' And Mr. Huston turned around and pointed to the north, and then pointed a little bit to the northwest, correcting himself, and he says, 'We get some terribly hard north winds, right out from that open space, and there should be another guy line placed on the north side.' Mr. Obert said, 'Well, all right, I will furnish you with another guy line.' The next question was, where should we place it, and Mr. Huston pointing to the tank tower there says, 'On the northwest post, just above that little "gird".'"

The witness Obert further testified as follows:

"Q. Just state all that he said, and what you said and what Mr. Papineau said. A. I told Mr. Huston that the tower was designed to stand without guy wires, and that we figured that we had plenty of guy wires on it, but if he wanted an additional wire, that was up to him, and we would be glad to do it.

"Q. What further was said? A. He said he would like to have one more guy wire placed on the north side. I asked him where we had better tie it, and he said, 'You better tie it to the tank tower on the north side of the tank tower.'

"Q. Was there any further conversation? A. Yes, I told him we did not have the wire there, but we would send one over later in the day and have it put on."

[2] In *Bush v. Weed Lumber Co.*, 63 Cal.App. 426, 432, 218 P. 618, 620, it is said: "An invitation to use the premises of another is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using them." Appellant does not dispute that Papineau was legally on its premises, and the evidence clearly demonstrates that he was an invitee. In view of the nature of the work to be done and in the light of the brief excerpts of testimony set forth, it is also clear to us that appellant invited Papineau not only on its premises, but also to the use of the entire water tower in connection with the job to be done. In the *Bush Case*, supra, 63 Cal. App. 426, at page 432, 218 P. 618, 620, it is further said: "The status, then, of appellant being that of an invitee, it became the duty of respondent to exercise ordi-

nary care and prudence to render the premises reasonably safe for the appellant, * * * and that duty has reference to such dangers as might reasonably be anticipated by a prudent and careful man." Applying this language to the circumstances surrounding the attachment of the guy wires to the northwest upright, and keeping in mind that there was constructed on said upright a partial ladder which, in conjunction with the roof of the shed immediately contiguous to the northwest upright, furnished ready access to that portion of the water tower between the two crossbars or girders, it seems clear to us that the jury or the trial court would be justified in finding that the use of said northwest upright as a ladder "might reasonably be anticipated by a prudent and careful man." In the Bush Case, supra, 63 Cal.App. 426, at page 432, 218 P. 618, 621, the court concludes its opinion by saying: "Considering all the pertinent evidence in the case, it is apparent that reasonable men might differ as to the inferences which might be drawn therefrom, and it cannot be properly declared that no reasonable man could find in favor of the defendant. 'If the finding of fact is based upon a reasonable inference, it is not within the power of this court to set it aside.'"

So, on the facts of this case, it cannot be said that the jury was not justified in finding that the appellant was negligent in the maintenance of its premises. Appellant, if it had extended the inspection of its premises, which the evidence shows was habitually made through its superintendent, Huston, to the partial ladder on the northwest upright, could easily have ascertained the condition of the same. The jury was justified in believing from the evidence that appellant had invited respondent to use this very upright. Under such circumstances, the jury was justified in concluding that appellant in effect advised respondent that it was safe to use, and that appellant therefore assumed the responsibility for its safety. *Harvey v. Machtig*, 73 Cal.App. 667, 239 P. 78; *Cordler v. Keffel*, 161 Cal. 475, 119 P. 658. In the case of *Harvey v. Machtig*, supra, 73 Cal. App. 667, at page 674, 239 P. 78, 80, the court says: "To use and keep in operation a device or apparatus upon which the safety of human life depends, without it being frequently or properly tested as to its continued strength and efficiency to meet the

purposes for which used, is not such reasonable care as a prudent man should take to guard the safety of those intrusted to his protection." Since the very nature of the upright, equipped as it was for ladder purposes, advertised itself as being fitted for that use, there was under the circumstances of this case a duty upon appellant to keep it fit or to ascertain its fitness for that use.

[3, 4] We find nothing in the record that compels the conclusion that Papineau was guilty of contributory negligence as a matter of law. The jury, as we have pointed out, was justified in finding from the evidence that Huston had directed the attachment of the guy wire to the northwest upright, and had in effect notified Papineau to use the incomplete ladder on the northwest upright to effect that purpose. The record shows nothing from which it can be said that Papineau was put on notice that the incomplete ladder was never used, or that it was defective. There is no evidence, physical or otherwise, that the ladder on the northwest upright was at any time different than the same incomplete ladder that Papineau first saw, or that as such it was not fully completed as a means of upward approach from the roof of the shed to that portion of the space between the crossbars or girders. When more than one rational conclusion can be drawn from the evidence by reasonable men, the question of contributory negligence is one of fact and not of law. *Hall v. Barber Door Co.*, 218 Cal. 412, 23 P.(2d) 279; *Meindersee v. Meyers*, 188 Cal. 498, 205 P. 1078; *Oliver v. Stoltenberg*, 24 Cal.App. 637, 142 P. 108.

Speaking of this principle, the court says in the *Stoltenberg Case*, 24 Cal.App. 637, at page 639, 142 P. 108, 109: "'Appellant's proposition is that the facts being undisputed, it was a question of law as to whether or not defendants were negligent, and that the finding and determination of the court is against the law and against the evidence. This, however, may not be said. It was for the court, as it would have been for a jury, considering all of the circumstances and facts shown by the evidence, to declare whether the defendants were or were not negligent. * * * The defendants were called upon to exercise the care which the circumstances required in the construction or maintenance of the temporary driveway, and what was

ordinary care it was peculiarly the province of the court below, sitting as a trier of the facts, to determine.”

Appellant's next point is that the verdict and judgment entered thereon was excessive by reason of passion and prejudice and that the judgment should therefore be reversed.

[5] Respondent, according to the record, suffered injuries as follows: Paralysis of and inability to raise the left arm; paralysis of the left side of the face, causing inability to use muscles on the left and right sides of the face, which resulted in talking with a lisp; a scar seven inches long from the front to the back on the right side of the scalp; shrinkage of the muscles and tissues of the left leg; impairment of hearing and vision; pain and sensitiveness of the left shoulder joint, and many other related pains and impairments too numerous to mention.

[6] The evidence shows that, by reason of the fall, respondent suffered a broken neck, and that the fifth, sixth, and seventh cervical vertebræ bodies were broken; that he had a halter around his neck and jaw to keep his head immovable, and that he was kept in bed under sedatives and opiates for a period of ten days; that the halter was used for one month, and that he had remained in the hospital for a period of three months, and had been treated up until the time of the trial; that he was in good physical condition before the accident, had worked regularly every day, and his injuries are such that he will never be able to resume his occupation of structural foreman. We are of the opinion that the verdict was not excessive, and the mere fact that the verdict was reduced by the trial court is no evidence whatever of passion and prejudice. *Swett v. Gray*, 141 Cal. 63, 74 P. 439.

Complaint is made that the court erred in giving five several instructions requested by respondent and in refusing to give three several instructions requested by appellant. We have perused these instructions and, reading the charge as a whole, we find no prejudicial error, and are of the opinion that the instructions given to the jury were fair and complete. The language of the court in *Sellers v. Wood, etc., Co.*, 205 Cal. 519, at page 524, 271 P. 1055, 1057, is appropriate on this point: "Extended argument is made that error occurred in the giving of certain instruc-

tions. The instructions as a whole correctly and fairly stated the law to the jury, and the merits of this action are so apparent that technical error in instructions would not warrant a reversal of the judgment."

The judgment is affirmed.

We concur: HOUSER, P. J.; YORK, J.



10 Cal.App.2d 341
In re CARLSON'S ESTATE AND GUARDIANSHIP.

CARLSON v. WEST.
Civ. 5511.

District Court of Appeal, Third District,
California.
Nov. 22, 1935.

Hearing Denied by Supreme Court
Jan. 20, 1936.

1. Guardian and ward ⇨155

Ward's objections to guardian's discharge held sufficient to raise issue as to alleged fraudulent concealment and alleged fraudulent statements in accounts filed by guardian.

2. Guardian and ward ⇨160

Equity will entertain jurisdiction to set aside accounts of guardian for extrinsic and collateral fraud if action is commenced within three years after discovery of fraud (Code Civ.Proc. § 338).

3. Guardian and ward ⇨144

Until guardian's petition for final discharge has been acted on, court has jurisdiction to entertain inquiry into any of reasons why guardian should not be discharged, and, if inquiry discloses that guardian has made fraudulent reports to court, sitting as probate court, probate court is empowered to surcharge guardian with sums of money unreported or misappropriated.

4. Guardian and ward ⇨155

Statute providing that minor's guardian appointed by court is not entitled to discharge until one year after ward's majority does not bar ward from thereafter filing objections to guardian's discharge on ground that guardian has not truthfully reported moneys received and disbursed (Probate Code §§ 1487, 1593).

5. Guardian and ward ⇨163

Orders settling guardians' accounts are not res judicata, and probate courts may re-

examine accounts and correct, revise, modify in amount, or entirely disallow items of expenditure previously approved by it.

6. Guardian and ward $\Rightarrow$ 155

Ward held entitled to file objections to guardian's discharge on ground of alleged fraudulent concealment of funds of estate, although petition for discharge was filed several years after ward attained majority and almost eight years after purported final account was filed, where there was no showing of laches or that ward's delay prejudiced any of parties (Probate Code, §§ 1487, 1593).

Appeal from Superior Court, Mendocino County; W. D. L. Held, Judge.

Proceeding in the matter of the estate and guardianship of Tune Carlson, a minor, on application of August West, guardian, for an order discharging him from his position as guardian, wherein the ward filed objections. From an order and judgment granting the discharge of the guardian, the ward appeals.

Reversed and remanded, with directions.

Taft & Spurr, of Ukiah, for appellant.

Charles Kasch, of Ukiah, and Leonard Stone, of Fort Bragg, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

On the 20th day of February, 1935, August West filed his petition in the superior court of Mendocino county praying for an order of the court discharging him from his position as guardian of the estate of Tune Carlson, a minor. This petition was not accompanied by any final account or statement as to whether any of the property of the estate of said minor had come into his possession since the hearing on the 15th day of April, 1927, settling an account theretofore filed by him, denominated as a "fifth" account, and also as a "final" account.

The petition for discharge alleged the appointment of the petitioner as guardian of the estate of a minor, and further alleged that said minor was born on the 11th day of April, 1912, and that more than one year had elapsed since said minor became of age. Thereupon, said minor filed objections to the discharge of said guardian, setting forth

that an account filed by said guardian on the 29th day of July, 1918, contained fraudulent representations and concealments as to the amount of money received by said guardian belonging to the estate of said minor, and also as to the amount of moneys expended on behalf of said ward.

In the second count of the objections filed by the minor, it is alleged that on the 12th day of August, 1919, said guardian filed an account in which he purported to have expended for the benefit of said minor the sum of \$1,070, whereas in truth and in fact said guardian had only expended the sum of \$710, and fraudulently failed to account for the difference between said items.

The objections further stated that on the 31st day of August, 1926, said guardian filed an account in which he purported to have expended and disbursed for the benefit of said minor the sum of \$1,280, whereas in truth and in fact said guardian only expended the sum of \$20.

As illustrating the character of the objections filed, and the sufficiency thereof, we set forth in full paragraph 4 of the objections, to wit: "That the said August West, as guardian in the above entitled matter, did on or about the 25th day of August, 1919, prepare and file in said court in the matter of said estate of said minor, an account purporting to be the third annual account as guardian aforesaid, covering a period from the 21st day of August, 1918, to the 12th day of August, 1919, wherein he did set forth, allege and account for the sum of \$1070.00 thereof, as having been disbursed, and represented in and by said account that he had expended to and for the purposes and in behalf of this minor the sum of \$1070.00, and affiant, on information and belief, alleges that said August West did fraudulently and intentionally represent to the court the fact that he had paid to and on account of said ward the sum of \$1070.00, whereas in truth and in fact he had paid out for and on account of said ward the sum of \$710.00 only; that by reason of said fraudulent account and conduct of the said August West, and not otherwise, said court did approve said account so filed, as aforesaid."

The record shows that during the pendency of proceedings, Tune Carlson mar-

ried, and is now known as "Tune Cauckwell."

After the filing of the objections to the discharge of said guardian, and praying for the opening and reexamination of the accounts and the surcharging of the guardian with the amounts alleged to be in his possession, the guardian interposed thereto the following motion, to wit (omitting title): That on the day and hour mentioned he would move the above-entitled court for an order awarding the said guardian judgment on the pleadings, in the matter of the application of the guardian, for final discharge and the opposition of objections filed thereto, and grant to said guardian a judgment and decree of final discharge of said guardian on the pleadings. "Said motion will be made upon the ground that no issue of fact is raised by the petitioner for final discharge, and the objections thereto, and that the said guardian is entitled to his final discharge on the pleadings on file. Said motion will be supported by this notice of motion, by all the records, papers and files in the above-entitled proceeding, and by the petition for discharge filed by said guardian, and the objections thereto filed by said Tune Carlson." This motion was granted by the court, not on the grounds alleged and set forth in said notice of motion, but upon the theory that as more than one year had elapsed after Tune Carlson became of age, she was barred from raising any objections to the petition filed by the guardian for his discharge, and also barred from raising any objections to the accounts filed by the guardian, set forth in the objections to have been fraudulent and untrue. The order signed by the court granting the discharge of the guardian appears also to have exonerated his sureties.

[1,2] No demurrer, either general or special, was interposed to the pleadings or objections filed by and on behalf of the minor, and the only question is whether those objections really tendered an issue. In this particular the case of *Gaver v. Early*, 58 Cal.App. 725, 209 P. 390, apparently answers the question affirmatively. There, as set forth in the petition, one of the counts stated that the guardian had filed an account showing the receipt of \$7,915.97, and no more, "and intentionally and fraudulently, and

for the purposes aforesaid concealed, failed to report and account for the sum of \$2,719.14 thereof. That thereafter, and on or about the 14th day of July, 1913, and by reason of said fraudulent acts and conduct of said defendants, and not otherwise, said court did approve and allow said account so filed." Under the holding in this case we think it clear that the objections filed herein sufficiently raised an issue as to the alleged fraudulent concealment and alleged fraudulent statements in the accounts filed by the guardian. While the guardian did not by his motion, or otherwise, tender the issue of the statute of limitations, which, of course, is a personal privilege, the statement of which needs no authorities to support it, the court nevertheless apparently based its order and judgment upon section 1593 of the Probate Code, reading: "A guardian appointed by a court is not entitled to his discharge until one year after the ward's majority." In purporting to exonerate the bondsmen, the court overlooked the provisions of section 1487 of the Probate Code which gives to a minor three years after a guardian has been discharged within which to institute an action against a guardian's sureties. There is no provision either in the Probate Code or in the Code of Civil Procedure purporting in terms to limit the time within which a minor may raise objections to accounts filed by a guardian, but as we have seen, the minor is allowed three years after the guardian is discharged within which to begin an action against bondsmen, and also that equity will entertain jurisdiction to set aside the accounts of guardians for extrinsic and collateral fraud if the action is commenced within three years after the date of the discovery of the fraud. 13 Cal.Jur., p. 199, § 48; section 338, Code Civ.Proc.

[3] Logical reasoning would lead to the conclusion that until the guardian's petition for final discharge has been acted upon, the court has jurisdiction to entertain an inquiry into any of the reasons why the guardian should not be discharged, and if in that inquiry it ascertains that the guardian has made untrue and fraudulent reports to the court, sitting as a probate court, the probate court is empowered to surcharge the guardian with the sums of money unre-

ported or that should have been reported, or with any sums of money misappropriated by him, if any sums are found to have been misappropriated.

[4] Section 1593 of the Probate Code is a limitation upon the right of the guardian, and does not, in its terms, purport to be any restriction upon the right of the ward to oppose the final discharge of the guardian, and there being nothing in the language indicating such an intent on the part of the Legislature, and no other provision of the Code so providing, we find no authority for extending the scope of section 1593, *supra*, so as to bar the minor in filing any objections to the discharge of a guardian on the ground that he has not truthfully reported moneys received and moneys disbursed, but has withheld for his own benefit property rightfully belonging to the ward.

[5] That the probate court has jurisdiction until after the discharge of the guardian, upon proceedings instituted therefor, or reasons set forth by the ward, has been definitely decided by the courts of this state. We need only to quote one paragraph from the case of *In re Vucinich's Estate et al.* (Angelich v. Vucinich) 44 P.(2d) 567, 569 (Cal. Sup.), to wit: "Unlike orders settling accounts of executors and administrators, when final, those settling guardians' accounts do not come within the rule of *res judicata*. The probate court is not precluded from a re-examination of former accounts rendered by a guardian of estates of minors, and on such re-examination it has power and authority to correct, revise, or modify in amount any item or items of expenditure theretofore settled, allowed, or approved by it, or to entirely disallow and withhold its approval or settlement of such item or items. Such is the rule first announced in this state in the case of *In re Guardianship of Cardwell*, 55 Cal. 137."

In states where the statute provides no time within which a ward may make application for the reexamination of a guardian's account, it appears that the time within which it may be made is within the sound discretion of the court. We take the following from the syllabus in the case of *In re Moore*, 112 Me. 119, 90 A. 1088, Ann.Cas. 1917A,

645, to wit: "Where no time is specified by statute within which a guardian's settlement may be opened for fraud or mistake, the time within which the ward, after attaining full age must apply for relief depends on the sound discretion of the court, considered with reference to the nature and extent of the account, the condition and situation of the parties, and the character and evidence of the fraud or mistake."

In this case the proceedings were not sought to be opened until after the discharge of one guardian and the appointment of his successor. Nothing appears in the case indicating that any testimony had been lost, or that any of the parties were disadvantaged by reason of the delay, which was for a considerable time. This case, as reported in Ann.Cas., *supra*, contains two pages of notes, citing cases where the question of laches has been considered.

That proceedings may be had in equity for vacating the settlement of the account of a guardian after discharge, and also by motion prior to discharge and the necessary pleadings therefor, is shown in 28 C.J., pp. 1240 and 1244, inclusive. See, also, *Estate and Guardianship of Wells*, 140 Cal. 349, 73 P. 1065, where the proceeding was filed in the probate court so entitled, but was considered as a proceeding in equity and entertained by the court for the purpose of determining the truth or falsity of the allegations made by the ward.

[6] In the instant case no question of laches is presented, nor is there any showing in the record that any of the parties thereto have been in the least disadvantaged by reason of any delay on the part of the minor. The delay of a guardian to file his petition for a discharge cannot be held as creating a bar as against the minor and estop her from filing objections thereto, on the grounds of alleged fraudulent concealments of the funds of the estate.

The judgment and order are reversed, and the cause remanded for further proceedings, in accordance with this opinion.

We concur: PULLEN, P. J.; THOMPSON, J.

10 Cal.App.2d 492

RIGNEY v. DE LA SALLE INSTITUTE.
ELECTRIC CORPORATION OF OAKLAND
v. SAME.

MAKIN v. SAME.
Civ. 5223, 5224, 5225.

District Court of Appeal, Third District,
California.

Dec. 5, 1935.

Rehearing Denied Jan. 4, 1936.

Hearing Denied by Supreme Court
Feb. 3, 1936.

1. Principal and agent ⇨145(4)

Third party, on learning person he dealt with as principal was agent of undisclosed principal, may generally recover from either agent or undisclosed principal.

2. Principal and agent ⇨133

Materialmen and subcontractors who knew that institute was owner of land upon which buildings were being constructed, that buildings were for use of institute and that person with whom they dealt in behalf of institute had been engaged in independent contracting business for several years, held justified in furnishing such person credit as an independent contractor.

3. Principal and agent ⇨133

Materialmen and subcontractors who had extended exclusive credit to person with whom they dealt in behalf of institute which was constructing buildings on assumption that such person was independent contractor as admitted by them and evidenced by their delivery to him of lien waivers held not entitled upon subsequently learning that supposed contractor was merely agent of institute to recover unpaid balances from institute on theory institute was undisclosed principal (Civ.Code, § 2335).

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Separate actions, which were consolidated and tried together, by Thomas F. Rigney, an individual, doing business under the firm name and style of the Rigney Title Company, by the Electric Corporation of Oakland, and by William Makin against the De La Salle Institute. From a judgment for plaintiff in each action, defendant appeals.

Reversed.

Roger, Clark & O'Brien, of San Francisco, and Sheldon Rutherford, of Napa, for appellant.

Clyde C. Sherwood and H. A. Dannenbrink, both of San Francisco, and Fernhoff & Sevier, of Oakland, for respondents.

MAXEY, Justice pro tem., delivered the opinion of the court.

The plaintiffs are materialmen or subcontractors who furnished labor and material to defendant for the construction and erection of certain buildings at Mount Veeder, in Napa county, Cal. Each of the plaintiffs filed separate actions for an alleged balance due for labor and materials furnished. By stipulation, the several actions were consolidated, and were tried as one action. This appeal has been taken by the defendant from the verdict of the jury in favor of three of the materialmen or subcontractors.

The defendant is a corporation, organized and existing under the laws of the state of California and maintained exclusively by the Christian Brothers, a teaching order of the Roman Catholic Church. The buildings under discussion were constructed for the purpose of conducting a training school for novitiates or candidates for admission to their order.

J. P. Brennan was a contractor and had been engaged in the construction business for many years. He was personally known to each of the plaintiffs herein, and they had known and dealt with him as an independent contractor for several years prior to the commencement of the building operations involved herein.

On December 8, 1930, the defendant, De La Salle Institute, hereinafter referred to as the "Institute," entered into an agreement with J. P. Brennan, whereby the Institute employed Brennan to act as general manager of construction, and as agent in all matters concerning the proposed work. Brennan secured bids from the various materialmen and subsequently entered into contracts with each of plaintiffs to furnish labor and materials upon this project. The contracts were all made in the name of Brennan, and there is no evidence that the contractual relation between Brennan and the Institute was ever disclosed to plaintiffs until after the completion of the buildings.

Each of the plaintiffs knew that the buildings were being constructed for the Institute and that the Institute was the owner of the property upon which the

work was being done. Plaintiffs were to be paid for the labor and materials as the work progressed, and the final payments were to be made to them upon the completion of the buildings. As these progress payments became due, Brennan called upon each of the plaintiffs, requested them to sign a waiver of lien, and stated to each of them that such procedure was necessary in order to secure their money from the bonding or finance company handling defendant's funds. Upon these lien waivers being delivered to Brennan, he secured the money from defendant's representative and made payments to plaintiffs.

There is no testimony that defendant was ever apprised of this procedure. The testimony shows that on occasions, the lien waivers were executed in blank, and later filled in by Brennan or under his direction. At other times, the lien waivers were made out for larger amounts than were then owing to plaintiffs, and that on these occasions, after having executed these lien waivers, and having delivered them to Brennan, he (Brennan) would pay to plaintiffs smaller sums than called for by the lien waivers, and which smaller payments were received by plaintiffs and credited upon the account. Plaintiffs knew, at the time of executing the first lien waivers, that they were to be deposited with some representative of the defendant for the purpose of securing the money claimed to be due to plaintiff upon said job.

Appellant, after starting these building operations, made several attempts to finance them, and were unsuccessful in securing the sums or amount of money necessary for that purpose. It became necessary for the Institute to bond its property, and in that manner conclude the financial part of the building program. These bonds were duly issued and secured by a bond indenture upon the property of the Institute, including the lands upon which the buildings were being constructed. The Bank of America National Trust & Savings Association was named trustee under the bond indenture to disburse the moneys received from the bonds, in accordance with the trust agreement. The bond indenture and trust agreement were duly recorded in Napa county, Cal. All moneys for the buildings, except a portion paid at the outset of the operation, were paid by and through the trustee upon presentation of the lien waivers by Brennan.

Upon the conclusion of the work, plaintiffs issued final receipts and final lien waivers purporting to show that payments in full had been made to each of them for such labor and material. These final receipts and lien waivers were delivered to Brennan, and he received the moneys from the trustee bank, but did not pay to plaintiffs the balances owing to each of them. The final receipts and lien waivers were executed and delivered on or about November 30, 1931.

On September 26, 1932, the plaintiffs were informed for the first time that Brennan had a contract of employment with the Institute, by the terms of which contract his employment was that of a general manager and agent, and not that of an independent contractor. The plaintiffs testified that they had at all times assumed that Brennan was employed by the Institute as an independent contractor, and that they had extended credit to him upon that assumption; that they knew nothing about any different contract until in September, 1932.

The testimony further shows that all of the moneys received from the bond issue had been paid out by the trustee, and that there were no moneys due or unpaid to Brennan, save and excepting the sum of approximately \$600, being the balance due him personally by the Institute upon his commission, as agreed in his contract of employment. All of the lien waivers presented by Brennan had been paid by the bank to Brennan.

Upon these facts the jury found a verdict in favor of plaintiffs, and upon stipulation of counsel, the amounts claimed by the respective plaintiffs were inserted into the verdict so that it became the verdict of that particular claimant. Judgments were accordingly rendered upon each of the verdicts for each of the several plaintiffs.

The sole and only question presented upon this appeal is: "Was the evidence legally sufficient to sustain the implied finding of the jury that the Institute was the undisclosed principal of Brennan so as to render it liable to the plaintiffs as materialmen or subcontractors?"

[1] It is a settled rule of law in this state that where one deals with another, believing him to be the principal, on subsequently learning that he was dealing with an agent of an undisclosed principal, he may recover either from the person he dealt with, or from the undisclosed

principal. *Hollywood Holding & Development Corporation v. Oswald*, 119 Cal. App. 21, 5 P.(2d) 963; *Duerr v. Sloan*, 40 Cal.App. 653, 181 P. 407; *Colquhoun v. Pack*, 32 Cal.App. 97, 161 P. 1168; *Gearry St., P. & O. R. Co. v. Rolph*, 189 Cal. 59, 207 P. 539.

[2] The plaintiffs at all times knew that the Institute was the owner of the land upon which the buildings were being constructed; they knew that the materials were being used to construct buildings for the use of the Institute, and that a representative of the Institute was in attendance during the time of construction. Whatever relation Brennan may have had or borne to the Institute, they knew definitely and positively for whom the labor and materials were being furnished. The plaintiffs further had direct and personal knowledge of the fact that Brennan had been engaged in the independent contracting business for several years, and were justified in relying upon his ostensible authority as an independent contractor; therefore, in so far as Brennan was concerned, they were justified in furnishing him credit as such a contractor. They had a right to assume that Brennan was an independent contractor. *Patent Scaffolding Co. v. Roosevelt Apts., Inc.*, 171 Wash. 507, 18 P.(2d) 857.

[3] The plaintiffs had no knowledge of the contents of the agreement between Brennan and the Institute until many months after the completion of the work and the giving of the final lien waivers. Until the provisions of this agreement were made known to the plaintiffs they were justified in looking to Brennan for payment, but when the agency of Brennan was disclosed, then plaintiffs were legally entitled to be compensated for their labor and materials by the Institute, unless some other element had intervened to preclude a recovery from such principal.

One of the tests of the rule relative to liability of an undisclosed principal is: Had exclusive credit been extended to the agent? In other words, had plaintiffs done some act which would demonstrate that exclusive credit had been extended to Brennan personally and regardless of whether he was an agent or independent contractor? The testimony upon this point is clear and convincing. Mr. Rigney, one of the plaintiffs, testified as follows:

"Q. Well, it is a fact, isn't it, then that you relied on Mr. Brennan's credit, so far

as furnishing that work and labor is concerned? A. That is right.

"Q. And it is also true that you relied exclusively on his credit, didn't you? A. Correct."

Mr. Ayden, the representative of the Electric Corporation of Oakland, testified as follows:

"Q. Let me ask you this question, that Mr. Sherwood asked his first witness, and that is whether or not, in furnishing those materials, you gave the credit, which was involved, to Mr. Brennan? A. I gave it to Mr. Brennan, you mean?

"Q. Yes, you did that exclusively? A. Yes, sir."

Also: "Q. And up until that time and during all of the time you were furnishing this material you relied exclusively on the credit of Mr. Brennan as the contractor? A. That is correct.

"Q. You knew, of course, this job was being built for the Christian Brothers? A. Yes, sir.

"Q. And you knew that at all times, of course? A. Yes, sir.

"Q. And you knew where the material was going to be used? A. Yes, sir."

Mr. Makin, one of the plaintiffs, testified as follows:

"Q. Is it your testimony upon Mr. Brennan's representation to you that he had to get some money from somewhere, whether it was from what has been called the 'Finance Company' or the 'Brothers,' or we will call it the owners, that you executed a lien waiver for an amount other than that which was coming to you so he could get that money from his principal? A. I believe that was the story."

And also: "Mr. Clark: Now, it was on the representations of Mr. Brennan, then, that he needed this money for this other purpose, away from the job, that you gave him a lien waiver, and receipt, showing that you had received more money than you had coming to you, isn't that true?

"The Witness: A. Yes, sir.

"Q. Is that what you said? A. Yes, sir."

There is, however, another point which demonstrates the fact that credit was exclusively extended to Brennan. Each of these plaintiffs had lien rights for the labor performed or materials furnished, and these liens would have priority over any and all other encumbrances against the

premises of the Institute, save and excepting similar claims of lien previously filed. Plaintiffs could have compelled the Institute to pay the balance of their claim at any time prior to the execution of the final lien waivers by the several plaintiffs herein. By the execution and delivery of the final lien waivers to Brennan, they accepted the exclusive credit of Brennan for the payment of their indebtedness. Had the final waivers not been executed, the trustee would not have paid Brennan for the amount owing to plaintiffs.

Section 2335 of the Civil Code provides: "If exclusive credit is given to an agent by the person dealing with him, his principal is exonerated by payment or other satisfaction made by him to his agent in good faith, before receiving notice of the creditor's election to hold him responsible."

The plaintiffs herein not only accepted Brennan as their debtor, but also extended exclusive credit to him. They further placed in his hands the lien waivers that enabled him to secure the payments from the trustee of the Institute and such payments were in fact made upon the evidences furnished by the plaintiffs, themselves. These facts bring this case squarely within the code provision.

The authorities amply bear out the conclusion that where exclusive credit is extended to the agent, regardless of any agreement by the parties, the rule of liability of an undisclosed principal is inapplicable, and the parties stand in the same relation as if the principal had at all times been disclosed. *Ferguson v. McBean*, 91 Cal. 63, 27 P. 518, 14 L.R.A. 65; *Geary St., P. & O. R. Co. v. Rolph*, 189 Cal. 59, 207 P. 539; *Rubin v. Platt Music Co.*, 92 Cal.App. 203, 268 P. 396; *Marshall v. Bernheim*, 64 Cal.App. 283, 221 P. 401; *Pacific Ready-Cut Homes, Inc., v. Seeber*, 205 Cal. 690, 272 P. 579.

The case of *Patent Scaffolding Co. v. Roosevelt Apartments, Inc.*, 171 Wash. 507, 18 P.(2d) 857, differs from the instant case in that there is no showing of an exclusive credit having been extended to the agent for the undisclosed principal, the credit was extended to the agent under an ostensible relation of independent contractor, which plaintiffs were entitled to rely upon.

We are, therefore, compelled to conclude that the evidence is insufficient to

warrant the implied finding of the jury that the Institute was the undisclosed principal of Brennan, so as to render it legally liable for labor and materials furnished by plaintiffs to him.

The judgment is reversed.

We concur: PULLEN, P. J.; THOMPSON, J.



10 Cal.App.2d 431

BOYSEN v. PORTER et al.

Civ. 9721.

District Court of Appeal, Second District,
Division 1, California.

Dec. 2, 1935.

Rehearing Denied Dec. 30, 1935.

Hearing Denied by Supreme Court
Jan. 30, 1936.

1. Automobiles ⇨245(24, 87)

Truck driver's negligence, as regards injury passenger sustained when truck lurched after coming to standstill at destination, and contributory negligence of passenger, riding in rear of truck on chair, in relaxing hold on side of truck before motor was shut off *held* for jury.

2. Negligence ⇨136(9)

Negligence is fact question for jury when reasonable minds can draw different conclusions from facts.

3. Trial ⇨139(1)

Where evidence was sufficient to sustain verdict rendered for plaintiff, defendant's motions for nonsuit, directed verdict, and judgment notwithstanding verdict, *held* properly denied.

4. Judgment ⇨199(1)

Trial ⇨168

Motion for directed verdict or for judgment notwithstanding verdict is controlled by same rules as motion for nonsuit.

5. New trial ⇨140(1)

Affidavits on information and belief, in support of motion for new trial on ground of irregularities in selecting venire, are unavailing.

6. New trial ⇨20

Selection of entire jury panel from persons assembled at headquarters of Catholic Welfare League, although undesirable, did not require new trial, where nothing in rec-

ord indicated that jurors concealed anything, or did not have proper qualifications, or were not regularly selected pursuant to statute (Code Civ.Proc. § 227).

7. Damages ⇨132(3)

\$2,500 held not excessive for fractures of spine, particularly to transverse processes of the fourth and fifth lumbar vertebrae, and injury to back of head, where plaintiff was required to wear plaster girdle and some disability would remain after probable healing of fractures.

8. Automobiles ⇨181(2)

Employee of committee to elect mayoralty candidate, to which committee owner lent truck and driver, who operated truck in accordance with employee's directions, held not a "guest" of truck owner and driver so as to be required to show willful misconduct before he could recover for injuries when truck lurched.

[Ed. Note.—For other definitions of "Guest," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Action by James Boyesen against John C. Porter and others. From a judgment denying their motion for entry of judgment in their favor, notwithstanding verdict for plaintiff, defendants Citizen Print Shop, Incorporated, and Frank Emery appeal.

Affirmed.

Hearing denied by Supreme Court; THOMPSON, J., dissenting.

Harry D. Parker, of Los Angeles (Horace W. Danforth, of Los Angeles, of counsel), for appellants.

Edwards & Taylor and Harvey D. Taylor, all of Los Angeles, for respondent.

ROTH, Justice pro tem.

Respondent was on June 10, 1933, the day of the accident hereinafter set out, and had been for some time prior thereto, employed by the committee seeking to elect John C. Porter, mayor of Los Angeles. The evidence discloses that on the day mentioned, the Citizen Print Shop, Inc., was good "enough to let us (the committee) have the use of their truck" and its driver, one Emery. Plaintiff's action for damages was commenced against the members of the committee, Citizen Print Shop, Inc., and Emery. Motions for directed verdicts were granted as to all named defendants except Citizen Print Shop, Inc., and Emery, against which two last-named defendants, hereinafter referred to as appellants, the

jury before which the case was tried brought in a verdict of \$2,500.

Emery drove the truck mentioned to various places, in accordance with directions of plaintiff. On the particular ride in question, a capacity load of furniture was being transported to a certain church building and Emery and another person were riding in the cab. Plaintiff was sitting in a chair facing forward. The chair rested on the floor of the truck near the rear, which was open, there being no endgate, but close enough to the side to enable plaintiff to hold onto the "stake body" built over the floor of the truck along its sides. The floor of the truck was "galvanized sheet iron" and was "perfectly smooth." It further appeared that the driver of the truck, by looking through the back of the cab, could see plaintiff. It also appears that there was room in the cab for plaintiff, but that on the trip in question he was riding in the position mentioned, holding to the side of the truck, steadying himself so, as he put it, he "wouldn't fall out." With plaintiff riding in this position, the truck came to standstill in front of the church building, and while the truck was stopped, although the motor was still running, plaintiff relaxed his hold, but his arm still "lay on the side of the truck" and with the other arm he had hold of the chair in which he was sitting. When plaintiff was in this position, the truck lurched forward with a jerk, throwing plaintiff to the street, as a consequence of which the plaintiff sustained fractures of the spine, particularly to the transverse processes of the fourth and fifth lumbar vertebrae, and an injury to the back of his head. As summarized in the bill of exceptions, plaintiff described the accident as follows:

"When the truck reached the church and stopped, I relaxed my hold, but did not remove my arm from the side of the truck, and I still had hold of the chair. After the truck stopped, it jerked forward and I went over the end.

"I do not know whether the chair slipped off the back of the truck or whether I fell backwards off the chair. When I fell, the truck stopped, and Mr. Emery and the other gentlemen came around. I do not know if Mr. Emery was the first or the other gentleman was. They both came there when I was sitting up on the ground, on the decomposed granite on the shoulder of the street. They assisted me to the

church and I sat on one of the chairs that came on the load. The others unloaded the truck. * * *

"I did not say anything to Mr. Emery about jerking the truck forward, but I did ask him why he had not taken the car out of gear. I don't know whether he made any response or not. I did not say that Mr. Emery caused the accident, and I do not remember that I said I thought he had been negligent but that it wasn't his fault."

The trial took place six months after the accident, at which time the evidence was that plaintiff would be required to wear a plaster girdle for at least three months, and that even though the fractures would in all probability heal, there would still remain some disability.

[1-4] Appellants appeal from the order entered on the verdict and from the order denying their respective motions to enter judgments in their favor notwithstanding the verdict. The particular point is that the evidence does not warrant a finding of negligence on the part of appellants. There is no conflict in the evidence to the effect that Emery brought the truck to a standstill at a place where it could have been properly unloaded, and where, except for the few feet that the truck lurched forward, it actually was unloaded. Under such circumstances, it cannot be said as a matter of law that plaintiff was not justified in relaxing his hold on the side of the truck. When reasonable minds can draw different conclusions from the facts, negligence is a question of fact for the jury. *Whitmeyer v. Southern Pacific Co.*, 102 Cal.App. 199, 282 P. 1005; *Grimes v. Richfield Oil Co.*, 106 Cal.App. 416, 289 P. 245. For the same reason, it can hardly be said that plaintiff was guilty of contributory negligence as a matter of law. As said in *Whitmeyer v. Southern Pacific Co.*, supra, 102 Cal.App. 199, at page 203, 282 P. 1005, 1007:

"Rarely is a set of circumstances presented which enables a court to say, as a matter of law, that negligence has been shown. It is usually a question of fact for the jury, an inference to be deduced from the circumstances of each particular case." If the evidence was sufficient to sustain the verdict, as we believe it was, it follows that the motions for nonsuit, directed verdict, and for judgment notwithstanding the verdict were properly denied. It would have been error for the court to grant a nonsuit, and the power of the court to direct a verdict or to grant a motion for

judgment notwithstanding the verdict is bottomed on the same rules which control the action of a court on a motion for nonsuit. *Perera v. Panama-Pacific International Exposition Co.*, 179 Cal. 63, 175 P. 454; *In re Estate of Caspar*, 172 Cal. 147, 155 P. 631; *Card v. Boms*, 210 Cal. 200, 291 P. 190; *In re Estate of Flood*, 217 Cal. 763, 768, 21 P.(2d) 579.

[5,6] Appellants by affidavit of their counsel, the averments of which were almost entirely made on information and belief, which affidavit was used in the proceeding on the motion for new trial, charged that the entire jury panel, from which was selected the jury that tried the case, was drawn from persons assembled at the headquarters of the Catholic Welfare League, and that the prospective jurors admitted this fact on voir dire examination by appellants' counsel. Aside from the fact that an affidavit on information and belief charging such facts is "unavailing for any purpose" (*Gay v. Torrance*, 145 Cal. 144, 151, 78 P. 540; *People v. Findley*, 132 Cal. 301, 64 P. 472; *People v. Williams*, 24 Cal. 31, 40); there is nothing in the record to indicate that the jurors concealed anything or that any of them did not have the proper qualifications, or that they were not regularly selected pursuant to section 227 of the Code of Civil Procedure.

This method of selecting a venire is not, however, to be recommended. The language of Mr. Justice Curtis in a concurring opinion in *Fitts v. Superior Court* (Cal. Sup.) 51 P.(2d) 66, referring in that case to a method of selecting grand jurors, is, we feel, appropriate to the situation presented in this case. The learned justice says at page 71 of that opinion: "The method employed by the trial court in the selection * * * of the grand jury * * * was so unusual and unprecedented and so fraught with gravest dangers that it is a matter of regret * * * that there is not to be found some legal authority whereby the courts might declare all acts of a jury so selected absolutely void."

[7,8] The instructions given on the measure of damages, when read together, disclose no error, and it cannot be said that the verdict rendered is such that it patently appears to have been rendered as the result of passion or prejudice on the part of the jury or any of the jurors. *Bonneau v. North Shore R. Co.*, 152 Cal. 406, 93 P. 106, 125 Am.St.Rep. 68. There is no merit in appellants' contention raised for the first

time on oral argument prior to the submission of this case on appeal, that respondent was a guest and that, since there was no showing of willful misconduct, the evidence does not sustain the verdict. Respondent was not a guest. *Haney v. Takakura*, 2 Cal.App.(2d) 1, 37 P.(2d) 170.

The judgment and the order denying motion of appellants for the entry of judgment in their favor notwithstanding the verdict are, and each of them is, affirmed.

We concur: HOUSER, P. J.; YORK, J.



10 Cal.App.2d 460

CITY OF LOS ANGELES et al. v. AITKEN
et al.
Civ. 5415.

District Court of Appeal, Third District,
California.
Dec. 4, 1935.

Hearing Denied by Supreme Court
Jan. 30, 1936.

1. Navigable waters ⇨1(6)

Mono Lake, which is ten miles wide and fifteen miles in length, with average depth which will readily float large vessels and is susceptible of use as public highway for transporting persons and property for commercial purposes, is "navigable lake."

[Ed. Note.—For other definitions of "Navigable Lake," see Words & Phrases.]

2. Evidence ⇨10(5)

Court will take judicial notice of fact that lake which is ten miles wide and fifteen miles in length with average depth which will readily float large vessels and is susceptible of use as public highway for transporting persons and property for commercial purposes is "navigable lake."

3. Navigable waters ⇨2

State cannot interfere with navigable streams and lakes within its borders, except to regulate, protect, and preserve easement of public therein for purpose of navigation unless such acts are exercised under doctrine of eminent domain with payment of just compensation for damage resulting to private property, or pursuant to enforcement of police powers.

4. Navigable waters ⇨39(2)

Constitutional provision limiting riparian rights to necessary use for beneficial purposes

is applicable to navigable lakes (Const. art. 14, § 3).

5. Navigable waters ⇨2

Term "water resources of state" in constitutional provision stating that general welfare required that water resources of state be put to beneficial use, included navigable lakes (Const. art. 14, § 3).

6. Eminent domain ⇨302

Owners of land bordering navigable lake who constructed pleasure resorts which were of value almost entirely because tourists were attracted by beauties of lake held entitled to substantial compensation, and not merely nominal damages, for appropriation of their littoral rights by diversion of water of streams flowing into lake, notwithstanding that water in lake was unfit for, and was not used, for domestic use or irrigation (Civ. Code, §§ 670, 830; Const. art. 14, § 3; art. 15, § 1).

Appeal from Superior Court, Tuolumne County; J. T. B. Warne, Judge.

Suit by the City of Los Angeles and another against Nina B. Aitken and others, defendants. From a portion of the judgment, the plaintiffs appeal.

Affirmed.

Ray L. Chesebro, City Atty., and James M. Stevens, Carl A. Davis, Russell B. Jarvis, and T. B. Cosgrove, Deputy City Attys., all of Los Angeles, for appellants.

Arthur A. De Chambeau, of Bridgeport, for respondent A. E. Dolan.

D. L. King, and C. N. Perkins, both of Riverside, R. L. Alderman, of Los Angeles, W. H. Metson, of San Francisco, A. Boyer, of Bridgeport, George A. Montrose, of Gardnerville, Nev., Chapman & Chapman, Ward Chapman, John S. Chapman, Thomas Wade Cochran, and William R. Law, all of Los Angeles, and Athearn, Chandler & Farmer, Frank R. Devlin, Milton T. Farmer, and Philip H. Angell, all of San Francisco, for other respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiffs have appealed from that portion of a judgment which was rendered against them in a suit in eminent domain which imposes damages for condemnation of the littoral rights of the respondents in their separate parcels of land adjacent to Mono Lake.

One problem only is presented on this appeal. It is the question as to whether a

municipality seeking to condemn the fee-simple title to the littoral rights of adjacent landowners to maintain the natural level of a navigable, nontidal lake, the water of which is so impregnated with mineral salts and alkali as to render it unfit for domestic use, may avoid the payment of substantial damages in compensation therefor under the provisions of article 14, § 3, of the Constitution of California.

Los Angeles and the water and power department of that city joined in a suit in eminent domain to condemn and divert all the waters of Rush and Leevining creeks and their several tributaries flowing into Mono Lake on the southerly side thereof, and to transport the waters of these creeks from their natural watershed to the city of Los Angeles to be used for municipal purposes. These two streams supply Mono Lake with 116 second feet of water, being 90 per cent. of all the water which flows into the lake, and which volume is adequate to furnish a population of half a million people with water for domestic purposes. Only one other small creek flows into this lake. It is not involved in this litigation. The lake has no outlet. It is situated in a volcanic mountainous region east of the Yosemite Valley. It has an elevation of 6,426 feet above the level of the sea. This elevation has remained substantially the same during all of the time of which we have knowledge. The lake is unique in its character, occupying a depression in the midst of lofty mountains and extinct volcanic cones. It is ten miles in width and fifteen miles in length with a maximum depth of 150 feet. In the middle of the lake are two small islands. The water of the lake is permeated with mineral salt and alkali to such an extent that it is unfit for domestic use or for irrigation.

Mono Lake is situated on the now famous Tioga Highway connecting Los Angeles with Lake Tahoe. From Mono a frequently traveled thoroughfare extends through a timbered country to the Yosemite Valley. The picturesque beauty, the highly colored rocks and precipitous walls and the rare surroundings of Mono Lake attract an increasing number of tourists to its popular resorts. John Muir, the late famous exploring scientist, half a century ago said of this locality: "This beauty * * * is of a still higher order, enticing us lovingly on through gentian meadows and groves of rustling aspen to Lake Mono, where, spirit-like, our happy stream van-

ishes. * * * Mountains, red, gray, and black, rise close at hand on the right, whitened around their bases with banks of enduring snow; on the left swells the huge red mass of Mount Gibbs, while in front the eye wanders down the shadowy canon, and out on the warm plain of Mono, where the lake is seen gleaming like a burnished metallic disk, with clusters of lofty volcanic cones to the south of it."

In addition to the respondents who are interested in this appeal, many other owners of property situated on the borders of the lake and riparian to the two condemned streams were made party defendants. In a preliminary hearing of this cause it was determined that the condemnation of the waters of Rush and Leevining creeks by the city of Los Angeles was a necessity. There is no controversy regarding that feature of the case.

The second amended complaint alleges that the littoral rights of the respondents' property "sought to be so taken and acquired" is:

"Division Six: The fee simple estate in and to all littoral or riparian rights to the maintenance of the level of Mono Lake by the discharge thereof of the above named creeks, together with all rights to the continued flow of the surface and percolating waters of said creeks, and the right to the continued use of the same within the watershed thereof.

"A. That said littoral and riparian rights include all rights to the maintenance of the level of the waters of Mono Lake by the discharge thereof of the above named creeks, together with all rights to the continued flow of the surface of percolating waters of said creeks, and the right to the continued use of the same within the watershed thereof, and which said rights are a part and parcel of the following described lands along which the shoreline of Mono Lake in its natural state extends, to-wit: " (Here follows the description of the various parcels of land belonging to the respondents.)

The several properties of the respondents are adjacent to the lake, but do not border on Rush or Leevining creeks, with the exception of the land of J. B. Clover, which is situated at the mouth of Rush creek. The various tracts of land, with the exception of the last-mentioned one, are somewhat remote from the vicinity of these condemned streams. Three of them,

owned respectively by Cunningham, Billeb, and Venita McPherson, are located at the western extremity of the lake. Those belonging to Wiseman, Stott, and the estate of Samman, deceased, are situated at the eastern extremity of the lake. The property of Wallis McPherson is located on one of the islands in the center of the lake. These properties are maintained chiefly as resorts for the accommodation of the traveling public. One or two of them are mere auto camps. All of them contain substantial improvements. Some of them have small gardens, shrubs and flowers. The Cunningham place includes 26 acres of land with valuable buildings, including a hotel, store, cottages, and a gas station. This property is estimated to be worth \$200,000 and is widely known as the Tioga Lodge. The Venita McPherson place consists of a tract of 135 acres of land with valuable buildings and improvements, commonly known as Mono Inn. Each of the other other properties have improvements which render them of an estimated value of more than double the amount of the judgment recovered by their respective owners.

The cause was tried with a jury. Substantial evidence was adduced at the trial to the effect that the diverting of all of the waters of Rush and Leevining creeks will result in reducing the lake to one-tenth of its present volume of water within five to ten years leaving the bed of the lake and the exposed mud flats covered with a thick crust of mineral salt or trona which will pulverize and fly with every breeze that blows over the surrounding land, ruining all vegetation and destroying the fertility of the soil. There is evidence that all of these properties will be thereby damaged to an extent of three-fourths to nine-tenths of their values. Even the plaintiffs' expert witnesses conceded that the diverting of the waters of these streams will ultimately result in practically draining the lake of most of its water. They admitted these properties would be thereby greatly decreased in value. Indeed, the appellants do not deny that these properties will be substantially damaged in value by the diverting of the two streams which supply practically all of the water of Mono Lake. But the appellants assert that since the water of the lake is saline or alkaline in its nature, and therefore unfit for domestic use or irrigation, the respondents are using it

for no beneficial purpose to their lands and therefore under the provisions of article 14, § 3, of the Constitution of California, they are entitled to no more than nominal damages in compensation for their littoral rights thereto.

The attractions of the traveling public for Mono Lake include its unusual and picturesque location, the beauties of its surroundings and the pleasure of boating, bathing, and the hunting of wild ducks and geese which frequent the lake in large numbers during certain seasons. The evidence indicates that the respondents depend for their livelihood and the maintenance of their resorts chiefly on the incomes derived from their transient guests and customers. When the lake is destroyed, the surrounding country will be converted into a desert and their properties will become valueless.

The jury returned verdicts in favor of the several respondents and the court rendered judgment accordingly for the following amounts:

For the littoral rights of Venita McPherson incident to her Mono Inn property consisting of 134.71 acres of land, the sum of	\$85,000.00
For Cunningham incident to her Tioga Lodge property consisting of 25.87 acres of land the sum of	85,000.00
For Wiseman incident to his 307.99-acre tract of land, the sum of	7,700.00
For Wallis McPherson incident to his island tract of 640.33 acres of land, the sum of ..	35,000.00
For defendants Billeb incident to their 118.67-acre tract of land, the sum of	40,000.00
For the littoral rights incident to the 160-acre tract of land belonging to the estate of Samman, deceased, the sum of ..	3,750.00
For the separate 77.88-acre tract belonging to the same estate, the additional sum of	1,326.00
For the littoral rights of the 318.79-acre tract of land belonging to Clover at the mouth of Rush creek, the sum of	20,000.00
For Stott incident to his 32.56-acre tract of land, the sum of	1,061.00

From that portion of the judgment which awards the respondents the foregoing substantial sums of money as damages for their littoral rights to require the maintenance of the natural level of Mono Lake the plaintiffs have appealed. It is claimed the court erred in refusing to strike from the record the evidence of substantial damages with respect to the littoral rights of each and all of the properties belonging to these respondents, and in refusing to instruct the jury accordingly, and that, on the contrary, all that any of the respondents are entitled to in compensation for their littoral rights is mere nominal damages.

We are of the opinion the respondents are entitled to substantial damages to compensate them for the appropriation of their littoral or marginal property rights by the plaintiffs; that the judgment is adequately supported by the evidence, and that the use and benefits of Mono Lake incident to their littoral property rights therein are neither unreasonable nor in conflict with the provisions of article 14, § 3, of the Constitution of California. It follows that the court properly refused to strike from the record the evidence of substantial damages. It also properly refused to instruct the jury that these littoral property rights of the respondents may be compensated for by the payment of mere nominal damages and it properly denied the plaintiffs' motion, under the provisions of section 663 of the Code of Civil Procedure, to vacate the decree and render a different judgment for nominal damages only.

[1,2] There can be no doubt that Mono Lake is a navigable body of water. It is large and deep and susceptible of use as a public highway for the conveyance of persons and property by means of commercial vessels. *Churchill Co. v. Kingsbury*, 178 Cal. 554, 558, 174 P. 329; *People v. Truckee Lumber Co.*, 116 Cal. 397, 401, 48 P. 374, 39 L.R.A. 581, 58 Am.St.Rep. 183; 26 Cal.Jur. 296, §§ 512, 513. The court will take judicial notice of the fact that a lake, which is ten miles wide and fifteen miles in length, with an average depth which will readily float large vessels and is susceptible of use as a public highway for transporting persons and property for commercial purposes, as unquestionably Mono Lake is so adapted, is a navigable lake. *People v. Truckee Lumber Co.*, *supra*. The state of California is, therefore, the owner of the land bordering on the margin thereof below the low-

water mark. Section 670, Civ. Code. On the contrary, the title of the respondents to their respective tracts of land which are involved herein, extends to low-water mark. Section 830, Civ. Code.

The appellants contend that since the water of Mono Lake is unfit for domestic use or for irrigation purposes for the reason that it is heavily impregnated with mineral salt and alkali which may not be extracted by the respondents except by consent of the state (Stats. 1911, p. 1154, as amended by St. 1931, p. 1047, 2 Deering's Gen. Laws of 1931, p. 2432, Act 4935), and that their use of the lake is confined to boating, bathing, and hunting, which are privileges common to the general public, their littoral rights by virtue of the fact that their properties border on the margin of this navigable lake are in conflict with the provisions of article 14, § 3, of the Constitution, and, therefore, they are not compensable in substantial damages. The respondents have not attempted to extract the mineral salts from the water of Mono Lake and claim no intention or right to do so. It is true that the pumping of water from a well to flood a duck preserve for the purpose of hunting wild game which may be thereby attracted to the property is a nonbeneficial use of the water on the land, which is prohibited by law as a waste of water intended for domestic use and for irrigation. *Ex parte Elam*, 6 Cal. App. 233, 237, 91 P. 811; *In re Maas*, 219 Cal. 422, 426, 27 P.(2d) 373. It is also true that the mere privilege of bathing, boating, and hunting on a navigable lake by the owner of marginal property thereon, is not such a beneficial use of the lake as will entitle one to compensatory damages for the destroying of those advantages. In the present case, however, the respondents are not complaining of their loss of the personal privileges of bathing, boating, or hunting on Mono Lake. They purchased land bordering on this unique lake and constructed buildings and improvements thereon for the maintenance of auto camps and pleasure resorts which are dependent for their success upon the income derived from the traveling public which is attracted to this alluring lake by these advantages. These enterprises depend on the continuation of these attractions. Without the existence of this lake and its surrounding attractions the value of the respondents' properties will be practically destroyed. These privileges and attractions constitute important

assets in determining the value of their properties. Moreover, among the essential littoral rights which are possessed by the respondents is their lawful right to the unmolested access to the lake.

In the interest of justice the property rights of individuals should be carefully guarded. Governments are intended primarily to protect the rights of its individual citizens. The equitable and well-established doctrine of eminent domain should not be invaded in the guise of the exercise of police powers so as to deprive individuals of their property rights without just compensation. Neither the Constitution nor the laws of California are intended for any such unjust purpose. It has been held that the owner of land littoral to a navigable body of water, as an incident to his right to use a boat thereon, may build and maintain a dock to enable him to reasonably use the lake and land his boat on his own property so long as it does not interfere with the rights of others. *Dolbeer v. Suncook Water Works Co.*, 72 N.H. 562, 58 A. 504. In 67 Corpus Juris, p. 852, § 279, it is said: "One who owns land adjacent to a natural lake is entitled to have the waters therein preserved in their natural state. Thus a riparian owner is entitled to have the waters of the lake on which his property abuts remain at their accustomed level without interference."

In *Black's Pomeroy on Water Rights*, p. 8, § 6, it is said a riparian owner of land adjoining a fresh-water, nonnavigable stream, as an incident to his littoral rights, is entitled to compensation for interfering with the enjoyment of an undiminished and unobstructed flow of the water, and that: "This is also true of fresh-water navigable streams and small lakes within the state where the tide does not ebb and flow; save that the public has an easement in such waters for the purpose of travel, as on a public highway, which easement, as it pertains to the sovereignty of the state, is inalienable, and gives to the state the right to use, regulate, and control the waters for the purposes of navigation. This public easement gives the state no right to convert the waters, or to authorize their conversion, to any other uses than those for which the easement exists; that is, for the purposes of navigation. The right to divert the water for other uses, although public in their nature, can only be acquired under and by virtue of the sovereign right

of eminent domain, and upon making just compensation."

In accordance with the preceding principle, it is said on page 9 of the last-cited authority that the owner of a mill, which was situated on a stream near the outlet of Lake Hemlock in New York, a navigable lake seven miles in length and half a mile wide, was entitled to relief against the city of Rochester for greatly reducing the volume of water in the lake and for diminishing the stream, under authority of an act of the Legislature, so as to impair the efficiency of the mill by pumping from the lake 4,000,000 gallons of water daily and conveying it by means of an aqueduct a great distance to the city of Rochester for municipal purposes.

In the recent case of *Litka v. City of Anacortes*, 167 Wash. 259, 9 P.(2d) 88, 89, it was held that the owner of property adjacent to nonnavigable Lake Campbell which had an area of 320 acres, who constructed a dwelling house, bathhouses, cabins, and a dock thereon, using the place as a resort where he ran a small store, served meals, rented boats and conducted a bathing beach and camping ground, and which had no value for agricultural purposes, was entitled to just compensation against the city of Anacortes for damage to his property resulting from its pumping nearly all of the water from the lake for municipal purposes, leaving an unsightly barren mud flat in lieu thereof. The court said: "When the city appropriated the water from the lake, it took from the respondents the very thing that was necessary and essential to the use of their property, and a valuable property right."

Under very similar circumstances the Supreme Court of Washington held in the case of *Martha Lake Water Co. v. Nelson*, 152 Wash. 53, 277 P. 382, that the company could not appropriate the water of a nonnavigable lake to be used on nonriparian land, without first condemning the riparian rights of owners of land bordering thereon, and paying them just compensation for the detriment to their property as a result thereof.

The appellants seek to distinguish these last-mentioned cases from the present action by asserting that since Lake Campbell and Lake Martha were nonnavigable bodies of water, the title to the lands of the complainants extended to the centers of those lakes, and that their real properties were,

therefore, actually damaged by the draining of the lakes. This reply, however, does not destroy the application of those principles to the present case. To be sure, the littoral owners of property in the present case hold to the low watermark of Mono Lake only on account of its being a navigable body of water. But the maintenance of their auto camps and pleasure resorts were the same as that which was involved in the Anacortes Case. Moreover, these respondents had the absolute and incontestable right to the free and unobstructed access to the body of the lake. The appellants recognize that right by seeking to condemn "all littoral or riparian rights to the maintenance of the level of Mono lake." When the appellants acquired fee-simple title to that interest in respondents' properties they thereby constructed a veritable "Chinese Wall," effectively barring the owners from the use of that vital privilege and valuable property right. We are convinced this may not be done without first paying just compensation therefor. In states where the riparian doctrine has been abrogated with respect to the use of water for domestic and irrigation purposes, the rights of littoral owners of land bordering on navigable bodies of water to free and unobstructed access thereto is recognized. *Shephard v. Cœur d'Alene Lumber Co.*, 16 Idaho, 293, 101 P. 591; *Gasman v. Wilcox*, 54 Idaho, 700, 35 P.(2d) 265.

[3] The state, itself, may not interfere with navigable streams and lakes within its borders, except to regulate, protect, and preserve the easement of the public therein for the purpose of navigation, unless such acts are exercised under the doctrine of eminent domain with the payment of just compensation for the damage resulting to private property (*People v. Russ*, 132 Cal. 102, 64 P. 111), or pursuant to the enforcement of its police powers. The draining of the water of Mono Lake, by acquiring the riparian rights to Rush and Leevining creeks, which are practically its only source of supply, is not a valid exercise of police powers justifying the appropriation of respondents' littoral rights on the lake, without the payment of just compensation. Private property may not be taken in the guise of police power under the circumstances of this case without condemnation and the payment of just compensation. The distinction between the application of the principles of eminent domain and police powers is clearly stated in

the case of *Conger v. Pierce County*, 116 Wash. 27, 198 P. 377, 380, 18 A.L.R. 393, where it is said with respect to the alleged improvement of the Puyallup river, a navigable stream, that the principle upon which the police power is based, "Does not authorize the taking or damaging of private property in the sense, used in the Constitutions with reference to taking such property for a public use. Eminent domain takes private property for a public use, while the police power regulates its use and enjoyment, or, if it takes or damages it, it is not a taking or damaging for the public use, but to conserve the safety, morals, health, and general welfare of the public."

In the case of *Gin S. Chow v. City of Santa Barbara*, 217 Cal. 673, at page 701, 22 P.(2d) 5, 16, it is said in that regard: "There is a well recognized and established distinction between a 'taking' or 'damaging' for public use and the regulation of the use and enjoyment of a property right for the public benefit. The former falls within the realm of eminent domain, and the latter within the sphere of the police power."

In the preceding case, a judgment was affirmed which denied the plaintiffs an injunction to prevent the city of Santa Barbara from impounding and diverting from the Santa Ynez river extraordinary storm waters which were not a part of the ordinary flow of the stream, and which were not beneficial to the lands of the riparian owners. Commenting on similar cases, the court said in that regard: "These decisions, in effect, establish the just rule that flood waters which are of no substantial benefit to the riparian owner or to his land, and are not used by him, may be taken at will by any person who can lawfully gain access to the stream, and conducted to lands not riparian, and even beyond the watershed, without the consent of the riparian owner and without compensation to him. They are not a part of the flow of the stream which constitutes "parcel" of his land, within the meaning of the law of riparian rights."

In the present case, the littoral rights of the respondents are dependent on the maintenance of the natural level of the lake, and the privilege of access thereto, and are beneficially affected by the presence of the lake in its natural condition as heretofore related.

The appellants, however, assert that these principles are all abrogated by the provisions of article 14, § 3, of the Constitution of California. We think not. Article 15, § 1, of the Constitution specifically applies the doctrine of eminent domain to the acquiring of littoral rights of property bordering on navigable waters within the state. It provides: "The right of eminent domain is hereby declared to exist in the state to all frontages on the navigable waters of this state."

Article 14, § 3, of the Constitution, relied upon by the appellants as authority confining the compensation of the respondents in this case to mere nominal damages, reads as follows: "§ 3. Conservation of water. It is hereby declared that because of the conditions prevailing in this state the general welfare requires that the water resources of the state be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or watercourse in this state is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or watercourse attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the legislature may also enact laws in the furtherance of the policy in this section contained."

[4, 5] The respondents deny the application of article 14, § 3, of the Constitution to the property owner's rights riparian to a

lake as distinguished from a flowing stream, and assert that the arbitrary taking and diverting of water from a lake for use in another watershed, to the detriment of a riparian owner of land thereon, without first paying just compensation therefor, violates the provisions of article 14, of the Amendments to Federal Constitution which prohibits the taking of property without due process of law.

These contentions have been determined adversely to the respondents by the recent cases of *Peabody v. City of Vallejo*, 2 Cal. (2d) 351, 40 P.(2d) 486, 491, and *Tulare Irrigation District v. Lindsay-Strathmore Irrigation District* (Cal.Sup.) 45 P. (2d) 972. In the *Peabody* Case the Supreme Court has clearly, concisely, and definitely held that the provisions of article 14, § 3, of the California Constitution apply to water rights in lakes, ponds, and flowing streams. It says in that regard:

"1. The right to the use of water is limited [under the constitutional amendment referred to] to such water as shall be reasonably required for the beneficial use to be served.

"2. Such right does not extend to the waste of water.

"3. Such right does not extend to unreasonable use or unreasonable method of use or unreasonable method of diversion of water.

"4. Riparian rights attach to, but to no more than so much of the flow as may be required or used consistently with this section of the Constitution.

"The foregoing mandates are plain, they are positive, and admit of no exception. They apply to the use of all water, under whatever right the use may be enjoyed."

The result of the application of this constitutional amendment is definitely held to have changed the former recognized right of a riparian owner of land to the entire flow of the stream in its natural condition, regardless of its necessary or beneficial use to his land, and that only so much of the water is now protected as is reasonably necessary for beneficial use thereof. This change wisely abrogates the old doctrine that a riparian owner of land may enjoin an interference with the full, natural flow of a stream regardless of whether it is useful or beneficial to his land. We see no reason why this economical principle which was adopted for the public welfare because of the rapidly increasing demands

for water should not apply to lakes as well as flowing streams. The Supreme Court has clearly said that it does apply "to all water" of the state. The preamble of section 3 of article 14, of the Constitution declares that "the general welfare requires that the water resources of the state be put to beneficial use." Unquestionably, the Legislature intended to include lakes in this term which is designated as "water resources of the State." Nor do we believe that a lake is excluded from the application of this amendment merely because it is navigable.

The Federal government has reserved no right to regulate navigation on bodies of water which are wholly within the borders of this state. Interstate regulation of navigable waters is not involved in this case. Mono Lake is wholly within the confines of California. It is said in the Peabody Case regarding the alleged infringement on the provision of the Federal Constitution prohibiting the taking of property without due process of law, that: "The attitude of the Supreme Court of the United States has been consistent in leaving the question of private water rights, which do not involve federal or interstate interests, to the control of local state policies."

[6] But this limitation of riparian rights of owners of land to a necessary use for beneficial purposes does not mean that the water must be actually used in irrigating the land or consumed for domestic purposes. It does not authorize the appropriation of littoral rights to land bordering on the margin of a lake without the payment of just compensation therefor, when the very value of the land depends on the maintenance of the lake in its natural condition. Irrigation and household uses of water are not the only reasonable or beneficial purposes for which it may be employed, even though the presence of mineral salts or alkali in the water renders it unfit for human consumption or domestic use.

For the reason that the existence of Mono Lake in its natural condition, with all of its attractive surroundings, is the vital thing that furnishes to the respondents' marginal land almost its entire value, and that the draining of the lake will nearly destroy the value of their properties and the incident littoral rights thereto, it seems clear that the lake is not being used by the respondents for an unreasonable or non-

beneficial purpose, but, upon the contrary, that their use of the lake in its natural condition is reasonably beneficial to their land, and the littoral rights thereof may therefore not be appropriated, even for a higher or more beneficial use for public welfare, without just compensation therefor.

It follows that the court did not err in refusing to charge the jury that the respondents were entitled to nominal damages only, and that the court properly denied the appellants' motion under the provisions of section 663 of the Code of Civil Procedure to set aside the judgment and render a different judgment for nominal damages only.

The judgment is affirmed.

We concur: PLUMMER, J.; PULLEN, P. J.



ANDERSON v. I. M. JAMESON CORPORATION et al.*

HERNANDEZ v. SAME.
Civ. 9801, 9802.

District Court of Appeal, Second District,
Division 1, California.

Nov. 29, 1935.

Rehearing Denied Dec. 28, 1935.

Hearing Granted by Supreme Court
Jan. 27, 1936.

1. Automobiles ☞244(2)

Fact that defendant's cow was unattended on highway at night *held* to establish prima facie case for occupants of automobile which collided with cow (Laws 1923, p. 565, § 151).

2. Automobiles ☞6

Change in statute which specifically provided that there should be no presumption that collision between vehicle and animal on highway was due to negligence of owner of livestock *held* inapplicable to cause of action due to collision between automobile and cow on highway which arose before and was tried after change in statute (Laws 1923, p. 565, § 151; Gen.Laws Supp. 1933, Act 144, § 423).

3. Appeal and error ☞999(1)

Jury's determination of issue of fact is final.

☞For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 59 P.2d 962.

4. Automobiles Ⓒ245 (78, 85)

In actions for injuries to occupants of automobile which collided with cow on highway, whether driver of automobile was negligent in lowering beam of automobile headlights when meeting truck or in driving at excessive speed after lowering beam held for jury (St. 1927, p. 1433, § 101).

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Separate actions by William L. Anderson and by Frank J. Hernandez against the I. M. Jameson Corporation. From judgment in each case in favor of plaintiff, the defendant appeals.

Judgments affirmed.

Black, Hammack & McWilliams, of Los Angeles, for appellants.

Oscar Richard Cummins and Harry C. Cogen, both of Los Angeles, for respondents.

EDMONDS, Justice pro tem.

Each of these actions is for personal injuries caused by the collision of an automobile with a cow. The plaintiffs based their actions on the doctrine of *res ipsa loquitur*. Defendant, although admitting ownership of the cow, denied any negligence and also pleaded the contributory negligence of the plaintiffs. The cases were tried together before a jury which returned separate verdicts in favor of each plaintiff. Defendant has appealed from each of the judgments entered thereon.

The facts concerning the accident are undisputed. Anderson, accompanied by Hernandez riding with him as his guest, was driving his automobile about 11 o'clock at night in a southerly direction on a straight, practically level, concrete highway fenced on both sides. The easterly side of the road was bordered by the Southern Pacific Railroad. The country is largely devoted to grazing, there being approximately 600 square miles of practically unfenced desert land used for this purpose. It has been the custom of cattle owners for many years to turn their stock loose in this territory for grazing from late fall until late spring. Some 2,500 cattle owned by different persons are grazed in this way. About 900 of this number were owned by the respondent at the time of the accident.

The cattle owners collectively employed a number of cowboys to look after their

cattle, and they were on duty from approximately dawn to dusk. Part of the duty of these cowboys was to see that the gates in the fences were kept closed.

The lands of defendant are some twenty miles distant from the scene of the accident. All of defendant's cattle are grazed on the easterly side of the highway and separated therefrom by the railroad track and two fences above mentioned. The water holes for the cattle are some three miles east of the railroad track. No controverted duty to maintain any fence was shown to be in defendant. The only evidence of negligence of defendant offered in plaintiffs' cases was the presence on the road of defendant's cow. How the cow got on the road is a matter of conjecture. Apparently in some manner she got into the territory west of the highway and entered an open gate along with a few other cattle, the ownership of which was not disclosed. Defendant never grazed any of its cattle west of the highway, and the only inference to be drawn is that this particular cow was either a strayed or stolen animal.

Plaintiff's car was in excellent condition as to lights and brakes, being practically a new car. There is no evidence as to speed save plaintiff's testimony that he thought he was driving about 40 miles per hour, and whatever inference may be drawn from the fact that after striking the cow the automobile rolled over once or twice, went through the fence and came to rest on the railroad right of way about 170 feet from the point of impact. Just before the collision occurred plaintiff observed an approaching truck and both the truck driver and plaintiff lowered the lights of their respective cars. Plaintiff did not see the cow until immediately before the impact, possibly 50 feet away. Hernandez never saw the cow; was making no effort to keep a lookout and at no time spoke to or admonished Anderson as to the manner of driving.

As a result of the collision with the cow, the automobile overturned and the occupants received injuries for which these suits were brought.

Appellant insists that the evidence is wholly insufficient to sustain the verdicts against it, and, also, that the evidence shows that Anderson, the driver of the automobile, was guilty of contributory negligence as a matter of law.

[1] The facts of this case bring it clearly within the rule stated in *Kenney v. Antonetti*, 211 Cal. 336, 295 P. 341, 342, where the court said: "The fact that defendants' horses were unattended upon the highway at night and the other facts adduced by the evidence, considered in the light of the above provisions [sec. 151, California Vehicle Act, Stats. 1923, p. 517; sec. 1714 Civil Code] and the further general rules of negligence applying at all times, clearly gave rise to an inference of negligence here, and sufficiently established plaintiff's prima facie case." Appellant insists that the rule stated in that decision is not applicable to this case for the reason that in 1933, after the accident sued upon in the cases now before us and before the cases were tried, the Legislature repealed section 151 of the California Vehicle Act and enacted it, with certain changes, as section 423 of the Agricultural Code. (Deering's 1933 Supplement, Act 144.) The contention is that the appellant is entitled to the benefit of the statute as it existed at the time of trial, and that its liability is to be measured accordingly.

As this section existed in 1927 (St. 1927, p. 1440) at the time of the accident which was the subject of controversy in the *Kenney Case*, it provided that: "No person owning, or controlling the possession of, any live stock, shall voluntarily or negligently permit any such live stock to stray upon or remain unaccompanied by a person in charge or control thereof upon a public highway." The Legislature of 1931 amended the section in minor particulars not material to the point under consideration.

The changes of 1933 are the substitution of the word "willfully" for "voluntarily," and the addition of the following: "In any civil action brought by the owner or driver of a motor vehicle for damages caused by collision with any domestic animal or animals on a highway, there is no presumption that such collision was due to negligence on behalf of the owner of such livestock." Appellant therefore insists that it is entitled to the benefit of the latter provision.

[2] The Legislature of 1931 (St. 1931, p. 2120) amended the California Vehicle Act (St. 1923, p. 553) by adding to section 113 the provision: "In any civil action the driver of a vehicle who has operated such vehicle at a speed in excess of the miles per hour set forth in subdivision (b) applicable at the time and place shall not be

deemed to have been negligent by reason thereof as a matter of law but in all such actions the burden shall be upon the opposing party to establish that the operation of such vehicle at such speed constituted negligence." In the case of *Morris v. Pacific Electric Railway Co.*, 2 Cal.(2d) 764, 43 P.(2d) 276, the court held that this change was prospective only and did not apply to actions arising before the amendment, but tried after it took effect. The same rule is applicable here, and appellant is not entitled to the advantage of the statute enacted after the accident occurred.

[3] The facts shown by the plaintiffs gave rise to an inference of negligence and established, prima facie, the right of each to recover. As against this inference, it was the duty of the jury to weigh and consider the evidence presented by the defendant. This it undoubtedly did. The determination by the jury of this issue of fact is final and absolutely controlling upon this court. In *re Estate of Moore*, 162 Cal. 324, 122 P. 844.

Appellant bases its claim that the respondent Anderson was guilty of contributory negligence on the asserted misuse of the lights on the automobile coupled with excessive speed. Anderson testified that as he approached the on-coming truck he lowered the beam of the headlights on his automobile without decreasing their brilliance. In such position, he testified, "they hit the car in front of you about 40 feet." By the testimony of an expert it was shown that automobile headlights complying with the requirements of the California Vehicle Law (*supra*) would throw a light 720 feet when not depressed. There is no claim that the headlights on the automobile in which the plaintiffs were riding did not comply with the statutory requirements. But it is contended that the driver should either not have lowered the beam of his lights, or should have reduced the speed of the car which he was driving.

[4] The California Vehicle Act (*supra*) provides in section 101, as amended by St. 1927, p. 1433, that headlights on automobiles may be constructed to permit them to be depressed below the level otherwise required, but without diminishing the amount of light projected therefrom. Whether or not respondent Anderson was guilty of negligence in driving at a speed estimated by him to have been 40 miles per hour after he had lowered the beam of the headlights on his automobile was a question of fact

to be decided by the jury, taking into consideration all of the circumstances which existed at the time and place of the accident. The distance of the on-coming truck, the color of the highway, the condition of the atmosphere, the visibility other than from headlights, and numerous other circumstances might properly have been, and no doubt were, considered by the jury in passing upon the alleged negligence of respondent Anderson. Under the evidence in this case, respondent Anderson was not negligent as a matter of law (*Hine v. Lepard* (Cal.App.) 42 P.(2d) 389; *Id.* (Cal.App.) 43 P.(2d) 595), and there is no evidence of any negligence on the part of respondent Hernandez.

The judgments are, and each of them is, affirmed.

We concur: YORK, Acting P. J.; DORAN, J.



**SHEA et al. v. CITY OF SAN
BERNARDINO. ***
Civ. 1560.

District Court of Appeal, Fourth District,
California.
Dec. 16, 1935.

Rehearing Denied Jan. 15, 1936.
Hearing Granted by Supreme Court
Feb. 13, 1936.

**1. Negligence ⇨108(1)
Torts ⇨22**

In California, joint tort-feasors are jointly and severally liable for injuries, and complaint which alleges only joint negligence sufficiently charges liability of each individually.

2. Municipal corporations ⇨756

Act making municipalities liable for injuries resulting from dangerous condition of streets, where condition is not remedied within reasonable time, imposes liability for negligence, and is not penal in character (St. 1923, p. 675, § 2).

3. Automobiles ⇨301(3)

Complaint alleging joint negligence of city and railroad held sufficient in action under Municipal Liability Act for injuries to occupants of automobile resulting from break in street grade at railroad crossing (St. 1923, p. 675, § 2).

4. Time ⇨9(1)

Effective date of statute requiring filing of claims against municipality within 90 days of accident must be excluded in computing time for filing claim for injuries occurring before date of statute (St. 1931, p. 2475; Pol. Code, § 12; Code Civ.Proc. § 12).

5. Time ⇨10(1)

Additional day must be allowed in computing time for filing claim against city for injuries if last day of limitation period was Armistice Day (St. 1931, p. 2475; Pol.Code, §§ 10, 12; Code Civ.Proc. §§ 10, 12).

6. Municipal corporations ⇨757(1)

City in adopting plan for street grading was not authorized to leave portion of street at and near railroad crossing without determination of grade therefor, or to relinquish to railroad right of establishing grade at right of way (St. 1923, p. 106, § 3; St. 1911, p. 730, as amended).

7. Municipal corporations ⇨757(1)

City owed duty to call upon Railroad Commission to order lowering of rail at crossing to remove obviously dangerous condition in street, if jurisdiction to order track lowered was solely in Railroad Commission (St. 1923, p. 675, § 2).

8. Municipal corporations ⇨798

City which claimed to have no control over railroad right of way at street crossing was nevertheless not relieved from duty of warning travelers along street that dangerous condition existed by reason of undue elevation of rail (St. 1923, p. 675, § 2).

9. Automobiles ⇨306(1)

Evidence in action against city for injuries to occupants of automobile resulting from dangerous condition of street at railroad crossing, sustained finding of city's control over place where accident occurred, notwithstanding claim that sole cause of injuries was difference in elevation between rails of track (St. 1923, p. 675, § 2).

10. Municipal corporations ⇨788(2)

City which, by failing to establish grade of street at crossing of railroad right of way, was instrumental in causing dangerous condition to exist at crossing could not avoid liability for injuries to persons using street, on ground of lack of notice of dangerous condition (St. 1923, p. 675, § 2).

11. Municipal corporations ⇨791(2)

Actual notice to governing body of city of dangerous condition of street is not prerequisite to traveler's recovery for resulting injuries, but constructive notice may be inferred from long-continued existence of defective condition (St. 1923, p. 675, § 2).

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 62 P.2d 365.

12. Municipal corporations ◉791(2)

Finding of city's notice of dangerous condition of street at railroad crossing by reason of break in grade and elevation of railroad track held justified, notwithstanding absence of actual notice, where condition had continued for 6-year period (St. 1923, p. 675, § 2).

13. Automobiles ◉255

In action against city for injuries to occupants of automobile resulting from break in grade of street at railroad crossing, it was no defense that defect was result of legislative act establishing street grade (St. 1923, p. 675, § 2; St. 1911, p. 730, as amended).

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by John J. Shea and another against the City of San Bernardino. Judgment for plaintiffs, and defendant appeals.

Affirmed.

William Guthrie, City Atty., and Wardwell D. Evans, Deputy City Atty., both of San Bernardino, for appellant.

Swing & Swing and Ralph W. Eckhardt, all of San Bernardino, for respondents.

JENNINGS, Justice.

Plaintiffs instituted this action against the defendant city to recover damages for personal injuries alleged to have been sustained by plaintiff Georgia O. Shea, while she was a passenger in an automobile which was being driven on E street in the city of San Bernardino by her husband, John J. Shea. The suit was originally brought against the city and the Atchison, Topeka & Santa Fé Railway Company, but was dismissed as to the last-named defendant on motion of plaintiffs prior to the submission of any evidence in the case. Liability was sought to be imposed on the city in accordance with the provisions of the Municipal Liability Act (Stats. 1923, p. 675) for injuries of the above-mentioned plaintiff which were alleged to have been sustained as a result of a dangerous condition which existed in E street at the intersection of said street with a right of way of the above-named railway company. The action was tried by the court without a jury, and resulted in the entry of a judgment in favor of plaintiffs in the amount of \$10,000, from which the defendant appeals.

[1-3] Appellant's first point is: "That the complaint does not state a cause of action by reason of the allegations of joint negligence of the city and the Railway Company." In this connection, it is argued that the Municipal Liability Act does not impose liability for negligence on the part of the municipality, but that it is a purely penal statute imposing a liability on the theory of a penalty, and being penal in character must be strictly construed, and that the liability which is thereby imposed cannot be extended by construction or implication. In support of the proposition that the act does not impose liability for negligence, it is pointed out that the word "negligence" does not appear in the statute. In contending that the statute being essentially penal in character must be strictly construed, it is urged that, since the act nowhere provides for the imposition of liability where the defect is charged to have resulted from joint negligence of the municipality and a third person, no liability may properly be imposed under such circumstances, and since the complaint alleged joint negligence on the part of the city and the railway company in maintaining the defective and dangerous place in the street, and it is nowhere charged that the city was solely responsible for the defect, the city may not be properly held liable under the provisions of the statute.

Examination of the complaint discloses that it was undoubtedly drawn on the theory that respondent's injuries were caused by the joint and concurring negligence of the city and the railway company. Passing for the moment the question of the effect of the peculiar statute under which liability was sought to be imposed upon the municipality and treating the action as one brought against two joint tortfeasors, it is clear that no obstacle to recovery against one is presented because of the fact that the complaint charged only joint negligence. It is settled in California that in tort actions, when two or more persons have been concerned in the commission of the tort, the injured party may proceed either jointly or severally against such joint tortfeasors who are both jointly and severally liable, and although the complaint may allege only joint negligence on the part of the joint tortfeasors it nevertheless states a complete and separate individual liability against each par-

ty so sued on account of the single act of which complaint is presented. *Fowden v. Pacific Coast S. S. Co.*, 149 Cal. 151, 157, 86 P. 178; *Cole v. Roebling Construction Co.*, 156 Cal. 443, 105 P. 255; *Dow v. City of Oroville*, 22 Cal.App. 215, 134 P. 197.

In support of its contention that the statute under which liability upon the city is here sought to be imposed is essentially penal in character and should be strictly construed, appellant relies on a number of decisions of courts of last resort in various New England states, notably those of Connecticut, Maine, and Massachusetts. Examination of these authorities discloses that the various statutes under which liability was sought to be imposed against municipalities for injuries alleged to have been suffered because of defective highways were clearly penal in nature and that the phraseology of these statutes is entirely different from the language employed in the California statute. For example, the Connecticut statute under which liability was sought to be imposed upon the town of Sharon for the joint negligence of the town and a third person in the case of *Bartram v. Town of Sharon*, 71 Conn. 686, 43 A. 143, 145, 46 L. R.A. 144, 71 Am.St.Rep. 225, was denominated the Act of 1672. The pertinent language of this ancient statute is quoted in the opinion as follows: "(1) That if it shall so happen that any person shall lose his life through the defect or insufficiency of any highway in passing over the same (due warning having been given of such defective highway), then the town shall pay a fine of £100 to his family. (2) If it shall so happen that any person shall lose a limb, or sustain other bodily injury, through or by means of such defect aforesaid, the town through whose neglect such hurt is done shall pay the party injured double damages."

It was decided that the statute was penal in character and should therefore be strictly construed, and that such construction would not permit a recovery when it appeared that the negligence of a third person had concurred with the negligence of the town to produce the injuries for which compensation was demanded.

The language of the California statute does not suggest that it is penal in character. Section 2 of the statute is entitled, "Public Liability for Negligence." It declares that counties, municipalities, and

school districts shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, highways, buildings, grounds, works, and property in all cases where the governing or managing board of such county, municipality, school district, or other board, officer, or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of any such street, highway, building, grounds, works, or property, and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition.

While it is true that the term negligence does not occur in the text of the statute it is nevertheless obvious that the liability imposed upon the political subdivisions mentioned in the act is imposed for the negligence of the boards, officers, or employees of such public bodies. The terms "fail" and "neglect" are familiar verbiage in the law of negligence and the employment of these terms by the lawmaking body is strongly indicative of legislative intent to impose liability for negligence and not by way of penalty or punishment. Moreover, section 2 of the statute has formed the basis of numerous actions instituted for the purpose of recovering damages from counties, municipalities, and school districts for the alleged negligence of officers and employees of such public bodies, and it appears to have been uniformly considered that the statute is one which imposes liability for negligence. Among such actions the following may be noted: *Gorman v. County of Sacramento*, 92 Cal.App. 656, 268 P. 1083, 1088; *Brooks v. City of Monterey*, 106 Cal.App. 649, 290 P. 540; *Mulder v. City of Los Angeles*, 110 Cal.App. 663, 294 P. 485; *Whiteford v. Yuba City Union High School Dist.*, 117 Cal.App. 462, 4 P.(2d) 266. In *Gorman v. County of Sacramento*, supra, the court in discussing the Act of 1923 said: "The second part, as the title also indicates, creates an entirely new and different liability, to wit, the liability of the county, making the county a legal entity, liable for the negligence of its officers in certain cases." In *White-*

ford v. Yuba City Union High School Dist., supra, 117 Cal.App. 462, at page 464, 4 P.(2d) 266, 267, the following pertinent language occurs: "The act of 1923 (page 675), as its title shows, creates a liability for negligence only." In Pittam v. City of Riverside, 128 Cal.App. 57, 16 P.(2d) 768, it was contended by the appellant city that negligence had nothing to do with an action instituted for the purpose of recovering damages for loss of property destroyed by fire which it was charged had escaped from the dumping ground of the city. In rejecting the contention, this court, 128 Cal.App. 57, at page 62, 16 P.(2d) 768, 770, said that knowingly maintaining public property in such condition that it is dangerous to life, limb, health, or safety of the person or property of another is a form of negligence, and that permitting public property to remain in a dangerous or defective condition after notice, without remedying such condition, is also a form of negligence, and that in these respects the action which sought to impose liability under the statute of 1923 involved negligence.

It is our conclusion, therefore, based on the plain language of the statute and the analysis which has heretofore been made of the act by the courts in the above-mentioned cases, that the above-stated contention of appellant is not sustainable.

[4,5] Appellant's second point is that "the complaint does not state a cause of action because it alleges claim was filed too late." The complaint alleges that respondents presented and filed with the city clerk of appellant a verified and written claim for damages on November 12, 1931, and that the claim was rejected on November 16, 1931. The complaint also alleges that the injuries which formed the basis for the claim were sustained on April 19, 1931. It is pointed out that in 1931 the Legislature of California enacted a statute (Stats. 1931, p. 2475) providing that a verified claim for damages which are alleged to have been sustained as a result of the dangerous or defective condition of any public street or highway shall be presented in writing and filed with the clerk or secretary of the legislative body of the municipality, etc., within 90 days after the occurrence of the accident, and that this statute became effective on August 14, 1931. It is urged that

since the pleading shows that the claim for damages was not filed until November 12, 1931, it fails to state a cause of action because it is apparent from the face of the complaint that the claim was filed too late and is barred by the provisions of the above-mentioned statute. In this connection, appellant concedes, first, that at the time the accident occurred, a claim for damages could have been filed at any time within a year thereafter; second, that the Legislature could not reduce the time within which claims could be filed to a period of time less than the full period provided in the statute. In other words, it is conceded that the statute could not operate retroactively as to claims for damages which had occurred prior to the enactment of the statute, but that as to such claims the adoption of the statute rendered it necessary that they be filed within 90 days after the date on which the law went into effect. Since the statute became effective on August 14, 1931, it is declared that respondents were required to have filed the claim on or before November 11, 1931, and as the complaint shows that it was not filed until November 12, 1931, that the cause of action based on the claim was barred by the statute.

In support of the above-mentioned contention it is declared that the statute was in effect during the entire day of August 14, 1931, and that therefore this date must be included in computing the 90-day period specified in the statute. The inclusion of the above-mentioned date would cause the 90-day period to expire on November 11, 1931, and it is urged that the claim was filed on the 91st day, and that therefore it was filed one day too late.

The contention is not sustainable. In the first place, it is not in accordance with the rule for computation of time declared both in section 12 of the Code of Civil Procedure and in section 12 of the Political Code. These sections provide that: "The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded." The rule thus announced clearly authorizes the exclusion of the effective date of the statute of limitation on which appellant relies. In the second place, section 10 of the Code of Civil Procedure provides that: "Holidays within the meaning of this code are

every Sunday and such other days as are specified or provided for as holidays in the Political Code of the state of California." Section 10 of the Political Code declares that the eleventh day of November, known as "Armistice Day," is a holiday, and that all public offices of the state and all state institutions, except the state university, shall be closed on the eleventh day of November of each year. If, therefore, it be assumed that appellant is correct in insisting upon the inclusion of the effective date of the statute, it is apparent that the 90th day of the period of limitation was November 11, 1931, which was a holiday and could not therefore be included in computing the 90-day period under the rule of computation established by section 12 of the Code of Civil Procedure and the like-numbered section of the Political Code.

[6] Appellant's third point is that "the evidence is not sufficient to sustain the judgment because the city did not have control of that portion of the street upon which the accident occurred." Consideration of this contention necessitates an examination of the evidence which was submitted during the trial of the action.

The evidence showed that the accident occurred at a point on E street in the city of San Bernardino where said street intersects the right of way of the railway company. The record indicates that evidence was produced which tended to prove that the most elevated point of the intersection of the street with the railroad right of way was 2 feet higher than the roadway on each side of the intersection. It also appeared that the north rail of the railway was approximately 3 inches higher than the south rail at the intersection. The testimony of respondents with reference to the occurrence of the accident showed that, on April 19, 1931, the respondent John J. Shea was driving a Hudson sedan automobile in a northerly direction along E street in the city of San Bernardino; that respondent Georgia O. Shea was seated on the rear seat of said automobile; that the vehicle was driven over the intersection at a speed of approximately 20 miles per hour; that when the rear wheels of the automobile passed over the north rail of the railway track the rear part of the vehicle was suddenly thrown upward, causing respondent Georgia O. Shea to be precipitated to the floor of the car, whereby she sus-

tained a fracture of the eighth dorsal vertebra. The evidence further showed that on December 9, 1924, the common council of the city of San Bernardino adopted an ordinance which established the grade of E street between Twenty-Seventh street and the north city limits of the city, that the ordinance established the grade of the street at four points in the east and west lines of E street, each point being 100 feet distant from the center line of the railway right of way, and provided that at all points between the above designated points the grade was established so as to conform to a straight line between said points. It was also shown that in the month of January, 1925, the common council of the city of San Bernardino instituted proceedings for the paving of E street, and that a map showing the plan and profiles for the improvement of the street was prepared by the city engineer and a resolution was passed by the common council to proceed with the improvement work in accordance with the plan and profiles and to the grades indicated on the map theretofore prepared by the city engineer; that a contract for the performance of the work was awarded to a private contractor; that the work was performed in accordance with the 1911 Street Improvement Act (St. 1911, p. 730, as amended); and that thereafter the street superintendent of the municipality reported to the common council that the contract had been completed and the work was accepted. Examination of the map showing the plan and profiles indicates that it purports to indicate "the grade to which work shall be done." It is, however, apparent that the grade to which the work should be done in the east and west lines of the street across the railroad right of way and for some distance north and south of the right of way was not indicated, and that as a matter of fact no grade was there shown for a distance of approximately 110 feet on each side of the street. It is also apparent from the map that the city council did not provide that the paving of the right of way and of the street for a distance of approximately 100 feet in proximity to the right of way should be done to the grade which had been established by ordinance. Since the work was done under the 1911 Improvement Act, it may be conceded that the city council could have ordered the work to be done to a grade different from the established grade section 3, Street Im-

provement Act of 1911, St. 1911, p. 733 as amended by St. 1923, p. 106. However, the city which was proceeding to improve a public street within its boundaries was required either to order the work to be done to the grade which had been formally established or, in any event, to some indicated grade. In adopting a plan for the work it was not authorized to leave a portion of the street which was included in the work of improvement without any grade being determined to which the work should there be done. In this connection, it must be remembered that the evidence showed that the paving of the right of way between the tracks and for a distance of two feet on each side thereof was done by the railway company. This was permitted by the provisions of section 77 of the Street Improvement Act (St. 1911, p. 763). Presumably the city relinquished to the railway company the right to establish the grade to which the work of improving the right of way should be done. This the city was not entitled to do. Furthermore, in addition to relinquishing the right to establish the grade of the work over the right of way, it was not entitled to leave an additional portion of the street which it was proceeding to improve for the benefit of the traveling public without making provision for the grade to which the work should there be done.

Appellant insists that the evidence showed that the sole cause of the injuries sustained by respondent Georgia O. Shea was the difference in elevation between the two rails of the railroad track at the intersection of the right of way with the street; the north rail being 3 inches higher than the south rail. It is then declared that this defect was one over which the city had no control and was powerless to remedy. In particular it is contended that the lowering of the elevation constituted an alteration of a crossing at grade of which the Railroad Commission of California has exclusive jurisdiction. The conclusion of this line of reasoning is that, under such circumstances, no liability could properly be fastened upon appellant under the provisions of the Municipal Liability Act.

The above-described contention of appellant is not persuasive. In the first place, it is obvious that there was a break in the grade of the street at the railway crossing. In the second place, the record shows that evidence was produced by re-

spondents which tended to show that the difference in the elevation of the rails was not the sole factor that contributed to the roughness of the crossing, but that the whole plan of the improvement at the intersection of the right of way with the street including the difference in the elevation of the rails and the break in the grade of the street was responsible for the condition that existed.

[7-9] Some consideration should be given to the contention that the state Railroad Commission has exclusive jurisdiction to alter crossings at grade and that appellant was powerless to remedy the condition that existed at the railway right of way. This contention is necessarily based on the hypothesis that the difference in elevation of the rails was the single factor that was responsible for the defective condition that existed at the intersection. In giving consideration to appellant's contention that the city was powerless to remedy the defect, the above-mentioned hypothesis will be assumed to be correct. Nevertheless, the contention is not impressive. It must be remembered that the improvement of streets within the boundaries of a city is an affair in which the city is vitally interested. The governing board and officers of the municipality in dealing with such an affair may not complacently declare that they were powerless over a long period of years to take any steps to remedy a defective and dangerous condition that existed in one of the principal streets of the city. If the Railroad Commission had the exclusive jurisdiction to order the north track to be lowered, it was the duty of the city at some time during the 6-year period to call upon the Railroad Commission to order the rail to be lowered and thus to remove an obviously dangerous condition in the street. Finally, if it be assumed that the city was entirely powerless in the premises, had no control over the right of way, and was entitled, so far as the condition which existed at the right of way was concerned, to rely on the lack of power and control to relieve it from liability, it was nevertheless not relieved from the duty to warn persons lawfully using the street that a dangerous condition existed. The evidence showed that no signs were exhibited giving warning to persons approaching the railroad crossing that it was a rough and dangerous crossing. It is our conclusion, based on all the facts and circumstances

disclosed by the evidence, that appellant's contention of evidentiary insufficiency because of lack of control by the municipality over the particular place in the street where the accident occurred is not sustainable.

[10-12] Appellant's fourth point is also based on the alleged insufficiency of the evidence. It is contended that the evidence showed that the city had no actual notice of the alleged defective or dangerous condition which was the cause of the accident and that therefore no liability may properly be imposed upon the municipality. As heretofore indicated, notice to the governing board of the municipality or to some officer or person having authority to remedy a dangerous or defective condition is a prerequisite to the imposition of liability on the municipality under the Public Liability Act. Under the view which we take of the case, appellant's contention of lack of notice is without merit because of our opinion that appellant itself was instrumental in causing the dangerous condition to exist. *Black v. Southern Pac. Co.*, 124 Cal.App. 321, 12 P.(2d) 981. In any event, as was pointed out in *Dawson v. Tulare Union High School*, 98 Cal.App. 138, 276 P. 424, 426, "The statute does not provide that actual notice is a prerequisite to recovery in such a case. The long-continued existence of a defective condition may establish constructive notice thereof. *Wurzbarger v. Nellis*, 165 Cal. 48, 53, 130 P. 1052; 43 C.J. 1043 to 1057. It may be inferred from the circumstances in evidence that the principal had constructive notice of the defective condition and he certainly had 'authority to remedy such condition.' To hold that actual notice is required in such a case would be to place a premium on indifference and neglect of duty. 'Neglect of duty cannot be made the basis of exemption from liability.' *Kramer v. Los An-*

geles, 147 Cal. 668, 681, 82 P. 334, 339." The above language was quoted with approval in *Hook v. City of Sacramento*, 118 Cal.App. 547, 554, 5 P.(2d) 643, and the court there pointed out that it was a question for the triers of fact to say whether a municipality through the persons "having authority to remedy such condition" failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy the dangerous and defective condition of which complaint was made.

[13] Appellant's fifth point is likewise directed to a claim of evidentiary insufficiency. It is contended that the defective condition, if it be assumed that any existed, was the result of a legislative act. This contention is predicated upon the hypothesis that the dangerous and defective condition which caused the injuries for which damages were awarded came into existence as a result of the grade of E street which was established by an ordinance adopted by the law-making body of the municipality. It is a sufficient answer to this contention to observe that it was not contended by respondents during the trial of the action, and it is not urged by them on this appeal that the grade of E street as it was established by ordinance was the cause of the dangerous condition which existed at the intersection of E street with the railroad right of way. On the contrary, respondents have consistently maintained that the dangerous condition was due to the fact that the improvement of the railroad right of way was not done to the grade established by ordinance, but to a grade different from that which had been thus established.

For the reasons stated, the judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

McINTOSH v. LOS ANGELES RY. CORPORATION.*

Civ. 10590.

District Court of Appeal, Second District,
Division 2, California.

Dec. 11, 1935.

Rehearing Denied Jan. 6, 1936.

Hearing Granted by Supreme Court
Feb. 6, 1936.**1. Appeal and error ⇨930(1)**

On appeal from judgment for plaintiff after trial before jury, evidence must be viewed in light most favorable to plaintiff.

2. Carriers ⇨316(1)

Mere injury to passenger does not place upon carrier duty of explanation, but establishment of such injury, coupled with proof of coincident and causal collision, derailment, or other unusual happenings to car casts upon carrier the burden of exculpation.

3. Carriers ⇨320(17)

In action by street car passenger for injuries sustained when, while standing in aisle, he was thrown through window by lurch of car as it rounded curve, passenger's statement that car "was going at a much greater speed than usual" held insufficient to take case to jury on ground speed was excessive.

4. Carriers ⇨320(19)

In action by street car passenger for injuries sustained when, while standing in aisle, he was thrown through window by lurch of car as it rounded curve, passenger's statement that when body of car struck curve it "simply lurched" held insufficient to take case to jury on ground lurch was unusual and evidenced negligent operation of car.

WOOD, J., dissenting.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Action by Colin McIntosh against the Los Angeles Railway Corporation. Judgment for plaintiff, and defendant appeals.

Reversed.

Gibson, Dunn & Crutcher, by Philip C. Sterry, all of Los Angeles, for appellant.

Meserve, Mumper, Hughes & Robertson, by Baldwin Robertson, all of Los Angeles, for respondent.

McCOMB, Justice pro tem.

This is an appeal by defendant from a judgment in favor of plaintiff after a trial before a jury.

[1] Viewing the evidence most favorable to the plaintiff (*Ah Gett v. Carr*, 3 Cal.App. 47, 48, 84 P. 458), the facts in the instant case are:

Plaintiff, a passenger on a street car operated by defendant, was, while standing in the aisle preparatory to leaving the car, thrown through a window, so that his body from his hips was hanging head down out of the car. The accident was caused by the lurching of the car as it proceeded around a sharp curve.

The sole question necessary for us to determine on this appeal is: Was the evidence sufficient to sustain the implied finding of the jury that the defendant was negligent in the operation of its street car?

[2] It is settled law that a mere injury to a passenger does not place upon the carrier the duty of explanation, but the establishment of such injury, coupled with proof of coincident and causal collision, derailment, or other unusual happenings to the car, does cast upon the carrier the burden of exculpation. *Rystinki v. Central California Traction Co.*, 175 Cal. 336, 344, 165 P. 952.

In the instant case plaintiff endeavors to bring himself within this rule by claiming there was substantial evidence that:

First: The street car was being operated at an unusual rate of speed.

Second: The street car lurched when it struck the curve.

[3] Plaintiff's first contention is based solely upon his own evidence. He testified: "He (referring to defendant's street car) was going at a much greater speed than usual."

Such testimony is insufficient to support a finding of fact that the street car was being operated at an unusual rate of speed.

In *Diamond v. Weyerhaeuser*, 178 Cal. 540, 543, 174 P. 38, 39, Mr. Justice Sloss says: "The plaintiff testified that the machine was coming 'very fast'; another witness, that its speed was decreasing before it reached the milk wagon, but that it was still going 'at a good speed.' The

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes.

*For subsequent opinion see 59 P.2d 989.

only other witness who testified for plaintiff on the subject said that it looked to him as if the automobile 'was going pretty fast.' These statements are entirely too uncertain to serve as a basis for a finding that the speed was over 20 miles an hour, or that it was in excess of the maximum rate which would be dictated by the demands of ordinary prudence. Such expressions as 'very fast,' 'pretty fast,' and the like are merely relative, and their meaning and effect must depend upon the unknown factor of the witness' personal views regarding standards of speed."

[4] Plaintiff's second contention is predicated likewise solely on his testimony, to wit: "When the body of the car struck that curve it simply lurched."

This evidence is wholly insufficient to support a finding of fact that the lurch was unusual. It falls clearly within the rule announced in *Diamond v. Weyerhaeuser*, supra.

In *Anderson v. Boston Elevated Ry. Co.*, 220 Mass. 28, 107 N.E. 376, 377, a Massachusetts case, in which the facts were analogous to those in the instant case, plaintiff was injured by being thrown through a car window as it rounded a curve and characterized the motion of the car as "violent," "awful," and "so violent that it seemed 'as though the car was going to tip right over.'" In reversing the judgment in favor of the plaintiff and ordering a judgment entered for the defendant, Mr. Justice Crosby, speaking for the court, said, 220 Mass. 28, 107 N.E. 376:

"The plaintiff contends that her description of the jerk of the car and the effect which it had upon her was sufficient evidence to warrant the jury in finding that the motorman was negligent in the operation of the car as it passed around the curve in coming into the station. * * * The case therefore must stand or fall solely upon the plaintiff's testimony.

"It is a matter of common learning that electric cars cannot be run without occasional jerks and jolts, and for injuries to passengers arising from the ordinary sway or lurch and jerk of a car there is

no remedy because there is no evidence of negligence; and this is true no matter how vivid, vigorous and vehement the adjectives employed may be in describing the movement of the car."

In *Delaney v. Buffalo, R. & P. Ry. Co.*, 266 Pa. 122, 109 A. 605, at page 606, Mr. Justice Walling, speaking for the Supreme Court of Pennsylvania in a case where a passenger on a train was injured when a sudden lurch caused her to fall upon her knees in the aisle and strike her head against the opposite side of the car, causing injury, says: "An injury to a passenger raises no presumption against the carrier, unless the accident is connected in some way with the means of transportation. [Citing cases.] And the situation is not changed by the fact that plaintiff's evidence describes the lurch or jolt as 'terrific.' That a passenger fell from her chair from the mere movement of the car of a fast train does not make out a prima facie case of negligence, and her mere characterization of the movement as a terrific or violent lurch adds nothing from which negligence can be legitimately inferred. [Citing cases.] There is no presumption of negligence arising from the use of the words 'sudden jerk.'"

From the foregoing, it follows that there was not any substantial evidence upon which the jury could lawfully predicate negligence upon the part of defendant.

The judgment is reversed.

I concur: CRAIL, P. J.

WOOD, Justice (dissenting).

I dissent.

The case of *Diamond v. Weyerhaeuser*, cited in the majority opinion, has little, if any, bearing upon the issues of the case before us. The two decisions from other jurisdictions are not controlling for the reason that they are opposed to the California decisions. *Rystinki v. Central California Traction Co.*, 175 Cal. 336, 165 P. 952; *Lynch v. Market Street Ry. Co.*, 130 Cal.App. 433, 19 P.(2d) 1009; *Karsey v. City and County of San Francisco*, 130 Cal.App. 655, 20 P.(2d) 751.

10 Cal.App.2d 616

PEOPLE v. McCLELLANT.

Cr. 2787.

District Court of Appeal, Second District,
Division 1, California.

Dec. 13, 1935.

1. Criminal law Ⓒ730(12)

In prosecution for driving automobile while intoxicated, conduct of prosecuting attorney in asking defendant if he had not been arrested for manslaughter and being drunk, and stating that he could prove that defendant had several times been drunk, *held* not reversible error, where trial court admonished jury to disregard question, and instructed jury not to consider as evidence statements made by counsel concerning facts of case (St. 1929, p. 537, § 112; Const. art. 6, § 4½).

2. Criminal law Ⓒ1144(15)

Appellate court presumes that jury did not disregard trial court's instructions.

Appeal from Superior Court, Los Angeles County; Raglan Tuttle, Judge.

Harvey S. McClellant was convicted of drunk driving of an automobile, and he appeals.

Affirmed.

Bruce Murchison, of Los Angeles (C. J. Enking, of Los Angeles, of counsel), for appellant.

U. S. Webb, Atty. Gen., and John O. Palestine, Deputy Atty. Gen., for the People.

HOUSER, Presiding Justice.

Defendant appeals from a judgment of conviction of the crime of violating the provisions of section 112 of the California Vehicle Act (St. 1923, p. 553, as amended by St. 1929, p. 537) or, as the offense is commonly known, of "drunk driving of an automobile."

As a reason for the reversal of the judgment, it is urged by appellant that the deputy district attorney, who was in charge of the prosecution of defendant, was guilty of misconduct in that, on cross-examination of defendant, he not only inquired of him whether on a specified date he had not been arrested "for manslaughter and drunk," but also, that upon objection to such question being sustained by the trial court, the deputy district attorney thereupon made the

statement that he was prepared "to prove that he (defendant) has several times been drunk."

The theory upon which appellant presents his point is that (as he asserts) because the evidence produced by the prosecution was evenly balanced by that produced by the defendant, the effect of the criticized question and the statement was that it added weight to the evidence presented by the prosecution, and thus caused the jury to return its verdict of "guilty" against defendant.

The respective parties to this appeal are familiar with the evidence, and manifestly no useful purpose would be served by herein setting forth even a summary of it. However, it may suffice to state that, after giving such evidence careful consideration, this court is unable to agree with defendant in his contention that it was "evenly balanced." Indeed, our estimate of the evidence, as shown by the "cold record," is that both in quality and in quantity the evidence to the effect that, within the meaning of the pertinent language of the statute, on the occasion in question defendant was intoxicated, at least preponderated over that adduced to the contrary.

[1] It may be conceded that the deputy district attorney was guilty of misconduct; but in the premises, it is improbable that such error caused "a miscarriage of justice." Section 4½, art. 6, Const. That conclusion is reached, particularly in view of the fact that, immediately following the question to which attention has been directly, the trial judge sustained an objection thereto and directed the jury to disregard it; also, that without waiting for an objection to be made by defendant to the criticized statement made by the deputy district attorney, the trial judge remarked, "Sustain the objection. I admonish the jury to disregard that"; and that in addition thereto, in charging the jury, the trial court gave a special instruction that was devoted to a minute and thorough admonition to the effect that, if any evidence had been admitted and afterward stricken out, or if any counsel had intimated by question, which the court had not permitted to be answered, that certain things were, or were not, true, the jury must disregard such questions and refrain from any inferences based upon

them; also, that if counsel upon either side had made any statements in the presence of the jury concerning the facts in the case, the jury must be careful not to regard such statements as evidence, but must look entirely to the proof in ascertaining what the facts were.

[2] Of course, the jury is presumed to have been composed of persons that were possessed of at least average intelligence; and that, in consequence, the several instructions given to it by the trial court were not disregarded.

The judgment is affirmed.

We concur: YORK, J.; DORAN, J.



10 Cal.App.2d 586

In re HARRIS.

HARRIS v. SUPERIOR COURT IN AND
FOR SONOMA COUNTY et al.

Civ. 5500.

District Court of Appeal, Third District,
California.

Dec. 11, 1935.

1. Divorce ☞152

Where entry of interlocutory judgment of divorce was inadvertently omitted, such judgment could not be entered a year after its rendition as of date judgment had been originally rendered (Civ.Code, § 132; Code Civ.Proc. § 939).

2. Appeal and error ☞347(1)

Judgment ☞386(1)

New trial ☞116(1)

Court cannot, by antedating order or entry of it, cut off right of party to move for new trial, to move to set aside judgment, or to appeal (Code Civ.Proc. § 939).

Proceeding in the matter of the petition of Charles P. Harris for an alternate writ of mandate against the Superior Court of the State of California in and for the County of Sonoma and others.

Writ denied.

Devoto & Smith, of Santa Rosa, for petitioner.

Clarendon W. Anderson, of Santa Rosa, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

[1] On August 31, 1934, an interlocutory judgment of divorce was rendered in the Superior Court of the County of Sonoma, in favor of petitioner herein, but through an inadvertence such interlocutory judgment was not entered. A year after the rendition of said judgment, petitioner, learning of the error, sought an order of the superior court directing the clerk thereof to enter said interlocutory decree as of August 31, 1934. This the court refused to do, and petitioner now asks this court through a writ of mandate to compel such entry.

No power exists in this court to grant the relief sought. This question seems definitely to have been settled by the rule expressed and the reasons give therefor in the case of *Nolte v. Nolte*, 29 Cal.App. 126, 154 P. 873, Mr. Presiding Justice Conrey speaking for the court. There the trial judge signed a final decree based upon an interlocutory decree entered nunc pro tunc. Thereafter, the court upon its own motion vacated the final judgment "because it was entered within a week after the actual entry of the interlocutory decree of divorce." From this order setting aside the final decree so entered an appeal was taken. The gist of the opinion upholding the action of the court in setting aside the final decree is not based upon any lack of authority in the court to enter a decree nunc pro tunc, but upon the ground that the court had no authority to enter a final decree until the expiration of one full year after the actual entry of the interlocutory decree.

Section 132 of the Civil Code provides: "When one year has expired after the entry of such interlocutory judgment, the court on motion of either party, or upon its own motion, may enter the final judgment granting the divorce, * * * but if any appeal is taken from the interlocutory judgment or motion for a new trial made, final judgment shall not be entered until such motion or appeal has been finally disposed of, nor then, if the motion has been granted or judgment reversed."

[2] The time within which such an appeal may be taken dates from the entry of the judgment. Section 939, Code Civ.Proc. As pointed out in *Spencer v. Troutt*, 133

Cal. 605, 65 P. 1083, a court cannot by antedating an order or the entry of it cut off the right of a party to move for a new trial, to move to set aside the judgment, or to appeal.

In *Grannis v. Superior Court*, 146 Cal. 245, 79 P. 891, 106 Am.St.Rep. 23, it was held the provisions of section 131 and section 132 of the Civil Code are limitations on the power of the court and intended to forbid the entry of the final decree until after the prescribed period. In *Claudius v. Melvin*, 146 Cal. 257, 79 P. 897, the court said: "We think the defendant is correct in the position that the year which must elapse before final judgment can be given begins to run from the time of the actual entry of the interlocutory judgment, and not from any theoretical nunc pro tunc date of entry."

The writ is denied.

We concur: THOMPSON, J.; PLUMMER, J.



10 Cal.App.2d 749

BURROWS v. BURROWS.

Civ. 5440.

District Court of Appeal, Third District,
California.

Dec. 20, 1935.

1. Appearance ⇨9(1)

If defendant raises any question other than that of jurisdiction or asks for any relief which can only be granted upon hypothesis that court has jurisdiction of his person, his appearance is "general," though termed "special," and he thereby submits to jurisdiction of court as completely as if he had been regularly served with summons.

[Ed. Note.—For other definitions of "General Appearance," see Words & Phrases.]

2. Appearance ⇨9(2)

Defendant who wishes to insist upon objection that he is not in court for want of jurisdiction over his person must specially appear for that purpose only.

3. Divorce ⇨81

Defendant in divorce case who incorporated, in motion to strike out and vacate portions of interlocutory decree, several matters

in addition to question of jurisdiction of court over defendant, entered "general appearance" in divorce action.

4. Divorce ⇨168

Judgment in divorce action which was not void could not be collaterally attacked.

5. Husband and wife ⇨254

One-half of land which was purchased with community funds and was conveyed to husband and wife as joint tenants was separate property of wife.

6. Judgment ⇨485

Judgment of court of record cannot be collaterally assailed unless it is void upon its face.

7. Judgment ⇨497(1)

Judgment roll only can be considered on collateral attack on judgment.

8. Judgment ⇨497(1)

Party making collateral attack upon judgment or order must show by record that court did not have jurisdiction, and action of trial court cannot be impeached by any matter outside of record.

Appeal from Superior Court, Los Angeles County; J. R. Girling, Judge.

Action to quiet title by Clinton A. Burrows against Lida B. Burrows. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

Mark F. Jones and W. L. Engelhardt, both of Los Angeles, for appellant.

Pease, Dolley & Elson, of Los Angeles, for respondent.

JAMISON, Justice pro tem., delivered the opinion of the court.

This is an action to quiet title to certain real estate. Plaintiff based his title upon a judgment in a divorce action therefore had between the parties to this action. Plaintiff recovered judgment, and from this judgment defendant appeals.

Respondent introduced in evidence the judgment roll in the divorce action and rested. Defendant then introduced two deeds conveying the land in controversy to the respondent and appellant as joint tenants.

Appellant contends that the attempted service of summons in the divorce action was defective and void, and this contention is admitted by respondent.

Respondent maintains that the defect in the service of the summons was cured by the general appearance of defendant in the divorce action, and in support thereof he cites the motion of defendant to strike out and vacate portions of the interlocutory decree of divorce and the appeal from the order made upon such motion, the appeal from the interlocutory decree, and the appeal from the order denying the motion to annul and vacate the order declaring void the order for the publication of the summons. These appeals were dismissed by the Supreme Court.

[1] It is the well-settled rule that if a party defendant raises any question other than that of jurisdiction or asks for any relief which can only be granted upon the hypothesis that the court has jurisdiction of his person, his appearance is general, though termed "special," and he thereby submits to the jurisdiction of the court as completely as if he had been regularly served with summons. *Security Loan & Trust Co. v. Boston & South Riverside Fruit Co.*, 126 Cal. 418, 58 P. 941, 59 P. 296; *Olcese v. Justice's Court*, 156 Cal. 82, 103 P. 317.

[2] If a party defendant wishes to insist upon the objection that he is not in court for want of jurisdiction over his person, he must specially appear for that purpose only, and must keep out for all other purposes except to make that objection. *Taylor v. Superior Court*, 93 Cal. App. 445, 269 P. 727.

[3] Inasmuch as the defendant, in the divorce case, incorporated, in her motion to strike out and vacate portions of the interlocutory decree, several matters in addition to the question of the jurisdiction of the court over the person of the defendant, we are of the opinion that she thereby entered her general appearance in the said action.

[4] The court therefore having acquired jurisdiction of the subject-matter and of the person of the defendant in the divorce action, it cannot be said that its judgment was void, and not being void it is not subject to collateral attack. *Hamblin v. Superior Court*, 195 Cal. 364, 233 P. 337, 43 A.L.R. 1509; *Seaboard National Bank v. Ackerman*, 16 Cal.App. 55, 116 P. 91; *Gates v. Gates*, 54 Cal.App. 407, 202 P. 151.

[5] Appellant contends that one-half of the land in controversy is her separate property and therefore the court erred in awarding it to respondent. Though the land was purchased with community funds, yet when it was conveyed to them as joint tenants one-half of it became the separate property of the appellant. *Siberell v. Siberell*, 214 Cal. 767, 7 P. (2d) 1003.

[6, 7] It is a well-established rule that a judgment of a court of record cannot be collaterally assailed unless it is void upon its face. *Hamblin v. Superior Court*, supra; *Seaboard National Bank v. Ackerman*, supra. And upon collateral attack the judgment roll alone can be considered. *Wendt v. Gates*, 102 Cal.App. 342, 283 P. 312.

There is no reference whatever in the judgment or in the judgment roll to the joint tenancy or to the fact that the appellant is the owner of a half interest in the land in controversy.

[8] A party making a collateral attack upon a judgment or order must show by the record that the court did not have jurisdiction, and the action of the trial court cannot be impeached by any matter outside of the record. *Galvin v. Palmer*, 134 Cal. 426, 66 P. 572.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

10 Cal.App.2d 758

LISLE v. RAGLE.

Civ. 1754.

District Court of Appeal, Fourth District,
California.

Dec. 21, 1935.

Appeal and error ⇨800

Motion to dismiss appeal was denied, where points and authorities, though not on file at time notice of motion was given, were filed prior to time specified therein for presentation of motion (Rules of Court of Appeal, rule 1, § 4; rule 5).

Appeal from Superior Court, Fresno County; Stanley Murray, Judge.

Action by Blanche E. (Green) Lisle against W. Orval Ragle, as administrator of the estate of Lottie L. Martin, formerly known as Lottie L. Green. Judgment for plaintiff, and defendant appeals. Motion to dismiss the appeal and to affirm the judgment.

Motion to dismiss the appeal denied.

Lindsay & Gearhart, of Fresno, for appellant.

B. M. Benson, of Fresno, for respondent.

JENNINGS, Justice.

Respondent's motion to dismiss the appeal herein and to affirm the judgment was made on the single ground that appellant had failed to file in this court points and authorities within the time prescribed by section 4 of rule 1 of the rules of this court. At the time notice of the motion for dismissal was given the motion was well taken as no brief in support of the appeal was then on file. However, prior to the time specified in the notice as the date on which the motion would be presented appellant's points and authorities were filed.

Rule 5 of the rules of this court provides that if points and authorities, though not filed within the time prescribed, are filed at the time notice of motion for dismissal is given, that fact shall be sufficient answer to the motion. This rule has been extended to include those cases wherein an appellant's opening brief is on file at the time the motion for dismissal of an appeal is heard, although such brief had not been filed at the time notice of the motion

was given. *Righetti v. Monroe, Lyon & Miller, Inc.*, 106 Cal.App. 346, 289 P. 650; *Fishman v. Silva*, 108 Cal.App. 121, 291 P. 430; *Tyner v. Axt*, 111 Cal.App. 187, 295 P. 97; *Toth v. Metropolitan Life Ins. Co.*, 113 Cal.App. 55, 297 P. 564; *Snodgrass v. Hand*, 125 Cal.App. 265, 13 P.(2d) 769; *Smith v. Taecker*, 127 Cal.App. 78, 15 P. (2d) 193; *North v. Evans*, 136 Cal.App. 434, 28 P.(2d) 938.

The motion to dismiss the appeal is therefore denied.

We concur: BARNARD, P. J.; MARKS, J.



10 Cal.App.2d 555

**EDISON SECURITIES CO. v. VENTURA
GUARANTEE BUILDING & LOAN**

ASS'N.

Civ. 5444.

District Court of Appeal, Third District,
California.

Dec. 10, 1935.

Rehearing Denied Jan. 9, 1936.

Hearing Denied by Supreme Court
Feb. 6, 1936.

1. Vendor and purchaser ⇨251

Where agreement for sale of land stated that part of purchase price shall be "represented" by transfer to seller through escrow of certain number of investment certificates which purchaser was to redeem, certificates held received by vendor in full payment of part of purchase price for which part vendor had no lien for purchaser's failure to redeem some certificates (Civ.Code § 3046).

Word "represent" means to stand in the place of; to supply the place, or perform the duties; to be a substitute for.

[Ed. Note.—For other definitions of "Represent," see Words & Phrases.]

2. Vendor and purchaser ⇨251

Under covenant that purchaser's title to land should be free and clear of all incumbrances, vendor could not resort to land for payment of part of purchase price, since term "incumbrances" includes taxes, assessments, and all liens upon realty, and vendor's right to resort to land for payment of purchase price is a "lien" (Civ.Code, §§ 1114, 3046).

[Ed. Note.—For other definitions of "Lien," see Words & Phrases.]

Appeal from Superior Court, Ventura County; Edward Henderson, Judge.

Action by the Edison Securities Company against the Ventura Guarantee Building & Loan Association. From a judgment for defendant, plaintiff appeals.

Affirmed.

Roy V. Reppy, E. W. Cunningham, and Gail C. Larkin, all of Los Angeles, for appellant.

Merle J. Rogers, of Ventura, for respondent.

JAMISON, Justice pro tem., delivered the opinion of the court.

This is an action to foreclose a vendor's lien.

On April 27, 1927, plaintiff entered into an agreement with defendant to sell it the land described in the complaint, the purchase price being the sum of \$45,000, to be paid as follows: \$5,000 upon the execution of the agreement, \$20,000 evidenced by note of defendant, secured by deed of trust or mortgage on the said land, and for the remaining \$20,000, by the delivery to plaintiff of \$20,000 worth of investment certificates at par value, issued by defendant. Said certificates to have an actual value of not less than \$20,000, and to be redeemed and paid at the rate of \$5,000 per annum.

Defendant paid the \$5,000 cash upon the execution of the agreement, executed its note for \$20,000, secured by a deed of trust on the property in controversy, and delivered to plaintiff the \$20,000 worth of investment certificates. Thereupon, plaintiff executed a deed to the defendant for said land. Defendant has paid the said note secured by the deed of trust, and has redeemed \$15,000 worth of the \$20,000 indemnity certificates. Plaintiff made demand for the payment of the remaining \$5,000 indemnity certificates, but payment of same not being made, it instituted this suit. Upon the trial, judgment went for defendant, and from that judgment, plaintiff appeals.

Appellant admits that no action would lie to enforce payment of the investment certificates. (Appellant's reply brief, page 1.) But it contends that this action is brought to enforce a vendor's lien for the unpaid portion of the purchase price of the said land.

Section 3046 of the Civil Code provides that: "One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer."

[1] If appellant received, in part payment, the said indemnity securities, then the issuance and delivery of said certificates to it would certainly prevent the said statute from applying to so much of the purchase price of said land as was covered by said certificates. *Doty v. California Rice Milling Co.*, 37 Cal.App. 449, 174 P. 389. The said agreement clearly shows that the said certificates were received by appellant in payment of \$20,000 of the purchase price of said land. The language used in said agreement can bear no other or different construction. It states that the sum of \$20,000 shall be represented by the transfer and delivery to the seller, through said escrow, of \$20,000 worth of the 6 per cent. duly issued investment certificates of respondent, at par. The word "represent," according to Words and Phrases, First Series, vol. 7, p. 6107, judicially defined, means to stand in the place of; and the "Century Dictionary" defines it as meaning, to supply the place, or perform the duties; to be a substitute for.

Therefore, the trial court was justified in finding, as in effect it did, that the investment certificates were taken in the place of, or as a substitute for \$20,000 in cash of the purchase price of said land.

[2] Respondent also calls attention to the fact that said agreement provided that the escrow holder should issue a guarantee of title, with liability of \$45,000, showing title to said property to be vested in said buyer, subject only to said deed of trust in favor of appellant, and otherwise, to be free of all incumbrances and rights, except as herein mentioned, there being no reservation therein of a vendor's lien. The covenant that respondent's title to said land should be free and clear of all incumbrances excludes the idea that a title subject to a lien in favor of appellant was to be retained. *Royal Consol. Min. Co. v. Royal Consol. Mines Co.*, 157 Cal. 737-748, 110 P. 123, 137 Am.St.Rep. 165.

The term "incumbrances" includes taxes, assessments, and all liens upon real property. Section 1114, Civ.Code. The vendor's right to resort to the land for

payment of the purchase price is a lien. *Hinkel v. Crowson*, 188 Cal. 378-383, 206 P. 58.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



BUENEMAN et al. v. CITY OF SANTA BARBARA et al. *

Civ. 9991.

District Court of Appeal, First District,
Division 2, California.

Dec. 18, 1935.

Hearing Granted by Supreme Court
Feb. 13, 1936.

1. Injunction ⇨85(2)

In action to enjoin enforcement of ordinance imposing license fee on persons engaged in commercial laundering or dry cleaning without maintaining plant within city, where it was alleged that such ordinance did not affect laundries or dry cleaning plants within city, record held to disclose no discrimination; city not being obligated to incorporate in one ordinance all provisions imposing license taxes for revenue.

2. Evidence ⇨83(2)

In action to enjoin enforcement of allegedly discriminatory license ordinance, presumption is that municipal authorities acted regularly in all matters.

3. Constitutional law ⇨230(3)

Ordinance imposing annual license fee of \$200 on persons engaging in commercial laundering or dry cleaning if work was not done at plant maintained within city at regular place of business held to make valid classification under state laws, and did not violate Fourteenth Amendment, as regards equal protection (Const.U.S.Amend. 14).

4. Pleading ⇨225(2)

Where court sustained demurrer to complaint, failure to grant leave to amend held not abuse of discretion where plaintiff meticulously pleaded cause of action and made no application to trial court to set aside judgment and grant permission to amend (Code Civ.Proc. § 473).

Appeal from Superior Court, Santa Barbara County; Atwell Westwick, Judge.

Action by Fred T. Bueneman and others, as trustees for the Wardrobe Laundry

Companies, a trust estate, against the City of Santa Barbara and others. The action was dismissed, and plaintiffs appeal.

Affirmed.

Burnett Wolfson and Earl I. Swetow, both of Los Angeles, for appellants.

J. F. Goux, City Atty., of Santa Barbara, for respondents.

STURTEVANT, Justice.

The plaintiffs commenced an action against the defendants to enjoin the enforcement of a license ordinance. The defendants appeared and filed a demurrer. After a hearing was had, the trial court made an order sustaining the demurrer and denying leave to amend. Thereupon a judgment was entered directing that the plaintiffs take nothing, that the action be dismissed, and that the defendants recover their costs. From that judgment, the plaintiffs have appealed.

Section 2 of the ordinance provides: " * * * And the commencing, carrying on or engaging in any trade, calling, business, profession or occupation in this ordinance specified without there first having been procured a license therefor from said City, or without complying with each and every and all of the provisions in this ordinance, shall constitute a separate violation of this ordinance for each and every day or fractional part of a day that said trade, calling, business, profession or occupation, is so carried on, and any person who shall violate any provision of this ordinance shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding Three Hundred Dollars (\$300.00) or by imprisonment in the City Jail of said City for not exceeding ninety (90) days or by both such fine and imprisonment." Section 7 of the ordinance provides: "Every person in the City of Santa Barbara who conducts or carries on or engages in the business of, or solicits orders for or accepts orders for, or maintains a regular delivery or distribution system for customary or usual delivery to and from regular customers as such of a laundry or a towel or linen supply service or a dry cleaning service, or any one or more of said three classes of business, where the plant or establishment used for the actual work of laundering or dry cleaning, or of both where both laundry and dry cleaning services are involved, is not maintained

within said City of Santa Barbara at a fixed and regular place of business within said city, distinct and separate from all other places of business or residence and regularly kept open with some person in exclusive attendance thereat for at least thirty (30) hours in each and every week, shall pay to said City the following license fee, which *said fee is by this ordinance required and imposed solely and only for revenue and not for any other purpose*, said license fee being:

[1-3] "The sum of Two Hundred Dollars (\$200.00) each year payable semi-annually in advance." (Italics ours.) No other parts of the ordinance, or of any other ordinance, are pleaded in haec verba. However, there is an allegation, "That under and by virtue of the terms of the said ordinance no tax or penalty is imposed or exacted from any individual, firm or corporation who engages in the same line of business that the plaintiffs are engaged in who does maintain a plant or regularly established place of business within the said City of Santa Barbara. * * *" There are also appropriate allegations to the effect that the tax as prescribed by the said ordinance is exorbitant, oppressive, discriminatory, and in violation of the provisions of the Constitution of the United States and the Constitution of the state of California. The plaintiffs contend that the special grounds of demurrer are devoid of merit, that the demurrer admits the allegations of the complaint, that a court of equity will restrain the enforcement of an unconstitutional ordinance, that the right to do business is a property right, and that they have no plain, speedy, or adequate remedy at law. For all of the purposes of this case, those several contentions will be conceded. However, the principal contention of the plaintiffs is that the ordinance in question is unconstitutional. That point is predicated upon the contention that the ordinance imposes a burden upon one group and exempts others. They cite and rely on *Ex parte Frank*, 52 Cal. 606, 28 Am.Rep. 642; *Lassen County v. Cone*, 72 Cal. 387, 14 P. 100; *Matter of Application of Richardson*, 170 Cal. 68, 148 P. 213; *Town of St. Helena v. Butterworth*, 198 Cal. 230, 244 P. 357; *Matter of Application of Hines*, 33 Cal.App. 45, 164 P. 339; *In re Hart*, 36 Cal.App. 627, 172 P. 610; *In re Riley*, 39 Cal.App. 58, 177 P. 854, and *In Re Robinson*, 68 Cal.App. 744, 230 P. 175. No one of the cases cited is helpful to these plaintiffs. The record before us

does not disclose any discrimination whatsoever. As recited above, the plaintiffs allege that the ordinance under attack does not impose a tax on those who transact a similar business, but who have places of business in Santa Barbara. The city of Santa Barbara was under no obligation to insert all provisions imposing license taxes for revenue in one ordinance. Assuming, but not conceding, the same to be material, there is no allegation that the city of Santa Barbara has not enacted other ordinances taxing for revenue other lines of business. In each of the cases cited by the plaintiffs the discrimination appeared on the face of the record before the court. Of course, it will be presumed that the municipal authorities have acted regularly in all matters. If the plaintiffs contend that in this particular instance they acted otherwise, the plaintiffs should show the facts by appropriate allegations. *County of Plumas v. Wheeler*, 149 Cal. 758, 87 P. 909. Nor was the ordinance in any way in conflict with the Fourteenth Amendment to the Constitution of the United States. The plaintiff cites *Chalker v. Birmingham & N. W. Ry. Co.*, 249 U. S. 522, 39 S.Ct. 366, 367, 63 L.Ed. 748, as sustaining its contention that the ordinance is unconstitutional. We think it is clear that it does not do so. It is confined solely to the facts of that case. The validity of a statute of Tennessee was involved. That statute imposed a tax of \$100 on foreign corporations which did not maintain their chief office in said state and a tax of \$25 on corporations that did maintain their chief office in said state. The court held that the classification had "no adequate basis." But, if it be contended that the ordinance involved in the instant case in effect divides certain occupations into two classes—those having a fixed place of business in Santa Barbara and those conducting the same business but who have no fixed place of business in Santa Barbara—such classification is valid under the laws of California. *Ex parte Haskell*, 112 Cal. 412, 44 P. 725, 32 L.R.A. 527. The same rule has been declared under the provisions of the Fourteenth Amendment to the Constitution of the United States. *Singer Sewing Machine Co. v. Brickell*, 233 U.S. 304, 34 S.Ct. 493, 58 L.Ed. 974. It was said in *Bell's Gap Railroad Co. v. Pennsylvania*, 134 U.S. 232, at page 237, 10 S. Ct. 533, 535, 33 L.Ed. 892: "The provision in the fourteenth amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws, was

not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the state in framing their constitution." That rule has frequently been cited and followed. (See Rose's Notes.)

[4] It is further contended that the trial court abused its discretion in failing to grant the plaintiffs leave to amend. We think the point is without merit. The record shows that the plaintiffs pleaded their cause of action with meticulous care. We do not find that they omitted a word which the facts would have authorized. Furthermore, the record does not show that at any time the plaintiffs applied to have the judgment set aside and asked permission to amend. If they desired such relief, they should have applied to the lower court therefor. Code Civ.Proc. § 473.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.;
SPENCE, J.

4 Cal.2d 724

**WILSON v. STOCKHOLDERS PUB. CO.,
Inc., et al.
L. A. 15438.**

Supreme Court of California.
Dec. 23, 1935.

1. Libel and slander ⚡6(2)

Statements in newspaper article that county supervisors had purchased from plaintiff's company \$75,000 worth of impractical teletype machines which were stored for two years after purchase, and that plaintiff had offered to repurchase machines for \$13,000 *held* not libelous per se.

2. Libel and slander ⚡6(2)

Statements in newspaper article that county supervisors were studying methods of using \$75,000 worth of impractical teletype machines purchased from plaintiff and that fee paid plaintiff for maintenance of six teletype machines for about four and one-half months was \$722.90 each, or \$246.48 more than machine originally cost *held* not libelous per se.

3. Libel and slander ⚡6(2)

False statement in newspaper article that county supervisors paid plaintiff \$4,357.93 as maintenance or service fee for teletype machines which were not in use *held* libelous per se.

4. Libel and slander ⚡87

Where libel complaint denounced as untrue practically entire newspaper article, and allegations of complaint were sufficient to raise issue of falsity of principal portions of article, complaint *held* sufficient on general demurrer.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action for libel by Fred J. Wilson against the Stockholders Publishing Company, Inc., and another. From a judgment for defendants, plaintiff appeals.

Reversed.

Prior opinion, 45 P.(2d) 829.

Lester E. Hardy and Victor A. Gillespie, both of Los Angeles, for appellants.

Binford & Binford, and L. B. Binford, all of Los Angeles, for respondents.

PER CURIAM.

This action for alleged libel is founded upon the publication of three different articles in the Illustrated Daily News concern-

ing the purchase by the county of Los Angeles of teletype machines for the new county hospital. In the first article, printed June 12, 1934, it was stated that the board of supervisors had purchased from the Sierra Equipment Company (the contract having been awarded to that company), of which plaintiff was president, 115 teletype machines for the sum of \$75,000; that they were found to be impractical by hospital officials and placed in storage, where they had remained for about two years; that a radio speaker system had been installed for the comparatively small sum of \$1,900; that on April 4, 1934, Wilson had written a letter offering to repurchase the machines for \$13,000, setting forth in haec verba a letter written by Sierra Equipment Company to the board of supervisors and signed by Wilson as vice president, seeking a 60-day option on the machines for that sum; that the reason the teletype system was impractical was because it necessitated watching by somebody to get the messages, whereas with the radio system employees might hear while attending to their regular duties; and that the supervisors refused Wilson's offer because they were planning to put the machines to work in other departments.

In the second article, under the heading, "County Pays \$4,357—5 Years Service on Junked Equipment," published July 31, 1934, it was said that the county had paid \$4,357.93 for a five-year maintenance for the teletype machines which had been stored when found to be impractical, and "while the machines, unused, gathered dust and cobwebs, records showed"; that the fee was paid to Wilson and his Sierra Equipment Company, from which the machines were purchased; that it was made a part of the contract of purchase, although they were bought outright, that "his" company would maintain and service them; that they were tested, found to be impractical, and on April 7, 1930, after they had been discarded, the supervisors adopted a resolution authorizing payment for this "maintenance" from October 1, 1929; and that on April 30, 1933, the county counsel notified the supervisors that the maintenance clause should be canceled, but that due to the contract provision that six months' notice of cancellation was necessary, "payments were continued until May 27, 1934." It was then added: "Just what 'maintenance', costing the county \$4357.93, was given the machines while they were in storage is not a part of the county records."

On August 11, 1934, the third article was published, which set forth that one of the supervisors was studying methods of making use of the machines purchased at the cost of \$75,000, who, after the facts had been published, had requested the director of the county board of efficiency for a report upon the use to which they might be put; that the director had recommended they be installed in the county forestry department and at the Olive View Sanitarium; that the newspaper desired to correct its published report that \$4,357 had been paid by the county for the maintenance of the 115 machines; that the \$4,357 had been paid to plaintiff and "his Sierra Equipment Corporation" for the maintenance of 6 machines which were used at the old hospital, the charge dating from October, 1929, to May, 1934; that no maintenance charge was ever made for the 115 unused machines; that the 6 machines were purchased from Wilson at the cost of \$2,750, or \$458.28 each, while the maintenance for the period amounted to \$722.90 each, or \$264.48 more than the machine originally cost.

We are not inclined to unduly lengthen this opinion by detailing the innuendo allegations or the denials of the truth of the things published with respect to the first or the third articles for reasons hereinafter set forth, but concerning the second it is averred:

"That the following statements and each of them contained in the aforesaid publication were published of and concerning the plaintiff and are and were false and untrue, to-wit:

"1. 'County Pays \$4,357—5 Year Service on Junked Equipment.'

"2. 'Los Angeles County paid \$4357.93 for a five year "maintenance" of \$75,000 worth of teletype machines purchased for use in the New General hospital, which were stored in the basement when found to be impractical, it was revealed yesterday at the office of the County Auditor H. A. Payne.'

"3. 'The money was paid over a period of five years while the machines, unused, gathered dust and cobwebs, records showed.'

"4. 'The "maintenance" fee was paid to Frank J. Wilson and his Sierra Equipment Company from which the machines were purchased. It was made a part of the purchase contract that despite the fact that the machines were bought outright and became county property his company would "maintain and service" them.'

"5. 'On April 30, 1933, the county counsel notified the supervisors that the "maintenance" Clause of the contract should be cancelled because the machines had never been used.'

"6. 'But the contract called for six months notice to Wilson and the Sierra Company before cancellation and so payment continued until May 27, 1934.'

"7. 'Just what "maintenance" costing the county \$4,357.93 was given the machines while they were in storage is not a part of county records.'

"That the aforesaid publications and the portions of the publications above specified are and were malicious, defamatory, false and untrue, in that:

"1. Fred J. Wilson was not the owner of the Sierra Equipment Company.

"2. That the county did not pay \$4,357.93 for five years service on 'junked equipment'.

"3. That Los Angeles County did not pay \$4,357.93 for a five year maintenance of \$75,000 worth of teletype machines while the machines, unused, gathered dust and cobwebs in the basement.

"4. That the records do show what this payment was for.

"5. That the maintenance fee was not paid to Fred J. Wilson or to the Sierra Equipment Company for services on these machines, or that the Sierra Equipment Company was his company or that the said machines were purchased from this company, or that it was made a part of the purchase contract 'despite the fact that the machines were bought outright and became county property his company would maintain and service them'.

"6. 'On April 30, 1933, the county counsel notified the supervisors that the "maintenance" clause of the contract should be cancelled because the machines had never been used.'

"7. There never was at any time a contract which called for six months notice to Wilson and the Sierra Equipment Corporation before cancellation of maintenance or service on these machines or that payment continued until May 27, 1934."

It is also alleged:

"That defendants, Stockholders Publishing Company and E. M. Boddy by the aforesaid publications and the aforesaid portions of the publications above specified meant to say and were understood by those who read said publications to mean and to impute:

"1. That plaintiff was the owner of the Sierra Equipment Corporation.

"2. That plaintiff was charging the County a 'maintenance' fee on equipment that was never used.

"3. That the plaintiff was dishonest and lacking in integrity in his dealings with the County of Los Angeles in that he was charging the County \$4357.93 as a 'maintenance' fee on 'junked equipment' not in use, and therefore for which there should be no necessity for 'maintenance'.

"4. That through some chicanery or juggling of accounts or through some other illegal or dishonest method the plaintiff had caused the money to be paid to him by the County of Los Angeles without a record being kept thereof."

A general demurrer to the first amended complaint was sustained, and the plaintiff declining to amend, a judgment of dismissal was entered, from which this appeal is prosecuted.

The questions involved are whether the denials of the truth of the publications are sufficient and whether the matters printed are susceptible to the interpretation put upon them by the innuendo allegations, assuming, of course, that the articles were not libelous per se.

[1] It is our view of the case that we need not be concerned with the minute details of the denials or the innuendo relating to either the first or the last publication, because we find nothing in either which exposed the appellant "to hatred, contempt, ridicule, or obloquy," or which caused him "to be shunned or avoided," or which had a tendency to "injure him in his occupation." A reading of the first article very clearly demonstrates that it was intended to and did charge the board of supervisors with poorly advised action in purchasing equipment without due consideration of its practicability for the use intended. It goes to the length of stating the exact manner in which the machines were determined to be impractical. There is no suggestion of dishonesty or unfair dealing on the part of appellant or the company which he represented. While by way of innuendo it is charged that the publication intended to convey the thought that plaintiff was dishonest and had sold the county useless and valueless equipment, we do not believe that it is subject to such an interpretation. It was not stated to be valueless or useless, but impractical only for the particular purpose, and for the reasons stated. Nor do we see any im-

propriety in the letter seeking an option to repurchase the machines at a reduced price after it had been determined they were impractical, or at least not as practicable as the loud-speaker system, at a reduced price. An offer to repurchase would be of no different category. It is a matter of common knowledge that such equipment is not of everyday use, for which reason appellant and the concern with which he was connected might have great difficulty in disposing of them at all. It seems manifest that the whole tenor and purpose of the article was to castigate the board of supervisors for purchasing such equipment without giving due consideration to the possibility of its use in a hospital.

[2] For similar reasons, we think the third article and its detailed allegations do not warrant special consideration. It is not suggested in the complaint that \$4,357 was not paid for the maintenance of the six machines at the old hospital, nor that such maintenance charge exceeded the original cost in the amount of \$264.48 per machine. Nor is it alleged that the county was not making use of the machines as published. And appellant is not otherwise connected with the article except as having sold through the Sierra Equipment Company the 115 machines as stated in the first publication. Hence there is nothing in the third story to reflect upon appellant's character or injure him in his occupation.

[3] However, the second article must be held to differ from the other two. It, in effect, charges that appellant exacted from the county \$4,357.93 for services performed in maintaining the machines—when no services could have been rendered because they were not being used. Without any qualification, such a charge would be one of unconscionable conduct and tend to injure appellant in his business. The statement that the contract provided for such maintenance although the machines were bought outright does not, we think, save it from the reasonable interpretation put upon it by plaintiff when, by way of innuendo, he says it was intended by the article to convey the thought: "That the plaintiff was dishonest and lacking in integrity in his dealings with the County of Los Angeles in that he was charging the county \$4357.93 as a 'maintenance' fee on 'junked equipment' not in use, and therefore for which there should be no necessity for 'maintenance.'"

[4] We have heretofore set forth the allegations by which the truth of the state-

ments in the article are denied. They are in the words of the publication, and sufficiently put in issue the falsity of the principal portions thereof, including the charge that the sum of \$4,357 was collected for servicing machines which were not in use. *Haskins v. Jordan*, 123 Cal. 157, 55 P. 786; *Leonard v. McPherson*, 146 Cal. 616, 80 P. 1084. The respondents place great reliance upon the case of *Mortensen v. Los Angeles Examiner*, 112 Cal.App. 194, 296 P. 927, to sustain this contention that the falsity of the published statement is insufficiently alleged, but an examination of that cause indicates that by artful pleading in that cause, no damaging statement was actually denied, although at first glance it might appear otherwise. Here the complaint denounces as untrue practically the entire article and as against a general demurrer must be held to be sufficient.

Judgment reversed.



4 Cal.2d 709

CADWELL v. ANSCHUTZ.

L. A. 15218.

Supreme Court of California.

Dec. 19, 1935.

Rehearing Denied Jan. 16, 1936.

1. Automobiles ⚙️244(12)

In action for injuries received when plaintiff motorist struck defendant's automobile which she was attempting to pass as it deviated from course to bring right wheels onto pavement from dirt shoulder of highway, evidence supported finding that defendant was negligent (St. 1925, p. 413, § 130).

2. Automobiles ⚙️209, 226(1)

Plaintiff motorist's failure to sound horn while attempting to pass defendant's automobile traveling in same direction held contributory negligence which barred recovery for injuries received in collision when defendant's automobile pulled to left in front of plaintiff as she attempted to pass (St. 1931, p. 2125, § 125 (d)).

In Bank.

Appeal from Superior Court, Los Angeles County; E. O. Leake, Judge.

Action by Mabel M. Cadwell against Marvin D. Anschutz. Judgment for plaintiff, and defendant appeals.

Reversed.

Prior opinion, 39 P.(2d) 886.

Walter S. Coen and Donald E. Ruppe, both of Los Angeles (Horace W. Danforth, of Los Angeles, of counsel), for appellant.

Flint & MacKay, Wesley L. Nutten, Jr., and Donald W. Hamblin, all of Los Angeles, for respondent.

LANGDON, Justice.

This is an action for damages for personal injuries. Defendant was driving his car at a speed of about 30 miles per hour on a public highway north from San Juan Capistrano. The road was concrete, about 20 feet wide, and defendant's car, just prior to the accident, was partly on the concrete, and partly on the adjoining dirt shoulder. Plaintiff was driving closely behind, at a slightly greater speed, and without signaling in any way swung out into the center of the road to overtake and pass defendant's car. As she did so she saw another car coming from the opposite direction, and attempted to turn back into the line of traffic. At the same time defendant without signaling turned his car slightly to the left to get off the dirt shoulder of the road and wholly onto the concrete. The right front wheel of plaintiff's car, turning back into a position behind defendant, struck his left rear wheel, and plaintiff sustained the injuries of which she complains. The jury brought in a verdict for plaintiff, from which defendant appealed.

[1] There is some dispute as to whether defendant was negligent in making the slight deviation of course necessary to bring his car onto the concrete portion of the highway, without signaling as for a turn, or looking to see that the movement might be made in safety. See Vehicle Act, § 130 (St. 1923, p. 558, as amended by St. 1925, p. 413). We are satisfied, however, that the jury might properly conclude from the circumstances shown that this act was negligent. See *Connerly v. Correia*, 66 Cal. App. 570, 226 P. 841.

[2] It is also quite clear that plaintiff was negligent in seeking to pass in front of defendant's car without sounding her horn. Vehicle Act, § 125 (d), as amended by St. 1931, p. 2125.

The only basis upon which it is sought to justify the jury's verdict is found in the contention that the negligence of defendant was the sole proximate cause of the collision, and that plaintiff's negligence did not proximately contribute thereto. A great deal of quotation from the evidence accompanies the discussion of this point in the briefs, but the obvious and admitted facts seem destructive of plaintiff's position. It is reasonably probable that if plaintiff had sounded her horn before attempting to pass defendant's car, he would have delayed his change of course or have taken appropriate precautions. This being so, it seems clear that plaintiff's negligent act was a contributing factor to the injury, and we have been given no theory upon which it might be said that it was not causally connected therewith. It follows that the jury could not properly bring in a verdict in favor of plaintiff.

The judgment is reversed.

We concur: WASTE, C. J.; CONREY, J.; CURTIS, J.; THOMPSON, J.; SEAWELL, J.



5 Cal.2d 22

STRUMBERGER et al. v. HALL et al.

L. A. 15405.

Supreme Court of California.

Dec. 30, 1935.

1. Appeal and error ☞907(4)

Where entire record was not before reviewing court, findings of trial court on issue of res judicata must be taken by reviewing court as supported by evidence.

2. Appeal and error ☞528(4)

Affidavits in connection with motion for new trial, which were certified by clerk but not brought up on appeal either by bill of exceptions or by reporter's transcript, held not properly before reviewing court on attempted appeal on judgment roll, precluding consideration of claimed error in denial of new trial (Code Civ. Proc. §§ 950, 953a).

In Bank.

Appeal from Los Angeles County;
Caryl M. Sheldon, Judge.

Action by Stephanie Strumberger and another against Richard H. Hall and Richard H. Hall, as administrator of the estate of Elizabeth S. Hall, deceased. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Kent C. Rogers and John C. Kleber, both of Los Angeles, for appellants.

Louis Feinstein, of Los Angeles, for respondents.

PER CURIAM.

This is a motion to dismiss the appeal or affirm the judgment on the ground the appeal was taken for delay and the questions are so unsubstantial as not to require further argument. An order of affirmance of the judgment was heretofore made from the bench.

The action was instituted by Stephanie and Louis Strumberger to quiet title and to declare a trust with respect to a promissory note and a deed of trust securing it, payable to Elizabeth Strumberger Hall, daughter of plaintiffs and wife of defendant Hall, and now deceased. The plaintiffs allege they are the beneficiaries of a resulting trust with respect to the note in that the consideration therefor was money belonging to them and that the payee had no beneficial interest therein and during her lifetime claimed no such interest, but was the holder of the bare legal title, and that the trust was terminated by the indorsement of the note and the assignment of the security to the plaintiffs and plaintiffs are the legal as well as the equitable owners thereof. The prayer is for the determination of the adverse claims of the defendant. Hall filed a disclaimer in his individual capacity, but, as executor of the estate of Elizabeth Strumberger Hall, he filed an answer denying the ownership of plaintiffs and the resulting trust in their favor, alleging that the assignment and endorsement were obtained by fraud of the plaintiffs and set up as an affirmative defense an action in the municipal court wherein he, as administrator, obtained a judgment against the plaintiffs determining that he was the owner of and entitled to possession of the note and trust deed. The municipal court judgment is pleaded as res adjudicata and by way of estoppel in that the title to the note and trust deed being there in issue, the plaintiffs should have set up their claim of trust by counterclaim.

The findings of the court recite a stipulation of the parties for a determination of the issues of res adjudicata and estoppel before the presentation of plaintiff's case, and on these issues the court found in favor of the defendant. Judgment was entered declaring plaintiffs had no right, title, or interest in the note and canceling the assignment to them by Elizabeth S. Hall. Plaintiffs thereafter moved for a new trial on the ground of irregularity in the proceedings which prevented plaintiff from having a fair trial, insufficiency of the evidence, errors in law and accident and surprise which ordinary prudence could not have guarded against. The motion was denied. The claims of irregularity, accident, and surprise are supported by affidavits to the effect that, when the stipulation for the trial of the issues of res adjudicata and estoppel in advance of the main case was entered into, counsel for plaintiffs stated to the court that it was their understanding that for the purpose of the trial of these issues the allegations of the complaint were to be taken as true; that the court and counsel for defendant acquiesced in this statement; that counsel for plaintiffs were therefore led into the belief that if the trial proceeded in this irregular manner the court would for purposes of the trial of this issue consider the allegations of the complaint as true; that plaintiffs' proposed findings to the effect that the allegations of the complaint were true which the trial court refused and that plaintiffs were thus misled and prevented from having a fair trial.

Respondent argues in support of his motion to dismiss this appeal that, the appeal having been taken on the judgment roll alone, error in connection with the order denying the motion for a new trial cannot be considered, since the affidavits in support of and opposed to the motion, although contained in the record, are not properly a part of the judgment roll, and that no transcript or bill of exceptions having been brought up, it is not open to the appellant to raise questions in connection with the findings on the issues of res adjudicata and estoppel which support the judgment. The record in the municipal court action was introduced in evidence in the trial of these issues.

[1] Appellants argue in their opening brief that the municipal court action was one in replevin, and hence the issue of equitable ownership was not determined,

but only the right to possession. However, in the absence of the record which the trial court had before it, it would seem that the findings that the plaintiffs were precluded from again raising these issues must be taken as supported by the evidence so that unless the question of the propriety of the ruling on the motion for a new trial is open for consideration, there seem to be no substantial questions raised by the opening brief.

The record contains the complaint, answer, findings, conclusions of law, judgment, stipulation for a trial on the two issues only, the notice of motion for a new trial and affidavits in support of and opposed to the motion, notice of appeal and notice and request for a transcript to be prepared "in accordance with the provisions of section 950 of the Code of Civil Procedure." The request lists, in addition to a transcript of the judgment roll, "the plaintiff's proposed findings of fact and conclusions of law; notice of intention to move for a new trial and a copy of all affidavits of plaintiffs and plaintiffs' attorneys on motion for new trial, order denying new trial."

[2] It seems clear that the affidavits in connection with the motion for a new trial are not properly before us, being certified by the clerk only and not being brought up either by bill of exceptions or by reporter's transcript under section 953a of the Code of Civil Procedure. *Cohen v. City of Alameda*, 124 Cal. 504, 57 P. 377; *Jeffords v. Young*, 197 Cal. 224, 239 P. 1054; *Lewis v. Grunberg*, 205 Cal. 158, 270 P. 181; *Gates v. McPherson*, 129 Cal. App. 473, 18 P. (2d) 980. Hence there is no support in the record now before us for the claimed error in the denying of a new trial.

Keck v. Keck, 217 Cal. 280, 18 P. (2d) 338, holds that, in a proper case, an appellate court may allow the temporary withdrawal of a record for the purpose of procuring its proper authentication or certification. However, the instant case would, if such a withdrawal were allowed, extend the principle of the *Keck Case* for the reason that there was not, as in the *Keck Case*, any attempt to bring up the evidence by proper transcript or bill of exceptions. The notice to the clerk indicates an attempt to appeal on the judgment roll, alone or with a bill of exceptions, as provided by section 950. No attempt was made to present a bill of exceptions and no transcript, so far as the record shows, was requested under

section 953a. In the Keck Case the notice was broad enough to include a reporter's transcript and the record was improperly authenticated mainly through the fault of the officials who made it up.

In view of the fact that the record, or so much of it as has been properly brought up, is insufficient to uphold the claims of the appellants, the judgment should be and is affirmed.



4 Cal.2d 760

CITY OF SAN JOSE v. LYNCH, City Clerk.
S. F. 15585.

Supreme Court of California.
Dec. 26, 1935.

1. Municipal corporations ⚙️64

Upon availing itself of home-rule provisions of Constitution, city becomes independent of general laws upon municipal affairs and has all-embracing power over municipal affairs restricted only by charter (Const. art. 11, § 6).

2. Municipal corporations ⚙️79

Opening, laying out, and improving streets and regulation of manner of their use are "municipal affairs" upon which home-rule charter, in so far as it makes provision therefor, is paramount to general law (Const. art. 11, § 6).

[Ed. Note.—For other definitions of "Municipal Affairs," see Words & Phrases.]

3. Municipal corporations ⚙️70

Where city charter was amended to take advantage of home-rule provision of Constitution, provision that city was authorized to exercise powers granted by general laws unless different procedure should have been provided in charter or by ordinance *held* not to limit exclusive power of city over municipal affairs by pre-existing charter provision that street improvements by special assessments should be under general law so as to render invalid subsequent ordinance providing for different method of street improvement (St. 1915, p. 1898, § 85; and § 2a, as added by St. 1933, p. 3226; Const. art. 11, § 6).

4. Municipal corporations ⚙️58

Every provision of charter should be construed in light of whole instrument with view to legislative intent, and, in consideration of conflicting provisions therein, construction

which best secures rights of all parties should be adopted, and, where general terms or expressions in one part are inconsistent with more specific provisions in another part, particular provisions must govern unless statute as a whole clearly shows contrary intention.

In Bank.

Original mandamus proceeding by the City of San Jose against John J. Lynch, as City Clerk of the City of San Jose.

Writ issued.

Archer Bowden, of San Jose, for petitioner.

Kirkbride & Wilson, of San Mateo, for respondent.

WASTE, Chief Justice.

By this proceeding in mandamus it is sought to compel the respondent, as city clerk of the city of San Jose, to publish a resolution of intention as required. The respondent has continuously refused so to do upon the ground that said resolution of intention and the ordinance upon which it is predicated were without the authority and power of the city council to adopt and are therefore void and of no effect. The controversy arises out of the following facts:

In 1915 the city of San Jose adopted a freeholders' charter (St. 1915, p. 1869). Section 85 thereof provides that where, in the judgment of the city council, the cost of any public street improvement is to be paid by special assessment on private property, the general state law in force at the time shall govern and control and all proceedings shall be in conformity thereto. However, in 1933, and pursuant to that portion of section 6 of article 11 of the State Constitution, which authorizes municipalities to amend their charters so as to empower them "to make and enforce all laws and regulations in respect to *municipal affairs*, subject only to the restrictions and limitations provided in their several charters," the charter of the city of San Jose was amended by adding thereto section 2a, which reads as follows:

"The City of San Jose shall have the right and power to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in this charter; provided that nothing herein shall be construed to prevent or restrict the city from exercising or consenting to, and the city is hereby authorized to exercise any and all

rights, powers, and privileges heretofore or hereafter granted or prescribed by the general laws of the State; provided, also, that where the general laws of the State provide a procedure for the carrying out and enforcement of any rights or powers belonging to the city, said procedure shall control and be followed unless a different procedure shall have been provided in this charter or by ordinance.

"It is the intention of the people of the City of San Jose in adopting this Charter amendment to take advantage of the provisions of the 1914 amendment to Section 6 of Article XI of the Constitution of the State of California, giving cities Home Rule as to municipal affairs." (St. 1933, p. 3226.)

Thereafter, and in 1934, the city council, under the authority granted to it by the new charter provision, adopted Ordinance No. 2439, entitled "San Jose Improvement Procedure Ordinance." This ordinance sets forth a procedure for public improvements, substantially analogous to that specified in the Improvement Act of 1911 (St. 1911, p. 730, as amended), in many instances adopting by reference sections of the 1911 act. Section 7 of the ordinance provides that the city, having theretofore elected to take advantage of the constitutional provision giving cities "home rule" as to municipal affairs by adding section 2a, supra, to its charter, and the matters referred to in the ordinance being within the classification of municipal affairs establishes the procedure therein outlined "as the exclusive procedure" applicable to such public improvements, and pursuant to the provisions of the new charter provision, "elects to have the doing of such public improvements governed by this ordinance, and any ordinance amendatory thereof, or supplemental thereto, together with the applicable provisions of its charter, instead of by the general laws of the State of California."

In July, 1935, the city council adopted a resolution approving plans and specifications for the improving of a certain street in the city, and on November 22, 1935, adopted its resolution of intention therefor, the latter providing that the work shall be done and the bonds therefor shall be issued in pursuance of the "Improvement Procedure Ordinance." The respondent city clerk, as stated above, refuses to publish the resolution of intention as required by section 3 of the "Improvement Procedure Ordinance," supra.

[1] The effect of a city electing to avail itself of the "home-rule" provisions of the

Constitution is stated in *Civic Center Ass'n v. Railroad Commission*, 175 Cal. 441, 448, 166 P. 351, 354, in the following language: "By subdivision 51, as will be observed, the city has brought itself within the conditions of the amendments of 1914 to sections 6 and 8, article 8, of the Constitution. Thereupon, according to the terms of those sections of the Constitution, its powers over municipal affairs became all-embracing, restricted, and limited by the charter 'only,' and free from any interference by the state through general laws. * * * The result is that the city has become independent of general laws upon municipal affairs."

[2] It is settled that the matter of opening, laying out, and improving streets and the regulation of the manner of their use are municipal affairs upon which the charter, in so far as it makes provision therefor, is paramount to general law. *Byrne v. Drain*, 127 Cal. 663, 667, 60 P. 433; *Hellman v. Shoulters*, 114 Cal. 136, 149, 44 P. 915, 45 P. 1057.

It must therefore be concluded in the present proceeding that the several improvements designated in the "Improvement Procedure Ordinance," and the particular improvement specified in the resolution of intention, are, and each is purely local and municipal in character and must be governed solely by pertinent municipal laws, in accordance with the general purport and intent of the "home-rule" section (2a) of the charter, to the exclusion of general state laws, unless said section, or other charter provisions, suggest and require a different conclusion.

[3] The respondent concedes that it was the intention of the people of the city of San Jose in adding section 2a to the charter to vest in the city council the power to legislate upon all matters of municipal affairs to the exclusion of general law. However, in denying the validity of the "Improvement Procedure Ordinance" and the resolution of intention, he assumes the position that this objective was not accomplished in so far as the improvement of public streets by special assessment is concerned because of the proviso appearing in section 2a and reading "subject only to the restrictions and limitations provided in this charter." He then refers us to section 85 of the charter, mentioned above, and included in the charter when originally adopted in 1915, to the effect that the general laws of the state in force at the time shall govern all special assessment street improvement proceedings. It is argued that section 85 is a restriction

and limitation provided in the charter, within the meaning of the proviso in section 2a, and though earlier in point of time, is specific in character and should prevail over the later and more general provisions of section 2a.

We cannot accept the interpretation placed by respondent upon the proviso appearing in section 2a, supra. The proviso is couched in the express language of the constitutional provision, supra, which authorizes "home rule" for municipalities, "subject only to the restrictions and limitations provided in their several charters." The framers of section 2a could not have intended that any other or different meaning be given the proviso than that intended therefor in the constitutional provision and it should not be given any greater significance. The proviso was unnecessary to section 2a, for without it the section would still be subject to the clause as used in the Constitution; the latter being the mode and measure of the power. With the proviso out of section 2a, but the section still subject to it as used in the Constitution, the inescapable conclusion from the broad language employed in the balance of the section is that it was intended to invest in the city complete and exclusive power of legislation and control over purely municipal affairs. The other portions of section 2a, supra, preserve to the city the right to do anything authorized by state law and where a procedure is provided by state law it shall govern "unless a different procedure shall have been provided in this charter or by ordinance." This latter is expressed in the future perfect tense, "shall have been," and not in the past tense, "has been," and must therefore be held not to refer to the provisions of section 85, included in the charter at the time of its adoption, to the effect that street improvements by special assessment shall be done under the general law, but rather to any procedure thereafter set up either in the charter or by ordinance.

The purpose underlying section 2a is found in the last sentence thereof to the effect that: "It is the intention of the people * * * in adopting this * * * amendment to take advantage of the provisions of the 1914 amendment to * * * the Constitution, * * * giving cities Home Rule as to municipal affairs."

Section 2a presents a definite attempt to adopt "home rule." The section is specific in this respect. It is general in that it is intended as an amendment of the entire

charter, rather than amending separately each section relating to matters of purely municipal character. It must therefore be construed as having the effect of causing section 85 to provide for the governing of special assessment street improvements by general law "unless a different procedure shall have been provided" at the time of the improvement in the charter or by ordinance. In the present proceeding we have a "different" procedure provided solely and exclusively by the "Improvement Procedure Ordinance" adopted pursuant to section 2a of the charter, and upon which ordinance the resolution of intention here involved has been predicated.

[4] Our construction of the pertinent charter provisions finds ample support in the authorities. It is axiomatic that every provision of the charter should be construed in the light of the whole instrument and of each and every other provision thereof, keeping in view at all times the intent underlying the same. In 59 C.J. 999, 1000, § 596, it is stated that: "In the consideration of conflicting provisions in a statute, the great object to be kept in view is to ascertain the legislative intent, and a construction which best secures the rights of all the parties affected has been held a proper construction. * * * General and special provisions in a statute should stand together, if possible, but where general terms or expressions in one part of a statute are inconsistent with more specific or particular provisions in another part the particular provisions must govern, unless the statute as a whole clearly shows the contrary intention. * * *"

Here, as we have shown, there has been a definite attempt by recent amendment of its charter to give to the city of San Jose unfettered "home rule" as to purely municipal affairs. Construing sections 85 and 2a of the charter as we have in this decision gives full and complete expression to this purpose and, in accordance with settled rules of construction, properly gives effect to the provision last in point of time by limiting the earlier provision (section 85) to special assessment street improvements for which a procedure differing from the general state law has not been provided by the charter or ordinance.

Let a peremptory writ issue as prayed.

We concur: SHENK, J.; CURTIS, J.; CONREY, J.; LANGDON, J.; SEAWELL, J.

5 Cal.2d 67

BART v. STREULI et al.

L. A. 15537.

Supreme Court of California.

Dec. 31, 1935.

Mortgages ⇨403

Breach of purchase-money mortgage containing provisions against removal or demolition of any building and requiring vendees to cultivate, fertilize, and prune growing trees *held* not to justify foreclosure, where vendees removed porch as part of improvement scheme, enhancing value of property by \$500, and trees did not require any attention.

In Bank.

Appeal from Superior Court, Los Angeles County; Allan Campbell, Judge.

Action by Anna Bart against Ferdinand E. Streuli and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

John C. Kleber, of Los Angeles, and Chas. M. Delameter, for appellant.

Meserve, Mumper, Hughes & Robertson, of Los Angeles, for respondents.

PER CURIAM.

This is a motion to dismiss an appeal or affirm the judgment in the above-entitled cause. Plaintiff sold real property to defendants, taking back a purchase-money mortgage for \$1,600. The mortgage contained the usual provisions against removal or demolition of any building, and required that the defendants cultivate, fertilize, and prune the growing trees. Plaintiff brought this action to foreclose, alleging breach of the above covenants. The trial court found that defendants removed the front porch, as part of a scheme of improvement, which enhanced the value of the premises by \$500, and that although defendants did not cultivate, fertilize, or prune, the trees did not require any attention and were in no way diminished in value by lack of attention. Judgment was accordingly rendered for defendants, and plaintiff appealed.

It is clear that plaintiff was not injured in any way, and was in fact benefited, by defendants' acts. Under the circumstances, the court had power to relieve against the effect of any technical violation of covenants in the mortgage. *Ebbert v. Mercantile Trust Co.*, 213 Cal. 496, 2 P. (2d) 776.

The judgment is affirmed.

5 Cal.2d 145

HURTEL et al. v. ALBERT COHN, Inc., et al.

L. A. 15414.

Supreme Court of California.

Jan. 3, 1936.

1. Automobiles ⇨226(2)

Pedestrian crossing street intersection contrary to ordinance before second traffic signal bell was sounded *held* guilty of contributory negligence per se, so as to preclude recovery for injuries sustained when struck by truck, where violation of ordinance contributed directly to injury.

2. Automobiles ⇨246(38)

Instructions allowing pedestrian recovery from driver of automobile for injuries sustained in intersection accident, regardless of pedestrian's negligence, if driver had last clear chance to avoid injury by using ordinary care, *held* sufficient.

3. Trial ⇨228(1)

Where trial court gave instructions requested by plaintiff, properly submitting last clear chance doctrine, it was immaterial that defendants' instructions contained no reference to that doctrine.

4. Automobiles ⇨160(4)

City ordinance providing that ringing of first bell in connection with mechanical traffic signal should merely indicate preparation for change in traffic movement, and that no traffic should enter intersection until green or "go" signal was shown, *held* applicable to pedestrians, where ordinance made it unlawful for pedestrians to cross other than with released traffic.

5. Automobiles ⇨243(4)

Evidence of local custom of pedestrians of starting across street intersection after ringing of first traffic signal bell and before ringing of second *held* properly excluded in automobile accident case, where custom was contrary to ordinance.

6. Automobiles ⇨160(1), 216

Duties of pedestrians and drivers of automobiles are reciprocal, and exercise of due care is required equally of each.

7. Depositions ⇨90

Defendants *held* properly permitted to read deposition of plaintiff, notwithstanding plaintiff's presence in courtroom, where plaintiff was not called to stand and defendant was not given opportunity to cross-examine (Code Civ. Proc. §§ 2021, 2055).

8. Depositions ⇨90

Deposition of party taken within state may be used without showing deponent's absence (Code Civ. Proc. § 2021).

In Bank.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by Loretta M. Hurtel and husband against Albert Cohn, Incorporated, and another. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Prior opinion, 45 P.(2d) 413.

Charles L. Nichols and Harmel L. Pratt, both of Los Angeles, for appellants.

Harry D. Parker and Parker & Stanbury, all of Los Angeles, for respondents.

THOMPSON, Justice.

This appeal is taken by the plaintiffs from a judgment rendered on a verdict in favor of the defendants in an action to recover for personal injuries sustained by Mrs. Hurtel when struck by a truck owned by the defendant corporation and operated by the defendant Bishop, one of its employees. The accident occurred at the intersection of Second and Fremont streets, which is within the congested area of the city of Los Angeles, and at a point within the area designated as a "pedestrian lane." The corner was controlled by mechanical traffic bells and signs, one of each being at each corner of the intersection. On the ringing of the first bell the "go" signs were changed to "stop," and, upon the ringing of the second bell, the "stop" signs which were up in the other direction changed to "go." It appears that, upon the ringing of the first bell, Mrs. Hurtel left the sidewalk from the northerly curb of Second street and proceeded southerly across Second street. The defendant's truck, traveling westerly on Second street, struck the plaintiff, inflicting the injuries complained of.

[1-3] The appellants complain that the court committed prejudicial error in instructing the jury that a violation of a city traffic ordinance by the plaintiff constituted contributory negligence. They also complain because plaintiffs were denied the right to prove the custom of pedestrians in Los Angeles to commence to cross the street upon the ringing of the first bell and that the court misinstructed the jury with respect to the reciprocal duties of pedestrians and drivers on city streets, and that the court erred in admitting in evidence the deposition of Mrs. Hurtel, taken by defendants prior to trial.

Considering these claims of error in their order, it is a well-settled rule in this state

that the violation of a statute or ordinance constitutes negligence per se (19 Cal.Jur. 632, and cases there cited), and that it constitutes contributory negligence if the failure to comply with the ordinance contributes directly to the injury. The instructions upon the subject of contributory negligence in the instant case included the element that the negligence of the plaintiff must have contributed to the injury. Appellants also complain because the instructions with respect to the contributory negligence of Mrs. Hurtel omitted the doctrine of the last clear chance. However, in at least two of the instructions given at the request of the plaintiffs, the jury was fully and properly instructed on the doctrine of the last clear chance and told that, regardless of the negligence of the plaintiff, if the defendant driver had the last clear chance to avoid injuring her by the use of ordinary care, then she was entitled to recover. It appears, therefore, that a fair reading of the instructions discloses that the jury was properly advised of the law with respect to this doctrine. And, in this connection, we may dispose of the contention of appellants that defendants' instructions did not include a reference to the last clear chance doctrine. The jury having been properly instructed upon the subject, it can make no difference at whose request or suggestion the instructions were given.

[4] Appellants also complain with respect to this first contention that the plaintiff was permitted to start with the ringing of the first bell. A reading of the ordinance, however, disposes of this argument. Sections 4 and 12 of the ordinance read as follows:

Section 4. "It shall be unlawful for any person to disobey the instructions of any mechanical traffic signal, lettered traffic sign, or paint marks placed upon the surface of the roadway in accordance with provisions of this ordinance, or any barrier or sign erected by any of the public departments or public utilities of the City of Los Angeles, provided the form of such barrier has been approved by the Board of Police Commissioners.

"The ringing of a bell in connection with any mechanical traffic signal shall indicate preparation for a change in the direction of traffic movement. When such bell is sounded no traffic shall enter an intersection until a green or 'Go' signal is shown."

Section 12. "At intersections where traffic is directed by a police officer, or by a

traffic signal, it shall be unlawful for any pedestrian to cross the roadway other than with released traffic."

It is plain from a reading of these sections that the interval between the first and second bell is a preparation period, and that neither vehicles nor pedestrians are permitted to cross the intersection until the second bell rings.

With respect to the first contention, appellants also assert that the court repeated instructions with respect to contributory negligence so as to emphasize the fact of contributory negligence. We think this is an unfounded criticism of the instructions given. They dealt with various elements, and we think only reasonably presented the situation to the jury.

[5] The next reason assigned by appellants for reversing the judgment is that they were precluded from introducing evidence of a custom in Los Angeles of starting after the first bell and before the ringing of the second. This evidence was properly excluded. The rule is well stated in *Stultz v. Thomas*, 182 N.C. 470, 109 S.E. 361, 362, as follows: "We do not think that an established use or custom among men engaged in the same line of work can avail as against the positive requirements of the ordinance, or statute. In fact, a breach of a legal duty, or a duty imposed by law, comes within the very definition of negligence; and, if such be the proximate cause of an injury, it constitutes actionable negligence." To the same effect are *Reinders v. Olsen*, 60 Cal. App. 764, 771, 214 P. 268, and *Fresno T. Co. v. Atchison, etc., R. Co.*, 175 Cal. 358, 165 P. 1013.

[6] To support their claim of error in the instructions relative to the reciprocal duties of pedestrians and drivers, appellants rely upon *Cleveland v. Petrusich*, 117 Cal.App. 71, 3 P.(2d) 384, holding that, while both are charged with the same degree of care, the amount of care exacted of the driver is far greater than that required of the pedestrian. The instructions criticized do not conflict with this statement of the rule, since no reference is made to the amount of care required of either, but the rule is correctly stated that their duties are reciprocal; the exercise of due care being required equally of each. The instructions as given are supported by *Maggart v. Bell*, 116 Cal.App. 306, 2 P.(2d) 516.

[7, 8] With respect to the last contention, that the defendants were permitted to make

improper use of the plaintiff's deposition, the situation is as follows: The plaintiff, Mrs. Hurltel, was present in court, but was not called to the stand nor was an opportunity to cross-examine her given to the defendants. The defendants offered the deposition previously taken, claiming the right to use her testimony under section 2055 of the Code of Civil Procedure. Plaintiffs objected to the deposition on the ground that she was present. The court overruled the objection and permitted the defendants to read the deposition. Where the deposition is taken under subdivision (1) of section 2021 of the Code of Civil Procedure, it may be used without showing the absence of the deponent. *Newell v. Desmond*, 74 Cal. 46, 15 P. 369; *Johnson v. McDuffee*, 83 Cal. 30, 23 P. 214; *Adams v. Weaver*, 117 Cal. 42, 49, 48 P. 972.

There are no other points which require discussion. The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; LANGDON, J.; CURTIS, J.



4 Cal.2d 717

In re SPROSTON'S ESTATE.

SPROSTON v. LATTER et al
L. A. 14502.

Supreme Court of California.
Dec. 23, 1935.

As Modified on Denial of Rehearing
Jan. 20, 1936.

1. Wills ⇨166(1)

Evidence held to support finding of undue influence in execution of will, notwithstanding questionable sufficiency of evidence to support finding of confidential relationship between testator and beneficiaries.

2. Wills ⇨166(12)

Proof of undue influence bearing directly upon testamentary acts exists where evidence is of such nature as to warrant inference that will was direct result of influence exerted for purpose of procuring it, and was not natural result of uncontrolled will of testator.

3. Wills ⇨165(1)

In will contest, evidence of declarations of decedent which were not part of res geste or execution of purported will held admissible on issue of undue influence as tending to

throw light on mental state of decedent, and feeling and attitude toward beneficiaries.

4. Wills ⇐360

In will contest, contention of error arising from admission of evidence *held* not available on appeal where objection on ground asserted was not made at time of admission of evidence.

5. Wills ⇐384

In will contest, failure of trial court to find on issues of mental capacity and due execution *held* not prejudicial error, since Supreme Court had power to make such findings on appeal (Code Civ.Proc. § 956a).

6. Wills ⇐334

In will contest, finding that will was executed through undue influence of beneficiaries *held* to support judgment for contestant regardless of findings that testator was mentally competent, and that will was duly executed.

In Bank.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Proceedings in the matter of the estate of Frank Sproston, deceased, by Francis Godfrey Sproston, contesting the probate of the will of Frank Sproston, deceased, opposed by L. B. Latter, executor of the last will and testament of Frank Sproston, deceased, and another. Judgment for contestant revoking probate, and the contestees appeal.

Affirmed.

Prior Opinion, 39 P.(2d) 266.

Leo F. Falder and Paul A. Tschirgi, both of Los Angeles, for appellants.

G. Harold Janeway, S. T. Hankey, and Janeway, Beach & Hankey, all of Los Angeles, for respondent.

SHENK, Justice.

The proponents appealed from a judgment setting aside the probate of the instrument theretofore admitted as the will of the decedent.

Frank Sproston died in Los Angeles on May 2, 1932, at the age of about seventy years. He left as his sole heir and next of kin his son, the contestant, Francis Godfrey Sproston. He also left a will dated March 21, 1932, wherein he declared that he was a single man and whereby he bequeathed the sum of \$500 to A. E. Cole, \$500 to Mrs. A. E. Cole, a \$600 note and trust deed to George Workman, and the balance of his estate to the proponents,

L. B. Latter and his wife. None of the legatees was related to him. The instrument named L. B. Latter as executor to serve without bond, and declared that any heir not named was intentionally omitted. The entire estate amounts to about \$8,000. The instrument was admitted to probate on June 17, 1932, and thereafter in October, 1932, the decedent's son filed his petition for revocation of the probate thereof on three grounds of contest, viz.: (1) That the instrument was not duly executed; (2) lack of testamentary capacity; and (3) that the decedent was subject to the undue influence of L. B. Latter and his wife, which operated directly upon the purported testamentary act. A trial was had before the court sitting without a jury. The court found specifically that the decedent, by reason of advanced age and physical infirmities, was without ordinary understanding and incapable of transacting business; that the Latters stood in a confidential relationship to him and were instrumental in obtaining and participated in the preparation and execution of the purported will, which was the product of the undue influence of the Latters operating directly upon the alleged testamentary act, and that the execution of the instrument was not the voluntary act of the decedent. The court made no findings on the issues raised by the first two grounds of contest, other than a general finding that the allegations of paragraph II of the second ground of contest, relating to mental incompetency, are true. The court apparently based its conclusions and judgment on the findings relating to the issue of undue influence. If the evidence sustains the findings on this issue, it is apparent that they in turn are sufficient support for the judgment without specific findings on the other issues.

About the year 1885, in Manchester, England, the decedent married. Three months later he left for Australia, alone. He never again saw his wife, nor did he ever see the son who was the issue of the marriage, although the decedent in 1908 returned to England and attempted to locate them. The wife died in 1918. After his departure from England the decedent worked as a steward on ships and later as a waiter in San Francisco and Los Angeles. George Workman and Frank Rose, also waiters, had been friendly with the decedent for many years. For nine years while he lived in Los Angeles and practically continuously prior and up to the

time of his death, the decedent boarded with Mr. and Mrs. A. E. Cole, also legatees. The Latters, the residuary legatees, had known the decedent for fourteen years.

There is no necessity to state in detail the evidence which gives support to the findings. We may note briefly that it discloses that for several years the Latters had importuned the decedent to make a will in their favor on the claim that he owed it to them, although the other persons mentioned herein who were his friends had been as kind to him as the Latters had been; and that Sproston had consistently expressed his intention not to make such a will, but that he intended to return to England some day and find his son.

In December, 1929, the decedent broke a leg and was taken to the hospital. He was discharged from the hospital, but from that time he showed marked physical and mental infirmities, was ill most of the time, and on March 16, 1932, was taken again to the hospital in what proved to be his last illness. He was visited nearly every day during his last illness by the Coles, Workman, and Rose, and the Latters saw him practically daily. Witnesses testified that Sproston's conversation at that time was irrational and without sequence, and that frequently his mind wandered and he appeared not to know where he was; that he frequently asked where he was and insisted that he was not at the hospital, but that he was on a boat and that the nurses worked for him. During this period Latter made the arrangements for the decedent's care at the hospital and at a rest home to which he moved Sproston before his death, made out checks for him to sign, and, when the decedent was too weak to sign, wrote Sproston's name by his own on one check, which was returned by the bank.

On the morning of March 21, 1932, Latter requested Dr. Tarnutzer at the hospital to send an attorney to draw a will for Mr. Sproston. Dr. Tarnutzer sent McCartney, an officer of a bank and an attorney on the inactive list. Latter introduced him to the decedent and both the Latters remained in the room during the interview between Sproston and McCartney and while the will was being prepared and executed, except for a few minutes when Latter went on a search for an additional witness. Latter sat within hear-

ing distance of the conversation between Sproston and McCartney. Sproston was sitting up in bed. McCartney wrote the will in his own hand and then gave it to Sproston to read. It was McCartney's testimony that Sproston told him to whom he wished to leave his property and that he wanted to leave the bulk of it to the Latters because they had been good to him; that it was at Sproston's request he inserted the clause respecting omitted heirs. Latter testified that during the preparation and execution of the will there were no other persons in the room except one Israelson, who came into the room and was asked to sign as a witness with Mr. McCartney. Latter testified that he read the contents of the executed paper before McCartney left and took it with him, and his subsequent declarations indicate that he was familiar with its contents and that he had prevailed upon Sproston to make the will as he did because of their close friendship. Neither Dr. Tarnutzer, who attended Sproston, nor any of the attending nurses, were called as witnesses. Subsequently Sproston stated to Rose that he had made a will and that he did not remember much that was in it except that "you," indicating Rose, "and Mrs. Cole were mentioned." Rose in fact was not mentioned in the will. Sproston died on May 2d following. After his death, Latter called on Mr. McCartney and obtained the will.

[1, 2] There is additional evidence tending to establish the childishness of the decedent's mentality and the wanderings of his mind during his illnesses following his first visit to the hospital in 1929; that in those periods the Latters took complete control of his affairs and his care and hospitalization; and that the Latters consistently pursued a fixed plan of obtaining by coercive measures the execution by Sproston of a will in their favor. The evidence, direct and circumstantial, strongly tends to prove that the Latters finally succeeded in overpowering the mind of the decedent against his expressed contrary intent. It follows that the findings of the court are sufficiently supported by the evidence. The record does not disclose such a set of acts which this court, giving to the evidence all due intendments and favorable inferences in support of the judgment, will declare as a matter of law may not serve as a basis for the finding that the purported will was not the expression of the

decendent's own desires and was not the product of the free agency of the decedent. Our conclusion from the record before us is that the findings of the court are fully supported even though the evidence that undue influence was exerted upon the purported testamentary act was circumstantial. Estate of Snowball, 157 Cal. 301, 107 P. 598. See Estate of Anderson, 185 Cal. 700, 708, 198 P. 407; Estate of McDevitt, 95 Cal. 17, 33, 30 P. 101; Estate of Carson, 74 Cal.App. 48, 61, 239 P. 364. The record does not present merely a case of "general influence not brought to bear directly upon the testamentary act," which, in the case of Estate of McDevitt, *supra*, and cases following it relied on by the appellants, was held not to amount to undue influence. That the facts constitute proof that undue influence bearing directly upon the testamentary act was exerted in this case is indicated by the facts and the decision in the case of Estate of Snowball, *supra*, where at page 307 of 157 Cal., 107 P. 598, 601, it was stated: "Such proof exists where the evidence is of such a nature as to warrant the inference that the will was the direct result of the influence exerted for the purpose of procuring it, and was not the natural result of the uncontrolled will of the testatrix." Even should we adopt the appellants' doubt cast upon the sufficiency of the evidence to support that portion of the findings that there existed a confidential relationship between the decedent and Latter, nevertheless the evidence otherwise amply supports the finding of the ultimate fact and the questionable sufficiency of the evidence as to the confidential relationship does not require or justify a reversal of the judgment.

[3,4] The appellants contend that the court erred prejudicially in admitting evidence of the declarations of the decedent which were not a part of the *res gestæ* or execution of the purported will. Those declarations were admissible, however, as tending to throw light on the mental state of the decedent and his feelings and attitude toward the Latters. Evidence in that

respect was material on the issue of undue influence (Estate of Snowball, 157 Cal. 301, 308, 107 P. 598; Estate of Anderson, 185 Cal. 700, 718, 198 P. 407), and the court so expressly limited the purpose of the testimony. We cannot say that the court was unmindful of the limited purpose of the evidence, and the record does not show that the declarations were made at a time too remote from the time of the execution of the instrument by the decedent, or that the court accorded to such declarations any undue weight. The appellants also assign as prejudicially erroneous the rulings of the court in admitting in evidence over the appellants' objection statements by Latter not made in the presence of his colegatee, Mrs. Latter, citing Estate of Dolbeer, 149 Cal. 227, 245, 86 P. 695, 9 Ann.Cas. 795; Estate of Dolbeer, 153 Cal. 652, 662, 96 P. 266, 15 Ann.Cas. 207; Estate of Lavinburg, 161 Cal. 536, 546, 119 P. 915, and similar cases. A sufficient answer is that the objection on that ground was not made at the time and may not be urged for the first time on appeal.

[5,6] It is urged that there was no evidence of lack of due execution nor any evidence that the decedent was mentally incompetent to make a will, and that the appellants were entitled to findings on all the issues raised by them. It may be assumed that the evidence is insufficient to support findings adverse to the proponents on those issues. But it does not follow that the omission to make findings thereon was prejudicially erroneous. A finding, if deemed essential, could be made by this court in favor of the contestant under the authority granted by section 956a of the Code of Civil Procedure. If the findings were so made, the findings on the issue of undue influence would still be sufficient to support the judgment.

The judgment is affirmed.

We concur: WASTE, C. J.; THOMPSON, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.; CONREY, J.

4 Cal.2d 744

JOHNSON v. STATE BAR OF CALIFORNIA.

L. A. 15249, 15433.

Supreme Court of California.

Dec. 23, 1935.

Petition for Rehearing and Modification of
Judgment Denied Jan. 20, 1936.**1. Attorney and client** ⇨53(2), 58

Evidence *held* to require suspension of attorney for one year on ground that he had engaged in solicitation of business through preparation and mailing of circular letters to attorneys in other states offering to sell contracts retaining such other attorneys for corporation engaged in acquisition of mortgaged property for which attorney was general counsel (Code Civ.Proc. § 287, subd. 2).

2. Attorney and client ⇨38

Attorney *held* subject to disciplinary proceedings for solicitation of business in state in which he was member of bar and performed acts of mailing letters soliciting business, notwithstanding that letters were mailed to other states (Code Civ.Proc. § 287, subd. 2).

3. Attorney and client ⇨49

Witnesses ⇨293

Disciplinary proceeding against attorney is not governed by procedural rules appertaining to trial of person accused of criminal offense and hence attorney may be called upon to testify even though testimony may establish violation of oath of office and duty as attorney (St. 1927, p. 38, as amended).

4. Attorney and client ⇨57

Testimonials of character and professional activities of attorney cannot be considered by Supreme Court in disciplinary proceedings against attorney where not presented to disciplinary body (St. 1927, p. 38, as amended).

5. Attorney and client ⇨36(1)

Supreme Court has jurisdiction of disciplinary proceedings against attorney where in State Bar acts merely as arm of court for purpose of taking evidence and making recommendations (Code Civ.Proc. § 287, subds. 2, 5).

6. Constitutional law ⇨46(2)

Contention of unconstitutionality of State Bar Act presented by mere assertion to that effect without citation of authority or argument other than attack upon methods of State Bar *held* insufficient to require Supreme Court to pass upon constitutionality of act (St. 1927, p. 38, as amended).

7. Attorney and client ⇨37

Statute regulating disciplinary proceedings against attorneys *held* constitutional (St. 1927, p. 38, as amended).

8. Jury ⇨19(18)

Attorney is not entitled to jury trial in disciplinary proceedings (St. 1927, p. 38, as amended).

9. Constitutional law ⇨306

Attorney *held* not deprived of due process by disciplinary proceedings before local administrative committee and Board of Governors of State Bar, although called to testify and not afforded jury trial therein (St. 1927, p. 38, as amended).

10. Attorney and client ⇨58

Evidence that attorney perfected appeal in mortgage foreclosure suit which was without real merit contrary to instructions of clients when interests of clients would have been served by dismissal thereof, and placed property in hands of other persons with whom he was associated in business of acquisition of mortgaged property, *held* to require suspension of attorney for two years (Code Civ.Proc. § 287, subds. 2, 5).

11. Judges ⇨47(1)

Justices of Supreme Court *held* not disqualified to review recommendation of suspension of attorney by Board of Governors of State Bar on ground that they aided in formation of State Bar, were members thereof and counseled with representative of State Bar with reference to rules of professional conduct (St. 1927, p. 38, as amended).

12. Judges ⇨39

Discharge of exclusive jurisdiction of Supreme Court cannot be prevented by disqualification of all or majority of its members.

13. Attorney and client ⇨58

On review of recommendations of Board of Governors relating to discipline of attorney, attorney was ordered suspended for a total period of three years.

In Bank.

Petition by George C. Johnson to review the recommendation of the Board of Governors of the State Bar of California that petitioner be suspended for the periods of one year and two years respectively, in two separate disciplinary proceedings.

Petitioner suspended for three years.

George C. Johnson, of Los Angeles, in pro. per.

Philbrick McCoy, of Los Angeles, for respondent.

THOMPSON, Justice.

Two disciplinary proceedings were instituted against the petitioner, the first no-

tice to show cause, setting forth that he had violated rule 2 of the Rules of Professional Conduct of the State Bar, and his oath and duty as an attorney at law, within the meaning of subdivision 2 of section 287 of the Code of Civil Procedure, and the second asserting that petitioner had violated rules 3, 4, and 7 of the Rules of Professional Conduct, as well as subdivisions 2 and 5 of section 287 of the Code of Civil Procedure.

Local administrative committee No. 3 found that petitioner had offended against the rule and the subdivision of the Code section, as set out in the first notice to show cause, and had also violated subdivision 5 of the same section. It recommends his disbarment. However, the Board of Governors reduced its recommendation to suspension for one year. With respect to the second charge, local administrative committee No. 8 recommended that petitioner be suspended for two years, which was approved and adopted by the Board of Governors. We have issued writs of review in both proceedings, at the instance of petitioner, for the purpose of determining whether the recommendation of the board should be adopted and, while we deem it appropriate to consider both proceedings in one opinion, we shall, in the interest of clarity, detail separately the facts as disclosed by the record. Hence, we turn at this juncture to the record which respondent says supports the first charges.

It appears that in the early part of 1934, petitioner prepared, in part at least, and mailed or caused to be mailed to from between five hundred and one thousand lawyers throughout the United States, the following circular:

**"Mortgage Adjustment & Salvage
Company**

**"408 South Spring St.,
Los Angeles, California.**

**"Dear Sir: This circular is as unusual as
is the offer herein made to you.**

**"You personally know several persons
who have 'lost' or are 'about to lose' their
properties through foreclosure. We are
launching a nationwide campaign of buy-
ing certain properties, and offer you the
opportunity to share with us thru the at-
tached contract.**

**"This panic has created the almost un-
believable situation that certain mortgages
and trust deeds are invalid and unenforce-
able. The United States Constitution, the**

Acts of Congress, court decisions, and the acts of the President all contribute to this conclusion. We have the legal opinion of George C. Johnson, lawyer of Los Angeles, and we are fully convinced, that the proposition is sound and that if attacked in court it will stand the final test. The idea also will have popular support, and it may be the next national campaign issue.

"George C. Johnson, LLB Northwestern University, is a member of the California, Texas and Illinois bars. In 1914, at the request of General Funston, the War Department sent him to Vera Cruz, Mexico, with General Funston's Chief Staff to handle matters there for the War Department during the American occupation. In 1914 Dean John Henry Wigmore of Northwestern University and the Judge Advocate Department wrote the 1914 Army Courts-Martial Manual, and supplementing it Mr. Johnson wrote a Memorandum Courts-Martial Procedure, many hundred thousands copies of which were used by the Army Courts as authority on procedure. In 1922 Mr. Johnson assisted the Mexican government to secure recognition by the United States government. In 1925 he was associated with the General Counsel for the American Bankers' Association and salvaged several large corporations for eastern banks. In 1926, he liquidated assets of Equitable Trust Company in Missouri and Texas, involving titles to some 4,000 pieces of realty, and in connection therewith filed one suit in San Antonio, Texas, against approximately 1,000 defendants. In 1931, in *Re Weeks Poultry Community, Inc.*, (D.C.) 51 F.(2d) 122, he established new law in California, that co-operative marketing associations are not amenable to the Bankruptcy Act. In 1934, in action No. 318,472, in the Superior Court of Los Angeles County, he established new procedure in that a judgment debtor, by merely hiding in his home, can be arrested for absconding, and also that a receiver can be appointed for a judgment debtor corporation. We believe Mr. Johnson is again right in the above proposition and we are so convinced of it that we are sending you this proposition thru the mail.

"This offer is open for ten days. You will not be required to make any purchase or do any act of which you yourself do not first approve. To assure your good faith in your own work, we must have the right to require you to assign your interest

later if the specific asset becomes involved in court action, or that you advance the court costs to retain it, which should not aggregate more than \$25.00 a suit.

"If interested, fill in the plan desired and sign the contract and mail it to us with U. S. Postal Money Order. Do not send bank checks. A duplicate signed contract, the plan and brief will be mailed you in the rotation the contracts are received. You will also receive free a copy of Mr. Johnson's analysis of the cause and cure of the panic, which will be of inestimable value to you.

"This is the big opportunity for lawyers to rehabilitate themselves.

"Very truly yours,

"Mortgage Adjustment &
Salvage Company."

"Agreement, made at Los Angeles, California, this ——— day of ———, 1934, by and between Mortgage Adjustment & Salvage Company, hereinafter called the client, and ———, whose address and name appears on the reverse side hereof, hereinafter called the attorney.

"1. Said client, hereby retains and employs said attorney to act as such exclusively for said client to purchase certain properties under the direction of said client as outlined in certain plans of operation to be forwarded said attorney and to prosecute and defend any and all actions to final adjustment that may arise in connection therewith.

"2. It is understood and agreed that all purchases and court proceedings shall be subject to the approval of said attorney; that the client will lend to said attorney the plans of operation and the legal opinion of its general counsel George C. Johnson to assist said attorney and that said attorney need make no purchase nor take any legal action of which he himself does not approve.

"3. In view of the fact that the client will operate this business throughout several states and that the ultimate financial success of said business depends largely upon keeping the plan and the legal theory secret so as to enable said client to obtain advantageous purchase contracts and because thereof it will be impracticable or extremely difficult to fix the actual damages for a breach of this contract, it is agreed that in case said attorney, without the written consent of said client, discloses to any person, firm, corporation or court, the plan or any part thereof or the

theory or the law under which the client is operating, or permits the same to be stolen or lost, that \$50,000 shall be presumed to be the amount of damage sustained by said client by reason of said breach of this agreement.

"4. Said attorney will not be required to advance any purchase money, but to assure his good faith in recommending purchases that will not become involved in court litigation, he may be required personally to advance the court costs and expenses and the briefs on appeal, as, if and when necessary, or to assign his interest in said specific property in lieu thereof.

"5. Title to all properties purchased shall be taken in the name of said client and the percentages thereof that is to be paid said attorney for his services from the final sale shall be held by said client in trust for said attorney until sale thereof and the proceeds on each sale shall be divided, as, if and when received, after deduction of all costs, expenses, advancements, carrying and maintenance charges, etc., (1) 50% to client and 50% to attorney, if attorney pays \$5.00 herewith for use of said plans and briefs; (2) 60% to attorney and 40% to client, if attorney pays \$10.00 herewith for use of said plans and briefs; (3) 70% to attorney and 30% to client, if attorney pays \$50.00 herewith for use of said plans and briefs; (4) 80% to attorney and 20% to client, if attorney pays \$100.00 herewith for use of said plans and briefs; (5) 90% to attorney and 10% to client if attorney pays \$200.00 herewith for use of said plans and briefs; provided, however, that if said attorney after receiving said plans and briefs desires to change his percentage he may do so by paying withing ten days after receipt of said plans and briefs double said amounts for the stated desired percentage.

"6. Said attorney hereby accepts said employment and agrees to render such services as attorney on the terms and conditions set forth under plan ——— above and encloses herewith Postal Money Order, dated ———, 1934, at ———, State of ———, for \$———. Signed in duplicate.

"Mortgage Adjustment &
Salvage Company, Client.
"————, Attorney."

Petitioner claims that he was employed by the Mortgage Adjustment & Salvage Company, and specifically by one A. M. Wood, to advise him concerning the va-

lidity of mortgages and trust deeds, and was instructed by Wood to send out the circulars. However, his own testimony very clearly indicates that he did not know whether there was such a company as the Mortgage Adjustment & Salvage Company; that it had no office at 408 South Spring street, Los Angeles, which address was, in fact, his own office; that he gave instructions that mail directed to the company at the number mentioned was to be delivered to his office; that he arranged "to answer any inquiries with reference to employment and advise" Wood of the results; that his wife ordered the circulars to be printed and addressed and mailed them from his office; and that one return enclosing a postal money order for \$5 was received, which the petitioner cashed and retained until when, after an investigation was started by the State Bar, he says he advised Mr. Wood that the response was insufficient to warrant proceeding further with the plan and returned the money to the sender. We should also observe that Mr. Wood was not called as a witness, nor was it sought to take his testimony. Also, the administrative committee found that during the hearing many of the answers of petitioner were "evasive" and "non-responsive, strongly indicating an intention on the part of the respondent to conceal from the committee the true facts, that during the hearing of this cause respondent exhibited disrespect to the Committee and expressed a contumelious attitude. * * *" Even the cold type of the record is sufficient in this case to support this finding and statement of the committee.

The petitioner asserts that the evidence is insufficient to support the conclusion that he was engaged in the solicitation of business. He also argues that, if advertising and solicitation were engaged in by him, it was done outside of the state of California, for which reason the State Bar has no jurisdiction. Further, he says that inasmuch as the proceeding was criminal, he could not be compelled to testify against himself, and that he was not accorded the protection ordinarily extended to one accused of crime.

[1] Dealing with the contentions in their order, we have no hesitancy in declaring that the testimony herein impresses us with the conviction that petitioner conceived and attempted to put into execution the plan or scheme outlined in the

circular. Separating the testimony to the effect that petitioner was employed by a Mr. A. M. Wood from the other facts above recited, no one could have the least doubt that he made use of a fictitious name for the purpose of concealing his own identity while writing and circulating for himself a very fulsome testimonial of ability and experience. Nor are we inclined to give a great deal of consideration to the testimony concerning Wood. It fails, under the circumstances of this case, to carry conviction. And, even though petitioner had been employed by Wood to give advice concerning mortgages and trust deeds, the fact remains that it was petitioner who carried the plans into execution, in so far as having the circulars printed and mailed.

[2] With respect to the claim that the advertising or solicitation was not done in this state, this argument overlooks the reason and purpose of disciplinary proceedings. It is primarily to keep the profession clean and wholesome and to limit the actions of the members of the bar within such bounds that it will have and merit the respect and confidence of the public. The petitioner was a member of the bar in this state. The acts were performed in this state. If petitioner, by his acts here, evidenced that he was lacking in that regard for his profession and the rules of conduct which have been adopted for its government, then it is here where action must be taken to discipline the petitioner and perhaps to remove him, temporarily at least, from the profession.

[3] The last argument has been so frequently passed upon that we feel called upon to do no more than say that there are numerous authorities in the books establishing the proposition that a disciplinary proceeding is not governed by the procedural rules appertaining to the trial of one accused of a criminal offense. It has frequently been held that a member of the profession may be called upon to testify, even though such testimony may establish his violation of his oath of office and his duty as an attorney at law.

[4] We have heretofore had occasion to comment upon the impropriety of efforts made to present to this court character testimonials and evidence of professional activities. See, also, *Allen v. State Bar*, 218 Cal. 19, 21 P.(2d) 107, and *Shaeffer v. State Bar*, 220 Cal. 681, 32 P.(2d) 140.

Without the introduction of such evidence before either the administrative committee or the state board, but in disregard of the statutory rule therein announced, the petitioner has gone outside the record to recite in fifteen pages his life history. He has devoted some seventy other pages to testimonials of character and activities and evidence thereof, and another twelve to an attack upon the State Bar and its methods. Not being a part of the record, they are improperly before us; cause an unnecessary amount of work; and, by the very manner of their attempted presentation, almost of necessity cause us to doubt the good faith of the petitioner. We reiterate the statement that such evidence may be altogether proper, but, in order to be considered, it must be presented to the body to which has been delegated the responsibility of taking testimony in disciplinary proceedings, in order that witnesses may be cross-examined and counter evidence offered.

The second proceeding involves a different state of facts. It appears from the record therein that prior to September 2, 1934, Mr. and Mrs. Ed. J. Swartout owned an apartment house located at 1920 and 1922 Harcourt avenue, Los Angeles, subject to an encumbrance approximating \$8,000, which obligation the Swartouts had guaranteed. On September 2d, an advertisement appeared in the classified section of a Los Angeles daily newspaper, reading as follows: "Will pay cash for your equity in income property threatened with foreclosure. Box V42 Times."

Mr. and Mrs. Swartout responded thereto. A couple of days later a Mr. Bliss, in company with a Miss Bock, called upon the Swartouts. The testimony with respect to what ensued is in conflict. Mr. and Mrs. Swartout testified that Bliss told them that they had a lawyer from Texas who was a fighter and that they would endeavor to save them money and would do it for one-half of what they saved. Mrs. Swartout said that Miss Bock informed her that she had placed her property in the hands of Bliss's company and that, as a result was not worrying about it. Mr. Bliss testified that he inquired concerning the mortgage and the income and told them that the income was too low to interest him in the property. He testified, however, that he did tell them that a Mr. Zettler had a plan whereby he could work it out. The Swartouts testified that they then and there agreed to meet

Bliss on Friday, at Fourth and Spring streets, for the purpose of being introduced to the lawyer. Bliss testified that no such appointment was then made, but that the Swartouts contacted him by telephone later and made the appointment. The fact remains that on Friday they met Bliss, who took them to Johnson's office and introduced them to petitioner and also to Mr. Zettler, who was an employee of Bliss. Mr. and Mrs. Swartout explained that they were being foreclosed. Nothing much else was done except that petitioner informed them that he would look it up and make an appointment for them to meet him the next morning at 11 a. m. They met Saturday, September 8th, at about 11. Besides Mr. and Mrs. Swartout, there were present the petitioner, Mr. Zettler and a Miss Zettler. Mr. Johnson was in the outer office. Petitioner informed the Swartouts that he had bad news for them; that they had been sued on the guaranty and judgment had been rendered against them for approximately \$8,000. According to the testimony of Mr. and Mrs. Swartout, he said that their car, bank account, and other property were liable and that they had better draw the money out of the bank, hide the car and otherwise protect their property. Petitioner denied this testimony, other than to concede he had discovered that this judgment had been rendered against the Swartouts personally. Petitioner in effect advised them that the gold clause in the trust deed was contrary to public policy, and, therefore, void, and for that reason they should appeal from the judgment. He then proceeded to draft two contracts, the substance of which follows.

The first contract, between Celesta A. Zettler and the Swartouts recited the ownership of the Harcourt avenue property by the Swartouts and the ownership of the West Thirty-Seventh street property by Mrs. Swartout as her separate property, the judgment lien thereon, and provided for the conveyance of the Harcourt avenue property to Miss Zettler, without warranty of any kind, the Swartouts to receive a one-third interest in any proceeds of the property, the parties to retain the Wm. M. Bliss Company, at 682 South Alvarado street, as agents to manage and collect the rents on the West Thirty-Seventh street place, one-half thereof, after deduction of expenses, to be paid to Johnson "as and for his attorney fees of \$100" for handling the appeal from the judgment

on the guaranty, and also to handle the personal property of the Swartouts still remaining in the Harcourt avenue apartments. The Swartouts further agreed that the \$100 to be paid to Johnson out of their share of the rent from the West Thirty-Seventh street property should be in addition to their proportionate share of court costs and expenses.

The parties to the second agreement were Celesta A. Zettler, Bliss, the Swartouts and Johnson. It recited ownership of the Harcourt avenue property by Miss Zettler, her agreement to pay the Swartouts one-third of all proceeds recovered therefrom and provides for the employment of Johnson on a contingent basis for a one-third interest in the real property, the value of which is therein agreed to be less than \$100; that the Bliss Company should manage the realty, collecting all rents and paying taxes and operating bills, the revenue to be banked and applied to operating costs, court costs, to maintain a fund of \$100 to protect the property in litigation, the net profits to be divided monthly between Miss Zettler, the Swartouts and Johnson, the compensation of the Bliss Company to be paid by Miss Zettler.

With respect to the West Thirty-Seventh street property separately owned by Mrs. Swartout, the terms fixed by the agreement are again set out.

Petitioner also drew the grant deed mentioned in the contracts. Mr. and Mrs. Swartout testified that Mrs. Swartout said she did not want to sign the contracts until she could talk them over with her son, but that petitioner told them they would not have time; that he was going to be out of the city on Monday and that they wanted to file the appeal on Tuesday. Upon this statement, they signed. Petitioner also denied having made the statement, saying that he became discouraged over their whispering together and told them to sign them, if they wanted to, later. He did admit, however, that he told them that if he took the appeal he wanted to work on it immediately. Zettler, however, remembered that Mrs. Swartout said something about preferring to have her son see them and that it was pointed out to her by Johnson that Monday was a holiday and that he expected to be out of the county somewhere, and that if it was not signed then, it would have to go over until the last of the next week.

Mr. and Mrs. Swartout thought the matter over on Sunday and determined they did not want to go ahead. On Monday, September 10th, according to their testimony, acting on the assumption that Johnson was out of the city, they went to the office of Bliss & Co. and left word for Zettler to come to their place. He came and they informed him that they did not want to go ahead; that they were willing to pay Johnson for the work he had done; that they thought \$25 was sufficient, but they did not desire to appeal. They testified that Zettler was agreeable and called up the petitioner, who, Zettler reported, thought \$100 for each of them ought to be "about right." Swartout then called Johnson and said he wanted the appeal stopped, to which Johnson replied, "I have got the contract and your name on it and I am going to live up to it unless I have that in writing." On September 13th, Mr. and Mrs. Swartout addressed and sent by registered mail to petitioner and to Zettler instructions to stop all proceedings in which their names were connected; saying that the mortgagee had made a liberal concession; and to return all their papers; and offering to compensate them to the best of their ability. However, the petitioner went ahead. The record does not reveal when the notice of appeal was filed, although it does appear that the last day for such action was September 22, 1934. The transcript was filed on that date and the opening brief on October 17, 1934. While petitioner in his testimony asserts that he prepared the brief within a day or two and gave it to Mr. Zettler, who caused it to be printed and filed, the record discloses two letters written by Johnson, one on October 1st and the other on October 12th, in the first of which petitioner advised the Swartouts that it would be necessary to print the abstract of the record and the brief and asking them to send in the rents to cover his fee and the costs, and in the latter demanding that they pay his fee promptly or he would "attach and collect." In the second letter he also said: "The brief will be ready by Monday" and demanded \$20 to pay for its printing. On October 11th, however, a lawyer named J. Wesley Cupp, advised petitioner by letter that he had been substituted as counsel for the Swartouts, asking that the substitution be signed by Johnson, and demanding a reconveyance of the property. Petitioner refused to sign the substitution, but, as we

have seen, proceeded with the appeal. Subsequently, the superior court made an order of substitution, and, on stipulation of the parties, the appeal was dismissed.

We ought now to relate another feature. Prior to June 27, 1934, Mr. and Mrs. Swartout had made application to the Home Loan Corporation for a loan to re-finance the Harcourt avenue property, but their application had dragged along without being either rejected or accepted. They were served with summons on that date and immediately took it to the office of the Home Loan Corporation and talked to a gentleman named Hopkins. Mr. Hopkins called a Mr. Harkness, of the mortgage company, on the telephone and told Harkness that they were "pushing this through under orders from Washington." Mr. Hopkins, after the conversation, told Mr. and Mrs. Swartout that they could go home and forget it. On the basis of this conversation, the judgment rendered against them was set aside, on the theory that they were guilty of excusable neglect. This result was accomplished through the services of Mr. Cupp. The petitioner's appeal was based solely upon his contention that the gold clause of the obligation rendered it invalid.

It should also be noted that petitioner conceded he was handling another similar transaction for Mr. Zettler, and, further, that Mr. Bliss and Zettler, while charged with collecting the rents, and who were to receive one-third of the real property from Celesta Zettler (they being unable to take title by reason of judgments against them) would, if they realized anything out of the property, receive their share as the result of "every dollar" having been "salvaged by" him. He asserts, however, that Zettler was to advance costs, but this is very patently contrary to the written agreements.

Another item which throws light upon the mental operations of petitioner is his frank declaration at the hearing that he had "left a fortune behind in the name of a client" and he did not "intend to leave the title in his client." Mrs. Swartout, in her testimony, put a different complexion on the affair by relating a remark said to have been made by Johnson to the effect "that lawyers were not allowed to advertise and he had to do something to pay office rent and stenographer."

The petitioner contends (1) that this court has no jurisdiction of this proceed-

ing; (2) that the State Bar Act (St.1927, p. 38, as amended) is unconstitutional; (3) that the evidence is insufficient to warrant his suspension; (4) that four of the justices of this court are disqualified because they counseled with State Bar representatives in reference to the rules of professional conduct, aided in the formation of the State Bar, and are members thereof; (5) that petitioner is entitled to and demands a jury trial; and (6), that the right to practice law is a property right of which he may not be deprived without due process of law.

[5] With respect to the first, second, fifth, and sixth grounds urged by petitioner, it is unnecessary to go to great lengths to demonstrate that they are without merit. This court has too many times determined that it had jurisdiction of disciplinary proceedings and that the State Bar acted merely as an arm of the court, for the purpose of taking evidence and making its recommendations, to warrant the assumption that such a contention advances an argument worthy of serious consideration. See *Herron v. State Bar*, 212 Cal. 196, 298 P. 474. The fact that the method provided for in the State Bar Act is "alternative and cumulative," as stated in the case referred to, disposes of petitioner's contention that the superior court has exclusive original jurisdiction. Aside from what has just been said is the fact, as recently announced by us in *Re Lavine*, 2 Cal.(2d) 324, at page 329, 41 P.(2d) 161, that this court is clothed with the inherent power, subject to such reasonable and minimum restrictions as the Legislature may prescribe, to determine who shall be officers of the court.

[6-9] With respect to the constitutionality of the act, petitioner says it is unconstitutional, without the citation of authority or an argument other than an attack upon the methods of the State Bar. It is a rule, well settled, that such a presentation of the subject is insufficient to require us to pass upon the points suggested. However, it is to be noted that the constitutionality of the act was thoroughly considered and discussed and decided contrary to petitioner's contention in the case of *State Bar v. Superior Court*, 207 Cal. 323, 278 P. 432. The fifth contention likewise must be determined against him upon a well-recognized rule. The specific question was ruled upon in the case of *In re Wharton*, 114 Cal. 367, 370, 46 P. 172, 55 Am.St.Rep.

72, and there are numerous statements to the general effect that disbarment proceedings are peculiar to themselves. See *In re Danford*, 157 Cal. 425, 108 P. 322; *In re Vaughan*, 189 Cal. 491, 209 P. 353, 24 A.L.R. 858, and cases there cited. *In re Herron*, supra, and its supporting authorities, conclude the suggestion that petitioner has been denied due process of law.

[10] Concerning the argument that the evidence is insufficient to warrant the discipline of petitioner, it is unnecessary to repeat by way of argument the testimony which we have recited in detail. Therefrom it appears that petitioner, contrary to the instructions of Mr. and Mrs. Swartout, his clients and the only persons against whom the judgment ran, persisted in perfecting an appeal and continuing litigation without real merit, when the interests of his clients would have been served, and subsequently were served, by a dismissal thereof. It also appears that his treatment of the clients—the placing of their property in the hands of other parties—was unfair. Nor can we resist the conclusion, especially when the facts of both these cases are considered, that he was associated with Zettler and Bliss in their search for persons harassed in mind by encumbered property.

[11, 12] Turning to the question of the disqualification of the Chief Justice and three associate justices, one of whom has since resigned, it should be noted that a motion to disqualify was made and denied from the bench in the first case herein considered.

Reverting to the grounds alleged for the disqualification, it is to be observed that if the justices mentioned are disqualified, the same objections, to a degree at least, might be interposed against all of the justices of this court and the justices of the District Court of Appeal. They are all members of the legal profession, even though, under the authority of *State Bar v. Superior Court*, supra, they are not active members of the State Bar, so as to

be subject to the proceedings thereof. And, while perhaps all of them did not actively counsel or participate in approving the rules of professional conduct, it is difficult to believe that all of them were not vitally concerned and interested therein. Assuming such to be the fact, can it be said that such interest or participation could any more disqualify a justice than a similar interest or participation in an opinion declaring the conduct which should characterize a member of the profession? We think not. The same reasoning disposes of the suggestion that they are disqualified because they aided in the formation of the State Bar, if such be the fact. There is no merit in the contention that the members of the court designated are in any manner disqualified. It might be well to add, however, that the discharge of the exclusive jurisdiction of this court cannot be prevented by the disqualification of all or a majority of its members. We read in 33 *Corpus Juris* 989, as follows: "The rule as to the disqualification of judges must yield to the demands of necessity. When disqualification, if permitted to prevail, destroys the only tribunal in which relief may be sought and thus effectually bars the doors of justice, the disqualified judge is bound to hear and decide the case." To the same effect, see *Evans v. Gore*, 253 U.S. 245, 40 S.Ct. 550, 64 L.Ed. 887, 11 A.L.R. 519.

[13] As heretofore mentioned, the Board of Governors recommended that petitioner be suspended for a total period of three years. We have no hesitancy in concluding that, under all of the circumstances of the cases herein, we should approve that recommendation.

It is ordered that petitioner be suspended from the practice of the law in this state for a period of three years, to commence thirty days after the filing of this order.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.; CONREY, J.; SEAWELL, J.

11 Cal.App.2d 86

PEOPLE v. DE SANTIS.

Cr. 1471.

District Court of Appeal, Third District,
California.

Dec. 31, 1935.

Hearing Denied by Supreme Court
Jan. 30, 1936.**1. Witnesses** $\S$ 330(1)

Where witness in rape prosecution denied that defendant and prosecutrix frequently spent evenings at witness' home, which tended to refute prosecutrix' statement that acts were committed after dark while she and defendant were returning from witness' home, asking witness whether his testimony was inspired by fear of defendant held proper (Pen.Code, $\S$ 261).

2. Criminal law $\S$ 1170 1/2 (5)

Error, if any, in district attorney's attempt to show that testimony of certain witnesses for defense was inspired by fear of defendant, held not prejudicial.

3. Criminal law $\S$ 829(1)

Where trial court instructed jury fully as to elements involved in rape prosecution, defendant was not harmed by refusal to give particular instructions submitted notwithstanding such instructions were proper (Pen. Code, $\S$ 261).

4. Rape $\S$ 59(8)

Instruction as to presumption of good character by defendant in traits involved in rape charge, and that proof offered as to defendant's general reputation was to go only to his credibility as witness and not otherwise, held properly refused as unsupported by evidence (Pen.Code, $\S$ 261).

Appeal from Superior Court, Yolo County; J. G. Bruton, Judge.

Antonio De Santis was convicted of rape, and he appeals.

Affirmed.

Huston, Huston & Huston, of Woodland, for appellant.

U. S. Webb, Atty. Gen., and Neal Chalmers, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal from a judgment of conviction for rape. The conviction was based upon an information charging the violation of section 261 of the Penal Code, the complaining witness being the sixteen year old daughter of appellant.

Appellant contends that the court erred in refusing to give three particular instructions and also erred in overruling objections to questions propounded a witness on cross-examination.

Upon direct examination, John Perry, a son-in-law of the accused, was asked as to visits by the accused and the complaining witness to the home of Perry from the latter part of June to the middle of July, 1935. He testified that appellant and his daughter, the complaining witness, were not in the habit of staying at the home of the witness in the evening, which tended to refute the testimony of the girl that her father would remain at the Perry home until dark before starting their return, and while on their way home after dark committed the acts of which she complained.

On cross-examination the district attorney attempted to impeach the witness by showing he was inspired by fear of the defendant. He was asked, "and didn't you tell us that if you told anything, and De Santis learned it that there was no telling what he might do to you?" The court overruled an objection on the ground it was not cross-examination, collateral, or hearsay.

[1,2] The particular question was not improper as it was an attempt to show the witness feared appellant and was offered to show this interest and fear. Appellant argues that certain other similar questions were improper, but no objections were interposed to them before the trial court. However, even if it could be said the district attorney was in error, it cannot be said such errors would justify a reversal.

[3] Defendant submitted and the court refused certain instructions directing the jury to examine with caution the testimony of the prosecuting witness in a case of this character when her testimony was not corroborated by other witnesses. The court did, however, give an instruction admonishing the jury to examine the testimony of the prosecuting witness with caution. The jury was also instructed in the usual language as to its province in determining the facts of the case, as to the weight of the evidence, the burden of proof and presumptions of innocence, so while the proffered instructions by the defendant were proper, appellant was not injured by the refusal to give the particular ones submitted, as the jury was fully instructed in the elements of the law involved in this case.

[4] The court refused to give an instruction submitted by defendant as to the presumption of good character by the defendant in the traits involved in the crime charged, and proof offered as to his general reputation was to go only to his credibility as a witness and not otherwise. This instruction was properly refused, as no evidence had been offered as to the general reputation of appellant. The court was not required to rewrite the instruction to fit the situation in the instant case. It was properly refused. The evidence discloses that appellant was fairly tried and properly convicted. Any other finding by the jury would have been a miscarriage of justice.

Defendant was convicted on three counts, each charging a specific act of rape, and the judgment of the court imposed prison terms in accordance with the verdicts of the jury, said terms to run consecutively. It is urged this sentence is excessive. There is nothing before us, however, to support such a contention.

The judgment and the order are hereby affirmed.

We concur: PLUMMER, J.; THOMPSON, J.



11 Cal.App.2d 25

DONNELL v. LINFORTH et al.

Civ. 9494.

District Court of Appeal, First District,
Division 1, California.

Dec. 24, 1935.

Hearing Denied by Supreme Court
Feb. 20, 1936.

1. Libel and slander ⇨7(13)

Statements in affidavits that person had stolen hogs, if false and unprivileged, are libelous per se.

2. Courts ⇨92

Dicta recognizing absolute character of privileged publication in judicial proceeding held to have some persuasive, if not authoritative, force (Civ.Code, § 47).

3. Statutes ⇨190

Where language of statute is clear, interpretation is unnecessary and literal wording of statute must be followed.

4. Libel and slander ⇨38(2)

Statements that plaintiff had stolen hogs, contained in affidavits filed in support of motion for new trial in action in which plaintiff had been witness, held "privileged," within statute providing that publication in judicial proceeding should be privileged (Civ.Code, §§ 45, 47).

[Ed. Note.—For other definitions of "Privileged Publication," see Words & Phrases.]

5. Libel and slander ⇨97

Defense that alleged libelous statements, made in affidavits filed in personal injury action, were privileged, could be raised by demurrer notwithstanding allegation that statements were not relevant to any issue involved in action, since such allegation was mere conclusion of law which was not admitted by demurrers (Civ.Code, § 47).

Appeal from Superior Court, San Francisco County; Daniel C. Deasy, Judge.

Action by William K. Donnell against Walter H. Linforth and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Vincent W. Hallinan, James J. Roach, and William F. Herron, all of San Francisco, for appellant.

Jesse H. Miller, of San Francisco, for respondents Walter H. Linforth and William M. Cannon.

Walter H. Linforth and William M. Cannon, both of San Francisco, for respondent Market St. Ry. Co.

GRAY, Justice pro tem.

[1] The plaintiff in a libel action appeals from an adverse judgment granted after the demurrers of the defendant Market Street Railway Company and of the defendants Walter H. Linforth and William M. Cannon had been sustained without leave to amend. In brief, the complaint alleged that, in an action for personal injuries brought against the defendant Market Street Railway Company, plaintiff had previously testified against such defendant; that such defendant and the other defendants, as its attorneys, in support of a motion for a new trial, had filed in such action two affidavits, which stated that plaintiff had stolen hogs from one of the affiants; and that such statements were false, defamatory, and not pertinent or

⇨ For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

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relevant to any matter in issue in such action. It is not disputed that the statements, if false and unprivileged, were libelous per se. *De Witt v. Wright*, 57 Cal. 576.

Section 45 of the Civil Code provides, in part, that "libel is a false and *unprivileged* publication." The pertinent part of section 47 of the same Code reads as follows: "*A privileged publication is one made—* * ** 2. In any * * * (2) judicial proceeding." (Italics ours.) If, as defendants argue, this privilege is absolute, the demurrers were properly sustained, for the complaint alleges that the defamatory matter was contained in affidavits filed in a judicial proceeding. On the other hand, if this privilege extends only to defamatory words which are relevant or pertinent to the judicial proceeding, as plaintiff contends, the demurrers should have been overruled. The question to be decided, then, is the extent of the privilege granted by section 47. The problem being the proper construction of this section, it is useless to discuss the decisions of other states upon this matter.

In *Moore v. United States F. & G. Co.*, 122 Cal.App. 205, 9 P.(2d) 562, this court held that statements contained in a complaint were not libelous, because the wording of the section makes the privilege absolute. The statement of an additional ground for the decision, to wit, that the defamatory matter was material and pertinent, does not make the former ground obiter dicta. *Camron v. Kenfield*, 57 Cal. 550; *King v. Pauly*, 159 Cal. 549, 115 P. 210, Ann.Cas. 1912C, 1244. This decision is in accord with that of the Third District found in *Reid v. Thomas*, 99 Cal. App. 719, 279 P. 226, where it is said: "The alleged libelous matter, consisting of the charge of insanity, appears on the face of the complaint in this action. It was alleged to have been filed in a judicial proceeding in a justice's court, and was, therefore, absolutely privileged. Section 47, Civ.Code." Relying particularly on the case of *Carpenter v. Ashley*, 148 Cal. 422, 83 P. 444, 7 Ann.Cas. 601, plaintiff argues that these decisions enunciate a rule contrary to that stated by the Supreme Court. In that case, the district attorney, in a larceny trial, had charged defendant's attorney with committing and suborning perjury. The holding is found in the following excerpt therefrom (148 Cal. 422, page 428, 83 P. 444, 445, 7 Ann.Cas. 601): "And it is quite

clear that in the case at bar the defamatory words alleged to have been spoken by the defendant of plaintiff, who was simply an opposing attorney in the case at hand, had no pertinency, relevancy, or reference, to the charge of larceny in the pending action of *People v. Ennis*, which was the subject-matter of inquiry in that action; he had no more privilege to use the defamatory words alleged than he would have had to charge plaintiff with robbery, rape, or murder." No consideration was given of the Code section or earlier California cases, but the cases cited are from eastern states. Nor has this case been subsequently cited, except in the case of *Irwin v. Newby*, 102 Cal.App. 110, 282 P. 810, 283 P. 370, where it was held that charges of fraud contained in a pleading were absolutely privileged by the Code section. In answer to the claim that the *Carpenter* Case has, by judicial decision, ingrafted an exception to the privilege given by the Code, the court said they understood that decision to hold that if the defamatory words have no relation or reference to the cause at hand or to any subject-matter involved therein, then such defamatory words are not in fact published in a judicial proceeding even though such defamatory words are published during the progress of a trial and in the very courtroom where the cause is on trial.

The Supreme Court in *Gosewisch v. Doran*, 161 Cal. 511, 119 P. 656, Ann.Cas. 1913D, 412, stated that it was unnecessary to decide whether allegations of a complaint charging misappropriation and embezzlement of corporate funds were absolutely or qualifiedly privileged because it found such allegations to be relevant and material. However, its review of the three earliest California cases is so apt as to warrant repetition (161 Cal. 511, page 513, 119 P. 656, 657, Ann.Cas. 1913D, 412): "The prevailing rule in England and in some of the American states has been that the privilege attaching to defamatory statements made in the course of judicial proceedings is absolute. Townshend, in his work on Slander and Libel, states, at section 221, that he believes the 'better and prevailing rule to be that for any defamatory matter contained in a pleading in a court of civil jurisdiction no action for libel can be maintained.' [Citing cases.] On the other hand, many courts in this country have limited the privilege to declarations pertinent and material to the mat-

ter in controversy. [Citing cases.] And this limitation of the rule was applied in a case arising in this state prior to the amendment of 1874 to section 47 of the Civil Code. *Wyatt v. Buell*, 47 Cal. 624. The language of subdivision 2 of the amended section is, however, broad and unrestricted in its terms, and this court, in *Hollis v. Meux*, 69 Cal. 625, 11 P. 248, 58 Am.Rep. 574, suggested a doubt as to whether the Legislature, by enacting that subdivision, intended to change the rule announced in *Wyatt v. Buell*, so as to render communications made in a judicial proceeding absolutely privileged. The court concluded, in the *Hollis* case, that the charges there made were relevant and material to the proceeding in which they were published, and therefore found it unnecessary to resolve this doubt. It may, however, be remarked that in *Ball v. Rawles*, 93 Cal. 222, 236, 28 P. 937, 27 Am.St.Rep. 174, the privilege is declared to be absolute, and *Hollis v. Meux* is cited as authority for the declaration." The case of *Ball v. Rawles* has been repeatedly followed and never criticized or overruled.

[2-4] In the course of its reasoning the Supreme Court has recognized in at least four cases that the privilege provided in section 47, subdivision 2, is absolute. *Snively v. Record Publishing Co.*, 185 Cal. 565, 577, 198 P. 1; *Stevens v. Snow*, 191 Cal. 58, 64, 214 P. 968; *Hale Company v. Lea*, 191 Cal. 202, 205, 215 P. 900; *Layne v. Kirby*, 208 Cal. 694, 696, 284 P. 441. In similar manner, the same recognition is found in *Meraviglia v. Bovee*, 113 Cal.App. 752, 754, 298 P. 1040. It may be conceded that the statements in these cases are obiter dicta, but it does not follow that therefore they should be discarded. The recognition of the absolute character of the privilege has some persuasive, if not authoritative, force. *San Joaquin, etc., Irr. Co. v. Stanislaus County*, 155 Cal. 21, 99 P. 365. The cases which declare the rule of absolute privilege differ from the present, (1) because in the former the person libelled was a party to the proceeding in which the defamatory matter was published, and in the instant case, plaintiff was merely a witness. The Code section, however, does not make any distinction. Since the language of the section is clear, plain, and unambiguous, there is no need for construction or interpretation and its literal

wording must be followed. 23 Cal.Jur. 721. It would appear, therefore, that the alleged defamatory matter contained in that affidavit was privileged.

[5] The complaint sets forth but a part of the affidavits. It is true that the complaint alleges that the statements set forth were not pertinent or relevant to any issue involved in the action, in which the affidavits were filed. This allegation is a mere conclusion of law, which is not admitted by the demurrers. *Gosewisch v. Doran*, supra. "If a complaint pleads facts which show the publication was made in a judicial proceeding, it does not state a cause of action unless it goes further and pleads other facts which show that in contemplation of law the publication was not in fact made in a judicial proceeding although made in court." *Irwin v. Newby*, supra, 102 Cal.App. 110, at page 116, 282 P. 810, 283 P. 370.

The demurrers having been properly sustained, the judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.



STEVENS et al. v. SUPERIOR COURT
IN AND FOR SAN JOAQUIN
COUNTY. *
Civ. 5556.

District Court of Appeal, Third District,
California.
Dec. 30, 1935.

Rehearing Denied Jan. 29, 1936.
Hearing Granted by Supreme Court
Feb. 27, 1936.

1. New trial ☞165

Where court denied motion for new trial, after filing of waiver of new trial as to any issue other than damages, on ground that evidence supported finding on that issue, court could not subsequently set such order aside and grant new trial in absence of mistake or inadvertence in granting of order.

2. Appeal and error ☞717

Reviewing court in considering validity of order for new trial is limited to language of actual order made by trial court, and cannot consider opinion filed in support of action.

3. New trial ⇨163(1)

Trial court has power to correct error in order for new trial which has been prematurely or inadvertently made.

4. New trial ⇨165

Order, purporting to annul previous order denying new trial and to grant new trial on issue of damages, which stated no ground for making such order, *held* void, since court exhausted its jurisdiction in making original order.

Petition for a writ of prohibition by Fred Stevens and another against the Superior Court of the State of California, in and for the County of San Joaquin.

Petition granted.

Bronson, Bronson & Slaven, of San Francisco, for petitioners.

Gumpert & Mazzer and C. H. Hogan, all of Stockton, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

The record before us shows that on April 26, 1935, M. Carpino commenced an action in the Superior Court of the State of California, in and for the County of San Joaquin, against the petitioners, to recover damages for and on account of personal injuries alleged to have been suffered by the said M. Carpino as a result of the negligence of the petitioners. On the 7th day of September, 1935, after trial, a judgment in favor of M. Carpino against the petitioners was entered awarding damages to Carpino in the sum of \$3,000. On September 11, 1935, M. Carpino filed in said action a notice of intention to move for a new trial. On October 5, 1935, the motion for a new trial was heard and argued before said Superior Court. Following the argument the motion for a new trial was submitted upon written points and authorities thereafter to be filed. On October 26, 1935, M. Carpino filed in the action a waiver as to any issue other than that of damages. On October 28, 1935, the respondent court made and filed its order denying Carpino's motion for a new trial. On October 29, 1935, the respondent court made and filed an order purporting to annul and set aside its previous order denying a new trial to M. Carpino, and purporting to grant a new trial on the issue of damages alone.

The petition is for a writ of prohibition restraining the trial court from proceeding with a new trial. Prohibition is conceded to be a proper remedy if the second order of the trial court is held to be invalid.

Upon the hearing of this cause it developed that the pleadings filed by the petitioners herein failed to set forth copies of the orders actually made and entered by the trial court. It was thereupon stipulated by counsel that certified copies of the respective orders might be furnished, and when furnished, deemed a part of the pleadings in this cause. Certified copies of the orders made by the trial court are now before us, and we set them forth in full, save and except as to the title of the court. The order made and entered by the court on Monday, October 28, 1935, is in the following words and figures:

"Monday, October 28, A. D. 1935.

"Present; Hon. C. W. Miller, Judge.

"M. Carpino, Plaintiff vs. Fred Stevens, Defendant. No. 26887

"The motion for a new trial in said cause having been heretofore argued by counsel, and submitted to the court, the court this day made an order denying plaintiff's motion for a new trial.

"Attest: Eugene D. Graham, Clerk.

"By F. R. Stanley, Deputy Clerk."

The order entered Tuesday, October 29, 1935, is in the following words and figures:

"Tuesday, October 29th, A. D. 1935.

"Present: Hon. C. W. Miller, Judge.

"M. Carpino, Plaintiff, vs. Fred Stevens and R. G. LeTourneau, Inc., a Corporation, Defendants. No. 26887.

"The court this day on its own motion made an order as follows, to-wit: It is hereby ordered that said order made and entered on the 28th day of October, 1935, denying plaintiff's motion for a new trial be, and the same is hereby vacated, annulled and set aside. And it is further ordered that the motion of plaintiff for a new trial be, and the same is hereby granted upon the issue of damages alone.

"Attest: Eugene D. Graham, Clerk

"By F. R. Stanley, Deputy Clerk."

We have omitted not only the title of the court but also the certificate of the clerk.

[1] In oral arguments, and also upon briefs filed in this cause, counsel for petitioners and also counsel for the respondent

ent have based their arguments upon the memoranda of opinions filed by the presiding judge of the trial court, apparently overlooking the limitations placed upon a reviewing court confining consideration in such cases to the orders actually made and entered by the trial court. However, we will make a slight reference to the written memoranda of the trial court, not for the purpose of basing any decision thereon, but to illustrate the point that the alleged inadvertence and oversight set forth in the second memorandum has no basis upon which to rest.

After stating in the first memorandum that a new trial would have been granted by reason of erroneous instructions having been given by the court, it is set forth that plaintiff's counsel in effect stated that they desired a new trial upon the sole ground of the insufficiency of the evidence to justify the verdict. The matter was then submitted upon briefs, and the briefs covered both points very thoroughly, and the court would have granted a new trial upon the ground that an erroneous instruction had been given, but for the fact that subsequent to the filing of the briefs in the case, plaintiff had filed therein a waiver of a new trial except as to the question of damages. Upon this point the court then uses the following language: "The evidence at the trial was sharply conflicting as to the extent or permanency of the injury, and the finding of the jury finds ample support in the evidence. In view of the definite waiver by the plaintiff, above referred to, the motion for a new trial will be denied."

"Thereafter, counsel for plaintiff urged the two grounds above stated for the granting of the motion as made in open court at the hearing, and still urged the granting of the motion upon the issue of damages alone. Thereafter, and on the 26th day of October, 1935, counsel for plaintiff filed herein a written waiver on behalf of the plaintiff, waiving a new trial in said action as to any issue other than that of damages. The court in reading said waiver, by oversight and accident, inadvertently concluded, and made the mistake of concluding, that the plaintiff thereby waived all grounds or reasons which he had theretofore urged for a new trial, except the ground or reason of the insufficiency of the evidence to justify the verdict, and that by reason of such oversight, neglect, accident and mistake in the reading of said waiver, and in the conclusion as to its effect, the

court, on the 28th day of October, 1935, inadvertently and improvidently made and caused to be entered in said matter its order denying plaintiff's motion for a new trial, at the same time expressing its opinion that the plaintiff is entitled to a new trial, and that the court would have granted a new trial upon the ground that an erroneous instruction had been given except for the waiver filed by the plaintiff.

"Upon a further reading and consideration of said waiver, it clearly appears to the court that the plaintiff did not, by such waiver, waive any ground or reason which he had previously urged for a new trial herein and is therefore entitled to a new trial upon the ground and for the reason that there was error in matters of law in giving a prejudicially erroneous instruction at the request of the defendants.

"In view of said oversight, neglect, accident and mistake which led to the inadvertent and improvident making and entry of said order, and in the interests of justice, it is hereby ordered that said order made and entered on the 28th day of October, 1935, be and is hereby vacated, annulled and set aside. And it is further ordered that the motion of plaintiff for a new trial be, and the same is hereby granted upon the issue of damages alone."

A setting forth of the waiver filed by M. Carpino shows conclusively that the court did not either misconstrue, overlook, or inadvertently arrive at an incorrect determination as to the effect of the waiver filed by M. Carpino. The waiver so filed is in the following words and figures, to wit (omitting the title of the court and cause):

"Waiver of New Trial as to Any Issue Other Than That of Damages

"The plaintiff in the above entitled action hereby waives a new trial in said action as to any issue other than that of damages.

"Dated: October 26, 1935.

"Gumpert & Mazzera

"Attorneys for Plaintiff."

The waiver did expressly waive any ground for new trial other than that of the issue of damages. The language contained in the memoranda of opinion dated the 29th day of October, 1935, alleging that the court by inadvertence misconstrued the waiver, is thus shown to be a misapprehension, and that there was no basis for the alleged inadvertence of the entry of judgment. The memoranda first filed sets forth a denial of a new trial on the grounds

of damages, setting forth that the trial was sharply conflicting, and that the finding of the jury had ample support therein.

The ground for granting a new trial on the alleged errors of the court in giving instructions did not enter into the case. The only questions presented to the court for consideration prior to the making of the first order was whether M. Carpino should have been granted a new trial on the question of damages, and that is the sole ground upon which the second order purporting to grant a new trial was based. As there was no mistake in relation to the error which preceded the entry of the first order denying a new trial, the question of inadvertence, neglect, etc., finds no place, and does not support the second order.

[2] Irrespective of what we have said, as shown by memoranda of opinions of the trial court in consideration of this cause, we are limited to the actual orders made by the trial court, as shown by the certified copies thereof. We do not question the powers of a trial court to correct its orders so that they shall set forth clearly and distinctly the purpose and intent of the court at the time of directing the entry of the order. There is a clear line of demarcation, however, between correcting an order which has not been entered as the court intended and the annulling and setting aside of a prior order by a subsequent order when the prior order has been made in such manner as to express the purpose and intent of the court at the time of the directing of the entry of the order and its actual order. A number of cases have been called to our attention by the respondent, but a review of them shows a state of facts wholly dissimilar to those presented in this cause.

In the case of *Wiggin v. Superior Court*, 68 Cal. 398, 9 P. 646, 647, it appears that upon the application of counsel for the heirs of the deceased the court made an order setting aside and vacating the decree of final discharge, reciting therein that such decree of final discharge was entered and made inadvertently and ex parte, and further ordering that the application of petitioner for final discharge be heard January 28, 1885. Thereafter, and on the 19th day of May, 1885, the court issued an order for petitioner to show cause why he should not pay money ordered to be distributed to the heirs, etc. In the consideration of that case the court in its opinion said: "As this is not an appeal

from the order setting aside the decree of final discharge, but a collateral attack thereon, we must assume as true the statements contained in the order, which are that the decree of final discharge of the petitioner was made 'inadvertently and ex parte.'" The second order entered by the court in this cause, as shown by the language thereof, contains no reference that a prior order was made inadvertently and ex parte. From which it follows that the record is entirely silent as to questions which we can consider and base a conclusion upon that the first order was made in any such manner.

In *Livesay v. Deibert*, 3 Cal.App. (2d) 140, 39 P.(2d) 466, the second order of the court entered nunc pro tunc was simply for the purpose of correcting a previous order, showing the grounds upon which the new trial was granted, which had been omitted by the clerk from the order actually entered.

In *Lauchere v. Lambert*, 210 Cal. 274, 291 P. 412, 414, the court granted a motion for new trial on the ground of the insufficiency of the evidence. It appears from the opinion in that case that the trial court, in open court, stated that the granting of a new trial was based upon the insufficiency of the evidence, and it further appears that the clerk failed to set forth in the orders actually entered the grounds upon which a new trial was granted. It was held within the power of the trial court to correct the clerical mistake. The court, in *Lambert Case*, quoted from the case of *Fay v. Stubenrauch*, 141 Cal. 573, 75 P. 174, as follows: "Nor is the right of the lower court to amend suspended or impeded by an appeal where an amendment does not affect any substantial rights of the appellant, and consists of the correction of a clerical mistake appearing upon the face of the record."

In *Burbank v. Continental Life Ins. Co.*, 2 Cal.App.(2d) 664, 38 P.(2d) 451, 452, we find an excellent example of the entry of an order so as to lay the grounds for consideration by an appellate court. We set it forth in full, as follows: "And in its final order the court declared: 'It appearing to said court that the said Minute Order (of dismissal) was the result of, and due entirely to, (1) the inadvertence, mistake and excusable neglect of plaintiff and his counsel with reference particularly to the submission of the matter of the original motion and the filing of additional affida-

vits in connection therewith, all as more particularly appears in the affidavit of said plaintiff and said counsel and others on file herein, all of which is, in the opinion of the court, entirely excusable, and the court so finds; and (2) the court may have inadvertently submitted and decided said motion before plaintiff has an opportunity to file additional affidavits, contrary to the understanding of said counsel and plaintiff; and it now appearing that an injustice would be done said plaintiff if the said Minute Order is allowed to stand, and that the interests of justice would be subserved by a vacation of said Minute Order, and the court believing that it should, in the exercise of its inherent and implied powers vacate said Order, and good cause otherwise appearing therefor: It is hereby ordered, adjudged and decreed that the said Minute Order be, and the same is hereby, recalled, vacated and annulled for all intents and purposes as if the same had never been made, and the original motion of defendant to dismiss said cause is hereby set for hearing for January 23, 1933."

The proceeding appears to have been had under section 473 of the Code of Civil Procedure.

In *King v. Emerson*, 110 Cal.App. 414, 288 P. 1099, 294 P. 768, the court granted a new trial on the ground of insufficiency of the evidence, and the question of entering the order failed to set forth that fact. This court held that it was within the jurisdiction of the trial court to amend its record so that it might speak the truth and show exactly the grounds upon which a new trial was granted.

The respondent also calls our attention to the case of *Watkins v. McCartney*, 70 Cal. App. 137, 232 P. 982. That case presents a situation where different judges of the same court entered different orders, and is readily distinguishable from the circumstances here presented. While not considered in the opinion in that case, the facts we think are sufficient to show want of jurisdiction for the orders made by the second judge.

That we are confined to the language of the actual orders made by the trial court in the decision of this cause, and not upon anything which does not appear in said orders, we cite the following cases:

In *Newman v. Overland Pacific Ry. Co.*, 132 Cal. 73, 64 P. 110, 111, we find the following (after stating what the court might consider), to wit: "This rule of

procedure is not affected by the fact that at the time of making the order the court files an opinion in support of its action, wherein it discusses one or more of the grounds presented. The order which is entered in the minutes is the only record of the court's actions, and is to be measured by its terms, and not by the reasons which the court may give for it."

In *Whitney v. Northwestern Pacific Ry. Co.*, 39 Cal.App. 139, 178 P. 326, 327, the court had before it the question of what it might consider in relation to the orders of the trial court, and used the following language: "The trial court disposed of this motion by making a general order granting the same. The appellant urges that this order should be considered as made upon the sole ground that the evidence showed deceased guilty of contributory negligence as a matter of law which would prevent a recovery; and in support of this claim, it is alleged in appellant's brief that at the time the order was made a memorandum was given to the clerk stating such ground for the order. No such memorandum is a part of the record, and therefore cannot be considered by this court. It has, however, been repeatedly held that any limitation of such a general order, to be effectual, must be specified in the order. The order of the court entered upon its minutes is the only evidence of the action of the court in granting the new trial, and such order is to be measured by its terms, and not by the reasons which the court may give for it. *Ben Lomond Wine Co. v. Sladky*, 141 Cal. 619, 75 P. 332; *Newman v. Overland Pacific Ry. Co.*, 132 Cal. 73, 64 P. 110; *Weisser v. Southern Pacific Ry. Co.*, 148 Cal. 426, 83 P. 439, 7 Ann.Cas. 636."

In the case of *Weisser v. Southern Pacific Ry. Co.*, 148 Cal. 426, 83 P. 439, 7 Ann.Cas. 636, it was attempted to be shown by a letter in contradistinction to the actual order, the intent and purpose of the trial court. The opinion on that question is as follows: "Even if the same had been written and filed at the time of the granting of the new trial, it could not have operated to limit the effect of the general order entered on the minutes of the court, which order so entered is, under the decisions, the only record of the court's action. Any limitation, to be effectual, must be specified in the order."

In *Ben Lomond Wine Co. v. Sladky*, 141 Cal. 619, 75 P. 332, 333, the court had

before it an opinion filed by the trial court, and also of the order of the court actually entered upon its records. It is there said: "This question would appear to be settled by the decision of this court in *Newman v. Overland Railway Company*, 132 Cal. 73, 64 P. 110, wherein it was held that, where there is an order granting a new trial, entered upon the minutes of the court, and also an opinion filed showing the reasons for the granting of the motion, and concluding with the words, 'the motion for a new trial is granted,' the order entered on the minutes is the only record of the court's action, and is to be measured by its terms, and not by the reasons which the court may give for it."

The case of *Egan v. Egan*, 90 Cal. 15, 27 P. 22, called to our attention, has to do only with the correction of clerical errors.

In *Bloomquist v. Haley*, 204 Cal. 258, 268 P. 364, 365, it appears that after entering an order the court made an attempt to vacate the previous order and enter a subsequent one. The court said: "The order is general in its terms and the record contains nothing in support of this assertion. Without doubt, the trial court exhausted its jurisdiction by granting the new trial, and the order made in attempting to vacate that order was void. *Holtum v. Greif*, 144 Cal. 521, 524, 78 P. 11, and cases there cited; *Dorland v. Cunningham*, 66 Cal. 484, 6 P. 135. No attempt was made to set the order aside upon a proper showing that it had been entered prematurely, or by inadvertence, as was done in *Odd Fellows' Savings Bank v. Deuprey*, 66 Cal. 168, 4 P. 1173, or to correct it, as in *Garoutte v. Haley*, 104 Cal. 497, 38 P. 194. The trial court having exhausted its jurisdiction by granting a new trial, its subsequent order in vacating its order granting a new trial and in modifying the judgment previously rendered was without authority and was for that reason void." See, also, *Holtum v. Greif*, 144 Cal. 521, on page 525, 78 P. 11, and cases cited.

[3] If the record shows that the order has been prematurely made or inadvertently made, the power of the court exists to correct the error. This is shown by the following language found in the case of *Odd Fellows' Savings Bank v. Deuprey*, 66 Cal. 168, 4 P. 1173, 1174, to wit: "An order granting or refusing a new trial,

made after the regular submission of a motion for that purpose, is reviewable only on appeal. *Coombs v. Hibberd*, 43 Cal. 452, 453; *Waggenheim v. Hook*, 35 Cal. 216; *Nichols v. Dunphy*, 10 Pac. C. Law J. 193. But it is otherwise where such an order has been inadvertently or prematurely made. If made, for instance, before the statement of the case or bill of exceptions, upon which it was to be made, has been settled, engrossed, and certified, and before the motion has been regularly submitted, the jurisdiction to hear and decide the motion was not called into exercise, the order would not be made in the regular exercise of the jurisdiction of the court, and, being improvidently made, it would be the duty of the court to set it aside. *Morris v. De Celis*, 41 Cal. 331; *Hall v. Polack*, 42 Cal. 218; *Coombs v. Hibberd*, supra; and *Nichols v. Dunphy*, supra. Here, however, the power of the court to hear and decide the motion for a new trial was regularly put in motion, and the order of the court in the decision of the motion exhausted its power over it. The court became functus officii."

[4] That the opinion of a trial court is no part of the record and cannot be considered independently of the orders actually made and entered by the court, see, also, 2 *California Jurisprudence*, p. 488. The order entered by the trial court on the 29th day of October, 1935, states no grounds for the making of the order. It simply purports to annul the previous order denying a new trial and granting a new trial on the issue of damages alone. Even if we were permitted to go outside of the record and consider the opinion of the court, it would have to be held that this particular ground for granting a new trial had been considered by the trial court and previously denied, and as we have said, no inadvertence of the trial court affected the order actually made. The orders of the court, however, actually made, not showing any legal reason for the entry of the order dated October 29, 1935, it must be held that the court exhausted its jurisdiction, and that such order is absolutely void.

The petition for a writ of prohibition is granted.

We concur: PULLEN, P. J.; THOMPSON, J.

11 Cal.App.2d 1

PEOPLE v. JACOBS.

Cr. No. 318.

District Court of Appeal, Fourth District,
California.

Dec. 21, 1935.

Rehearing Denied Jan. 4, 1936.

Hearing Denied by Supreme Court
Jan. 20, 1936.

1. Bigamy ☞

Statute, providing that proof of second marriage outside California and proof of subsequent cohabitation in California would sustain bigamy charge, declared both rule of evidence and rule of substantive law, notwithstanding that statute occurred under division title and topical head of Code respecting evidence (Pen.Code, § 1106).

2. Criminal law ☞97(1)

Where information in bigamy prosecution charged that second marriage occurred in California, evidence that second marriage took place in Utah did not deprive court of jurisdiction over offense, in view of statute providing that second bigamous marriage solemnized outside California should be punishable on proof of cohabitation within California (Pen.Code, § 1106).

3. Indictment and information ☞171

Test of materiality of variance in information is whether pleading so fully and correctly informs defendant of offense with which he is charged that, taking into consideration proof which is introduced against him, he is not misled in making his defense.

4. Bigamy ☞5

Variance between charge in information in bigamy prosecution that second marriage occurred in California, and proof that such marriage occurred in Utah, held not fatal, where information further charged cohabitation in California subsequent to such marriage (Pen.Code, § 1106).

5. Indictment and information ☞161(3)

In bigamy prosecution in which information charged that second marriage occurred in California and evidence showed that such marriage took place in Utah, information could have been amended to obviate variance upon application, even though application might not have been made until after all evidence had been submitted (Pen.Code, § 1008).

6. Bigamy ☞5

In bigamy prosecution, state must prove that marriage alleged to have been bigamous was in fact contracted (Pen.Code, § 1106).

7. Bigamy ☞11

In bigamy prosecution, woman's testimony that marriage with defendant was solemnized in Utah in presence of minister and two witnesses after obtaining marriage certificate signed by minister and witnesses in her presence, and evidence that woman and defendant subsequently lived together as husband and wife in California, that woman introduced defendant as her husband, and that defendant addressed letters to woman as his wife, held prima facie proof of marriage (Pen. Code, § 1106).

8. Bigamy ☞11

In bigamy prosecution, testimony of defendant's first wife as to solemnization of her marriage with defendant, their cohabitation as husband and wife at various places in California, that five children were born as issue of such marriage, and that to her knowledge such marriage had never been dissolved, was prima facie proof of fully consummated marriage when defendant contracted alleged second bigamous marriage (Pen.Code, § 1106).

9. Bigamy ☞11

Evidence held insufficient to exempt defendant from charge of bigamy on ground that when second alleged bigamous marriage was contracted his first wife had been absent for five successive years without being known to defendant within that time to be living (Pen.Code, § 282, subd. 1).

10. Bigamy ☞2

Statute, exempting from charge of bigamy defendant who contracted second marriage after spouse by former marriage had been absent for five successive years without being known to defendant within that time to be living, contemplated spouse's absence from established home for five successive years without giving to defendant any information as to spouse's whereabouts or whether spouse still lived (Pen.Code, § 282, subd. 1).

11. Criminal law ☞1170½(2)

Error in permitting defendant charged with bigamy to be asked whether he had told third person that he had living wife held harmless, where defendant's denial that he had made such statement was uncontradicted.

12. Criminal law ☞1170½(5)

Inquiry as to whether defendant charged with bigamy knew third person, after inquiry as to whether he had told third person that he had living wife, held harmless.

13. Witnesses ☞387

Permitting defendant charged with bigamy to be asked whether he had given his age to physician at hospital on certain date with view of showing statement inconsistent with testimony, and permitting defendant to answer that he had never been in such hospital, held harmless.

tal and that he did not know such physician, *held* not error.

14. Criminal law ☞1037(2), 1129(1)

Misconduct of prosecuting attorney, in bigamy prosecution, in overshadowing proper inquiry by reference to birth of child bearing defendant's name, would not be considered, where asking of question was not assigned as misconduct and court was not requested to instruct jury to disregard question and objection was merely made on various grounds which was promptly and properly sustained.

15. Criminal law ☞444

Where information charged "Ben Fred Jacobs," also known as "Balus Forest Jacobs," with offense of bigamy, admission of carbon copy of voter's registration certificate issued to "Balus F. Jacobs" and discovered among defendant's personal belongings, to show that defendant went under name of "Balus F. Jacobs" in addition to the other name stated in information, *held* not error, where witness familiar with defendant's handwriting testified that signature on certificate was that of defendant.

16. Criminal law ☞1186(4)

Admission of prejudicial hearsay evidence in bigamy prosecution *held* not reversible error, where miscarriage of justice did not result (Const. art. 6, § 4½).

17. Criminal law ☞1169(2)

In bigamy prosecution, admission of testimony of witness concerning prior bigamous marriage between herself and defendant, if erroneous, was not prejudicial, where defendant had admitted prior conviction for bigamy.

18. Criminal law ☞371(1)

In bigamy prosecution, testimony of witness concerning prior bigamous marriage between herself and defendant *held* properly admitted, where defendant had testified that he believed his first wife was dead when he contracted bigamous marriage for which he was being prosecuted.

19. Criminal law ☞370, 371(1)

Evidence of commission of other crimes is admissible if it tends to establish intent or guilty knowledge, particularly where accused claims that he had no such intent or knowledge as to commission of crime.

20. Criminal law ☞1144(14)

Where accused referred in his brief to refused instructions by number and by incomplete suggestion of their contents without presenting their full text, and did not present other instructions given by court bearing on subjects covered by refused instructions, reviewing court would assume that instructions given were free from serious error and that

instructions refused were properly refused (District Court of Appeal Rules, rule 8, § 3).

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Ben Fred Jacobs, also known as Balus Forest Jacobs, was convicted of bigamy, and he appeals.

Affirmed.

Joseph Seymour, of Riverside, for appellant.

U. S. Webb, Atty. Gen., Paul D. McCormick, Deputy Atty. Gen., and Earl Redwine, Dist. Atty., and William O. Mackey and John G. Gabbert, Deputy Dist. Attys., all of Riverside, for the People.

JENNINGS, Justice.

The defendant was accused by information of the crime of bigamy and with having suffered a prior conviction of a felony. On arraignment he admitted the prior conviction and pleaded not guilty of the offense here charged. At the conclusion of the people's case, the defendant moved the court to direct a verdict of acquittal, which motion was denied. The trial thereupon proceeded to completion and resulted in a verdict of guilt and subsequent judgment of conviction. Motions for a new trial and in arrest of judgment were presented by defendant and denied. From the judgment and from the orders of the court denying the above-mentioned motions, defendant presents this appeal.

Appellant's first point is that the trial court had no jurisdiction of the offense or of the defendant, since the information charged that the alleged marriage took place in the county of Riverside while the evidence showed that the purported marriage occurred in the state of Utah. It must be conceded that the evidence showed that the marriage with Jennie Barton, which formed the basis of the charge of bigamy alleged in the information, was solemnized in the state of Utah. Jennie Barton so testified and her testimony in this regard stands uncontradicted. However, the undisputed evidence also showed that after the marriage with Jennie Barton had been solemnized in Utah appellant came to California; that he sent a telegram to Jennie Barton requesting her to come to San Bernardino, Cal., and sent her a ticket which entitled her to transporta-

tion to Los Angeles, Cal.; that she went to the last-named city where appellant did not meet her on her arrival; that she located appellant in San Bernardino where she subsequently met him; that she remained with appellant in a hotel in San Bernardino for one night and on the following day the two went to Indio in Riverside county, Cal., where they lived together as husband and wife for approximately one month; that appellant left Jennie Barton in Indio without funds on December 24, 1934; that she then wired her sister at Boulder City, Nev., for money, which the sister sent her and she thereupon went to Boulder City, where she remained in her sister's home until the latter part of January, 1935, when she went to the city of Riverside, where she rejoined appellant and lived with him as his wife at several different places in the last-mentioned city.

[1,2] The above-narrated evidence demonstrates the unsoundness of appellant's contention of lack of jurisdiction of the offense. The act of solemnization is merely one step in the assumption of the marital status. Cohabitation of the parties subsequent to solemnization is an essential requisite of marriage. Section 1106 of the Penal Code is entitled "Evidence on a Trial for Bigamy." It is there provided that upon a trial for bigamy, it is not necessary to prove either of the marriages by documentary evidence but that the same may be proved by such evidence as is admissible to prove a marriage in other cases and that "when the second marriage took place out of this state, proof of that fact, accompanied with proof of cohabitation thereafter in this state, is sufficient to sustain the charge." The facts established by the evidence exactly fit the statutory requirement for substantiation of the charge as indicated by the above-quoted language. The scope of the statute is more extensive than the mere announcement of a rule of evidence. It also declares a principle of substantive law notwithstanding the fact that the section occurs under a division title and topical head of the Code respecting evidence. The Legislature having clearly indicated its intent that a second bigamous marriage which is solemnized outside the state should be punishable on proof of cohabitation within the state leaves no doubt as to the jurisdiction of the trial court over the offense under the cir-

cumstances developed by the evidence in this case. *People v. Ellis*, 204 Cal. 39, 266 P. 518.

[3-5] Appellant's second contention is that the verdict of conviction lacks evidentiary support. In support of this contention it is first pointed out that the information specifically alleged that the bigamous marriage with Jennie Barton was contracted in Riverside county, Cal., whereas the uncontradicted evidence showed that the marriage occurred in the state of Utah. It is urged that this situation constituted a fatal variance between the accusation and the proof offered in its support. That there was a variance between the charge contained in the information and the proof submitted in support of the charge is obvious. The information clearly alleged that appellant married Jennie Barton in the county of Riverside on or about November 19, 1934. The evidence showed that the marriage between appellant and Jennie Barton actually took place at Tooe, Utah, on the above-stated date. However, the information further alleged that, subsequent to the marriage, appellant lived with Jennie Barton in Riverside county. Since it is clear that cohabitation is an essential element of marriage and the complaint alleged cohabitation in Riverside county subsequent to marriage which was amply sustained by the evidence, it may not be urged successfully that appellant was in any way misled or prejudiced in his defense by reason of the allegation that his marriage to Jennie Barton occurred in Riverside county. The test of the materiality of variance in an information is whether the pleading so fully and correctly informs a defendant of the offense with which he is charged that, taking into consideration the proof which is introduced against him, he is not misled in making his defense. *Bar Association of San Francisco v. Sullivan*, 185 Cal. 621, 639, 198 P. 7; *People v. Freeman*, 29 Cal.App. 543, 156 P. 994. While this test is applied to the situation which is here presented, the immateriality of the variance is immediately apparent. It may properly be observed that if application had been made the trial court could have ordered the information to be amended to obviate the variance under the provisions of section 1008 of the Penal Code even though the application was not made until after all evidence in

the case had been submitted. *People v. Du Fault*, 1 Cal.App.(2d) 105, 36 P.(2d) 196.

[6, 7] In support of the contention of evidentiary insufficiency appellant further maintains that there was no sufficient showing that the marriage with Jennie Barton ever took place. It must be conceded that in the prosecution of an individual for having committed the crime of bigamy it is required that the people prove that the marriage which is alleged to have been bigamous was in fact contracted. However, section 1106 of the Penal Code clearly and unmistakably declares that "upon a trial for bigamy, it is not necessary to prove either of the marriages by the register, certificate, or other record evidence thereof, but the same may be proved by such evidence as is admissible to prove a marriage in other cases." Examination of the record discloses that, in addition to the testimony of Jennie Barton that the marriage between appellant and herself was solemnized at Tooele, Utah, on November 19, 1934, in the presence of a named minister of the gospel and two named witnesses after a marriage certificate had been obtained which was signed by the minister and the witnesses in her presence, the parties subsequently lived together as husband and wife at Indio and in the city of Riverside. It was also shown that Jennie Barton had introduced appellant as her husband to various persons at Indio and in Riverside and that she received through the mail a number of letters and post cards addressed to her in the handwriting of appellant under the names "Mrs. Fred Jacobs," "Mrs. B. F. Jacobs," and "Mrs. F. Jacobs." The above-mentioned evidence was ample to make out a prima facie case of the existence of the marriage relationship which was alleged to have been bigamously contracted. *Budd v. Morgan*, 187 Cal. 741, 203 P. 754; *People v. Mock Yick Gar*, 14 Cal.App. 334, 111 P. 1039; *In re Morgan*, 106 Cal.App. 602, 289 P. 647; *In re Estate of Chandler*, 113 Cal.App. 630, 299 P. 110. It may properly be remarked that the above-described evidence was in no respect contradicted. In particular it is significant that appellant, who took the stand in his own behalf, gave no testimony regarding the marriage which it was alleged he had bigamously contracted with Jennie Barton. Under these circumstances, appellant's complaint that

a marriage in fact was not established by the evidence is manifestly lacking in merit.

[8] In connection with his claim of evidentiary insufficiency, appellant also contends that the existence of an undissolved marriage between himself and his first wife was not established by the evidence. This contention is likewise untenable. The first wife was present in court and testified fully as to the solemnization of her marriage with appellant, their cohabitation as husband and wife at various places in California, that five children were born as the issue of the marriage, and that, so far as she was informed, the marriage had never been dissolved by judicial decree. Appellant testifying as a witness for himself made no denial of the existence of the marriage between himself and his first wife and in effect admitted its existence. The above-described evidence was ample to establish a prima facie showing of the fact of a fully consummated marriage which was in existence at the time he contracted a marriage with Jennie Barton.

[9, 10] Appellant also contends that the evidence showed that, at the time the alleged bigamous marriage with Jennie Barton was contracted, he had not heard from his first wife for more than five years, and that he is therefore exempt from the charge of bigamy of which he has here been convicted by reason of the exception contained in subdivision 1 of section 282 of the Penal Code. Subdivision 1 of section 282 provides that the definition of bigamy as given in section 281 of the Penal Code does not extend to any person by reason of any former marriage whose husband or wife by such marriage has been absent for five successive years without being known to such person within that time to be living.

The evidence respecting this particular feature of the case is not entirely free from conflict. The first wife of appellant called as a witness for respondent was asked on direct examination to give the approximate date of her last conversation with appellant to which she replied that she could not remember the exact date. The following inquiry was then propounded to her: "How could you fix that date, Mrs. Jacobs?" To this question she gave the following answer: "About 1931, I believe." If the jury accepted this testimony as true and correct, it is obvious that appellant was not exempt from the charge

of bigamy lodged against him since the uncontradicted evidence showed that his marriage with Jennie Barton took place on November 19, 1934, less than the statutory period of five years after he had actually seen his first wife and knew that she was then living and that he was still married to her. However, it should be noted that, on cross-examination, the above-mentioned witness testified that the last time she saw appellant was at some time between the 1st and the 15th of September, 1929. The appellant himself testified that he last saw his first wife about the middle of September, 1929, that he had not heard from her since that time, and that on November 18, 1934, he believed that she was dead.

In connection with appellant's claim of exemption from the charge of bigamy, it should also be noted that the first wife testified that appellant did not leave her, that the work in which he was engaged rendered it necessary for him to be absent from his home at frequent intervals, and that at times he sent for her and took her with him for some unspecified period. This testimony is relied upon by appellant as indicating that he could not properly be charged with having voluntarily absented himself from his home. However, the same witness testified that the last place in which the parties lived together was in San Francisco and that, after their separation, she continued to live in San Francisco for a time and then moved to Oakdale where she took up her residence in her mother's home. It is again significant that appellant made no showing that he had ever endeavored to locate his former wife during the five years that elapsed after he had seen her in San Francisco although during two years of this five-year period he duly complied with one of the conditions of his parole from San Quentin Prison, where he had been confined as punishment for a former bigamous marriage by regularly sending money for the support of his children.

Taking all of the evidence in the case which bears upon appellant's claim of exemption from the charge of bigamy because of the provisions of subdivision 1 of section 282 of the Penal Code, it is our opinion that the claim is not sustainable. The above-mentioned section does not specify from whom or from what place the husband or wife must have been absent to entitle the other party to the marriage to the benefit of the exception.

However, it is not beyond the bounds of reason to indulge in the assumption that, in adopting the law, the Legislature had in mind an established home from which one of the spouses should absent himself or herself for a period of five successive years without giving to the remaining spouse any information as to where he or she might have gone or whether he or she still lived. The situation disclosed by the evidence in the instant case clearly does not entitle appellant to the benefit of the statutory exemption. It was certainly he who voluntarily absented himself from his first wife and from the home. She remained in the home with the children of whom appellant was the father. Appellant's testimony that he believed her dead prior to the time he contracted the marriage with Jennie Barton evidently did not commend itself to the jury. The jury was not bound to accept the statement as true emanating as it did from a person whose interest in the outcome of the case unquestioned and further from a person who had theretofore been convicted of an exactly similar felony to that with which he was here accused. Furthermore, appellant's first wife was not dead when he contracted the marriage with Jennie Barton, and if it be assumed that he testified truthfully that he believed that she was dead he was mistaken in a belief in which, under the circumstances here shown, he was not justified in indulging.

[11,12] Appellant maintains that the trial court unduly and improperly extended the scope of appellant's cross-examination. It is particularly urged that the court committed reversible error in permitting certain questions to be asked on cross-examination pertaining to one Sente Theresa Sieveking. The following inquiry which was allowed to be propounded over appellant's objection may be cited as illustrative of appellant's position: "Now, Mr. Jacobs, when Sente Theresa Sieveking in Los Angeles asked you to marry her when she became pregnant, isn't it a matter of fact that you told her you could not because you had a wife living?" It must be conceded that on direct examination no question was asked which related to the above-mentioned person. However, the last inquiry propounded to appellant on direct examination was whether it was his opinion on November 18, 1934, that his first wife was dead, to which he replied that it was. The first question asked on

cross-examination was when he arrived at the above-mentioned opinion, to which he replied that he thought it was about the month of January, 1930. He was then asked if he had retained the opinion ever since the last-mentioned date, to which an affirmative answer was returned. The above-quoted inquiry was then allowed to be propounded.

It is apparent that the purpose of the inquiry was to impeach appellant's prior statement that he believed his first wife was dead by showing that, at a time subsequent to January, 1930, he had told another woman that he could not marry her because he had a wife living. Unfortunately, the inquiry did not specify the date on which the impeaching statement was made nor is the date given in any subsequent inquiry. We think, therefore, that the court erred in permitting the question to be asked in the form in which it appears. Conceivably, the statement might have been made at some time prior to January, 1930. However, appellant's answer to the question was that he had never made such a statement to any one. No evidence was produced which tended to prove that appellant had made the statement sought to be attributed to him. His denial remained uncontradicted, and we must assume that the jury so regarded it when it considered all the evidence which had been produced during the trial. It should be noted that, over his objection, appellant was then asked if he knew Sente Theresa Sieveking, to which he replied that he did not remember. We regard the last-mentioned inquiry as harmless.

[13] It is also urged that the trial court erred in permitting the following inquiry to be answered on cross-examination over appellant's objection: "Did you give your age to Lyle G. McNeal, physician at the Cedar of Lebanon Hospital on September 15, 1933?" This question was permitted to be answered as tending to show that, on the date specified, appellant had made a statement regarding his age which was inconsistent with the testimony as to his age given by him on direct examination. To this question appellant replied that he had never been in the hospital named in the inquiry and that he did not know Dr. McNeal. We think that no error was committed in permitting the question to be asked and answered.

[14] Greater difficulty is encountered in giving consideration to appellant's charge

that the district attorney was guilty of serious misconduct in propounding to appellant on cross-examination the following inquiry: "Now when Balus Forest Jacobs was born in Los Angeles on September 15, 1933, did you give your age to Lyle G. McNeal, physician who had charge of the case?" The last-quoted question immediately preceded the inquiry which is outlined in the immediately preceding paragraph. The trial court properly sustained appellant's objection to the question.

It is obvious that the question containing a reference to the birth of the child in Los Angeles should not have been asked. The apparent purpose of making the inquiry which was to show that an inconsistent statement respecting his age was made by appellant on the date specified is overshadowed by the reference to the birth of the child bearing the same name as that of appellant. The deputy district attorney who conducted the cross-examination of appellant was undoubtedly guilty of misconduct in making the inquiry in the form in which it appears. However, the record discloses that appellant's counsel did not assign the asking of the question as misconduct nor did counsel request the trial court to instruct the jury to disregard the question. On the contrary, the attorney merely objected to the question on various grounds and as above noted the objection was promptly and properly sustained. Under these circumstances the complaint of misconduct entitling appellant to a reversal of the judgment comes too late on this appeal and may not prevail. *People v. Kramer*, 117 Cal. 647, 49 P. 842; *People v. Panagoit*, 25 Cal.App. 158, 143 P. 70; *People v. Spady*, 64 Cal.App. 567, 222 P. 191.

Appellant excepted to certain remarks made by the prosecutor in his closing address to the jury and now contends that the making of them constituted misconduct entitling him to a reversal of the judgment. Examination of the statements to which exceptions were thus taken impels the conclusion that appellant's complaint in this regard is not well taken and may not be sustained.

[15] Appellant cites as fatally erroneous and prejudicial the admission of certain evidence by the trial court. This evidence consisted of the testimony of two witnesses called by respondent and certain documentary evidence. The last-mentioned

evidence was a carbon copy of a certificate which was shown to be a voter's registration certificate which was discovered among the personal belongings of appellant. The witness who identified the certificate testified that she was familiar with appellant's handwriting and that the signature which appeared on the certificate was that of appellant. The certificate bore the date December 10, 1934, the residence address of the voter, which was stated to be 1110 Ingraham street, and the name which appeared thereon was "Balus F. Jacobs." The information alleged that the offense specified therein had been committed by Ben Fred Jacobs "also known as Balus Forest Jacobs." The document was admitted on the theory that it showed that appellant went under the name which appeared on the certificate in addition to the other name stated in the information. No error was committed in the admission of the evidence.

[16] The oral evidence of whose admission appellant complains consists of certain testimony given by two of respondent's witnesses. These witnesses were Jennie Barton Jacobs who was the complaining witness against appellant and Irma Jacobs. The former, who identified the registration certificate mentioned in the preceding paragraph, was permitted to testify over appellant's objection that after she had discovered the certificate she went to the address given therein which she found was an apartment house, that she examined the register and found the names "Mr. and Mrs. B. F. Jacobs" appearing thereon, that she learned "they had moved from that apartment house" and that "they moved to a house on Wilshire boulevard" which was also an apartment house, that she visited the last-mentioned house, which was at 1901 Wilshire boulevard, and there discovered a woman "who called herself the wife and a baby whom she said Mr. Jacobs was the father of." It is useless to attempt to excuse the admission of much of the above-described evidence, particularly that part of the testimony relating to the discovery of a woman who said she was appellant's wife and the baby of whom appellant was declared by this woman to be the father. There are numerous exceptions to the fundamental rule of evidence which precludes the admission of hearsay evidence. We know of none that would condone the reception of such pa-

tent hearsay evidence as that of which particular complaint is here presented. That it was prejudicial to appellant is scarcely open to doubt. Nevertheless, section 4½ of article 6 of the Constitution of California expressly prohibits a reviewing court from reversing a judgment for the improper admission of evidence "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Thorough and careful examination of the record herein has produced a settled conviction that the manifest error in the admission of the evidence did not result in a miscarriage of justice. It is our opinion that no other determination could have been reached by the jury than a verdict of guilt if the evidence improperly admitted had not been received.

[17] Appellant's complaint respecting the improper admission of the testimony of Irma Jacobs is based principally on the fact that it brought to the attention of the jury facts which it is contended were not merely immaterial and incompetent but also highly prejudicial to appellant's rights. It appeared that because of a marriage which appellant had contracted with this witness he suffered a prior conviction of bigamy on December 30, 1927, and was punished therefor by being sentenced to confinement in San Quentin Prison, which sentence he served. This was the prior conviction alleged in the information which appellant admitted upon arraignment. The testimony elicited from the witness which it is contended was improperly admitted related to her marriage with appellant. She was allowed to testify that she married appellant on January 31, 1927, at San Jose, Cal., and that she had taken no action to have the marriage dissolved. If it be assumed that the admission of this evidence was erroneous, it does not appear that appellant was in any respect prejudiced by its reception. Appellant had admitted the prior conviction of bigamy alleged in the information. The admission necessarily implied the existence of a bigamous marriage prior to that for which appellant was here prosecuted. The testimony of the witness simply established the fact of the prior marriage.

[18, 19] However, it is our opinion that the evidence was properly admitted. Appellant testified that he believed that his

first wife, Mary Agnes Jacobs, was dead. The effect of this testimony was to negative the existence of an intent to commit the crime for which he was being prosecuted. It is settled that evidence of the commission of other crimes is admissible if it tends to establish intent or guilty knowledge particularly where an accused claims that he had no such intent or knowledge as to the commission of the crime. *People v. Hendrix*, 192 Cal. 441, 221 P. 349; *People v. McGill*, 82 Cal. App. 98, 255 P. 261; *People v. Bonilla*, 124 Cal.App. 212, 12 P.(2d) 64.

[20] Appellant complains that the trial court erred in the instructions which it gave to the jury and that it improperly refused to give forty-four instructions which he offered. In presenting this contention appellant's brief on appeal refers to these instructions by number and by very incomplete suggestion of their contents without in any instance presenting the full text of the instruction. Nor has appellant presented, in connection with instructions claimed to have been erroneously refused, other instructions given by the court bearing upon the subjects covered by the refused instructions. It is therefore evident that appellant has failed to comply with section 3, rule 8 of the rules governing practice in this court, and in the absence of more definite criticism we are justified in the belief that the instructions given by the trial court were free from serious error and that instructions which were offered by appellant and refused were properly refused. *People v. White*, 102 Cal. App. 647, 649, 283 P. 368; *People v. Reese*, 136 Cal.App. 657, 674, 29 P.(2d) 450.

In support of his contention that the trial court erred in refusing to direct the jury to return a verdict of acquittal at the close of respondent's case and in refusing his motion for a new trial and his motion in arrest of judgment, appellant has presented no contentions different from those presented on his appeal from the judgment. Review of the record impels the conclusion that no error was committed by the court in its denial of each of the aforesaid motions.

The judgment and orders from which this appeal has been taken are therefore affirmed.

We concur: BARNARD, P. J.; MARKS, J.

ROSENBERG et al. v. JANSSEN et al.*
Civ. 9583.

District Court of Appeal, First District,
Division 1, California.
Dec. 23, 1935.

Hearing Denied by Supreme Court
Feb. 21, 1936.

1. Constitutional law ⇨ 169

Generally, remedial legislation does not impair obligation of contracts, because one has no vested right in any particular mode of procedure.

2. Mortgages ⇨ 559(3)

Statute precluding deficiency judgment where trust deed or mortgage was foreclosed under power of sale, unless notice of breach and election to sell was recorded one year before sale date, held inapplicable where sale proceedings were commenced before effective date of statute which was not expressly made retroactive, and since, if construed as retroactive, would impair obligation of contract (Civ.Code, §§ 3, 2924, and 2924½, as added by St. 1933, p. 1674; Code Civ.Proc. § 692).

3. Mortgages ⇨ 559(2)

Statute precluding deficiency judgment where trust deed or mortgage was foreclosed under power of sale, unless notice of breach and election to sell was recorded one year before sale date, would not be construed as applicable where sale proceedings were commenced before effective date of statute on ground of emergency, where no emergency was referred to in statute and existence thereof was not shown (Civ.Code, §§ 3, 2924 and 2924½, as added by St. 1933, p. 1674; Code Civ.Proc. § 692).

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by Sara Rosenberg and others against E. A. Janssen and others. From an adverse judgment, defendants appeal. Affirmed.

Ivan N. Maroevich, of San Francisco, for appellants.

J. J. Posner, of San Francisco, for respondents.

McNUTT, Justice pro tem.

The facts are stated in the opinion of the court.

"The only question for determination on this appeal is whether or not section 2924½ of the Civil Code, as added by St. 1933, p. 1674, is constitutional and retroactive" (ap-

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Hearing denied by Supreme Court 54 P.(2d) 721.

pellant's opening brief, page 15); or, as respondent puts it, "the sole ground of appeal is the claim that Civil Code, § 2924½, applies to this case." The section follows:

"No judgment shall be rendered for the balance due upon any obligation which was secured by a deed of trust or mortgage with power of sale upon real property following the exercise of such power of sale, if exercised at any time between the effective date of this act and September 1, 1935, unless it shall affirmatively appear that the notice of breach and election to sell provided for in section 2924 of the Civil Code, pursuant to which such sale was held, was recorded at least one year before the date of such sale. This act and the provisions of this section shall be effective to and until September 1, 1936."

On October 4, 1927, defendants E. A. and Isabel Janssen executed a two-year note and trust deed for \$10,000. (Tr., p. 3.) On February 3, 1928, defendants E. A., Clayton R., and Florence Ethel Janssen executed another two-year note and trust deed for \$12,000. (Tr., p. 9.) On May 4, 1933, notices of breach were recorded. (Tr., p. 6, f. 17; Tr., p. 12, f. 36.) Notices of time and place of sale were posted August 9, 1933, and published August 9, 16, 23 and 30, 1933. (Tr., p. 7, f. 19; Tr., p. 13, f. 39; Tr., p. 35, f. 105.) On September 5, 1933, one parcel of property was sold for \$7,000. (Tr., p. 7, f. 21.) On September 6, 1933, the other parcel was sold for \$8,500. (Tr., p. 14, f. 40.) Suit for the balance remaining unpaid on both notes was filed October 2, 1933. (Tr., p. 16, f. 47.) After trial and before decision (Tr., p. 39, f. 116), the court, on February 15, 1934, vacated the submission of the cause, permitted plaintiffs to amend the complaint to allege the fair market value of the realty at time of sale, and appointed an inheritance tax appraiser. (Tr., p. 39, f. 116.) No objection to these orders was made. The requisite amendment was filed, counsel stipulating it was deemed answered. (Tr., pp. 23-26.) On February 26, 1934, a further hearing was had. The appraiser reported the fair market value as \$1,500 above the total sale price. (Tr., p. 40, f. 118.) Judgment for plaintiffs followed, defendants receiving all credits claimed, including said \$1,500. (Tr., p. 40, f. 119.)

[1-3] Section 3 of the Civil Code provides that no part of the Code (amendments included, *In re Frees' Estate*, 187

52 P.(2d)—60½

CAL.REP.51-52 P.2d-38

Cal. 150, 201 P. 112) is retroactive unless expressly so declared. The Code section under examination does not so declare nor is it made applicable, in terms, to trust deeds where proceedings to sell had been commenced before August 20, 1933. Appellant argues that the section in question as applied to this particular case is not violative of the contract clauses of the respective Constitutions nor does it violate due process clause of the Constitution because it is essentially remedial, and that legislation of that class does not impair the obligation of contracts because one has no vested right in any particular mode of procedure. As a general proposition, this is true. His main reliance as to the remedial aspects of the law is based upon *Los Angeles Bond & Securities Co. v. Heath*, 120 Cal.App. 328, 7 P.(2d) 1089, wherein a statute extended the time to pay street assessments. Consideration of the statute there under examination illustrates the vice of the application of the principle to the instant case. The same statute which extended the time to pay street assessments also extended the time to sue, whereas at bar it is manifest that, if the amended Civil Code section is to apply, the statute of limitations would have run against the right of the plaintiffs to sue for deficiency judgment, and, hence, a deprivation of a substantial right would have been worked. The parties to the instant proceeding incorporated the provisions of section 2924 of the Civil Code and 692 of the Code of Civil Procedure in their contract, namely, that upon default the security could be sold within three months and twenty-one days after recordation of the notice of breach. *Robinson v. Magee*, 9 Cal. 81, 84, 70 Am. Dec. 638; *McGee v. San Jose*, 68 Cal. 91, 94, 8 P. 641; *Bates v. Gregory*, 89 Cal. 387, 26 P. 891; *Hershey v. Cole*, 130 Cal. App. 683, 20 P.(2d) 972.

Further, the law in force when the contracts were made provided that where the security sold for less than the amount paid, the creditor could sue on the note to recover the deficiency. *Sacramento Bank v. Copsey*, 133 Cal. 663, 66 P. 8, 205, 85 Am.St.Rep. 242; *Ley v. Babcock*, 118 Cal.App. 525, 5 P.(2d) 620. These parties, by contract, agreed that after the default the property might be sold within a reasonably short time; to change that time to one year in the event the plaintiff desired to recover an unpaid balance, the value of the security meanwhile diminishing, would violate the contract

clauses of the Constitutions. *Barnitz v. Beverly*, 163 U.S. 118, 16 S.Ct. 1042, 41 L.Ed. 93. So that if this statute is to be given retroactive effect it would impair the contract rights of the plaintiffs.

Kindred legislation has been declared unconstitutional in retroactive aspects in many jurisdictions. *Bankers Life Co. v. J. R. Canterbury, Jr., et al.*, 50 P.(2d) 83, October 17, 1935, the Second Appellate District, Division Two, held that section 2924½ of the Civil Code does not apply to notes or trust deeds executed prior to the effective date of that act, and that to hold otherwise would impair the obligation of a contract and render this section unconstitutional. The same decision draws attention to a ruling in *Brown v. Ferdon* (Cal.App.) 46 P.(2d) 218, to the same effect, in which case a hearing has been granted by the Supreme Court.

Appellant urges upon the court's consideration the so-called "Minnesota Decision," wherein a moratorium statute of that state was upheld by the Supreme Court of Minnesota as by the Supreme Court of the United States, in *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413, 88 A.L.R. 1481; *Blaisdell v. Home Building & Loan Association*, 189 Minn. 422, 249 N.W. 334, 86 A.L.R. 1507.

No decision is cited by appellant which sustains the right of the Legislature to compel the surrender by a person of a valuable contract right (here the right to sue for a deficiency) in order to exercise other rights provided in the legislation. The *Blaisdell* Case does not afford a parallel either by reason of the terms of the statute or decision. The Minnesota law gives to the court the power to adapt the law to the exigencies of each particular case and the occurrence of conditions, not here claimed to exist, were there found to exist as a predicate for the application of the law, namely, acute emergency, amounting to public disaster, and adaptation in the way of postponement of the sale to meet the needs of the particular case, a finding that the fair market value of the property involved exceeded the redemption price so that a benefit would accrue to the debtor by postponement, a finding that the debtor was presently unable to meet his debt, and therefore would be benefited by the postponement, and, finally, an ad interim compensation to the creditor pending the delay.

There is no direct evidence that any acute emergency existed in California between the effective date of the statute, August 20, 1933, and the date of sale, September 6, 1933. No emergency is referred to in the statute, nor is the existence of such supplied by pleading or evidence. The existence of none can be inferred from the fact that the Legislature permitted the ninety days to elapse between the enactment of the law and the date of this operation. The joint resolution of the Legislature to which appellant draws attention as dated April 14, 1933, had reference to homes and farms and not to apartment houses wherein defendants do not reside. Evidence was produced that between August 20, 1933, and the date of sale, September 6th, there was a market for similar properties rather than that there was no market for real estate.

In *Worthen Co. v. Thomas*, 292 U.S. 426, 54 L.Ed. 816, 78 L.Ed. 1344, 93 A.L.R. 173, it is held that the *Blaisdell* Case precluded a consideration which would permit the state to adopt as its policy the repudiation of debts or the destruction of contracts and that the ruling involved in the latter case was reasonable from the standpoint of both mortgagor and mortgagee. It will be observed that in the *Blaisdell* Case the mortgagor was granted additional time to redeem after sale under the aforementioned conditions. In the case at bar, if the creditor was compelled to wait the statutory time to sell the security as a condition of suing for a deficiency judgment, he would in the circumstances of this case, lose his right to sue for any deficiency by reason of outlawing of the debt.

In *Central Bank of Oakland, a Corporation, v. Frank H. Proctor et al.* (Cal. App.) 51 P.(2d) 157, November 6, 1935, and in *Bechtel v. Nelson et al.* (Cal.App.) 51 P.(2d) 99, it is held that section 580a of the Code of Civil Procedure, as added by St. 1933, p. 1672, § 4, is not retroactive because of failure of the Legislature so to declare it, and, further, because such operation would impair contractual obligations, and that, consequently, the provisions of the section could not be invoked in determining the amount of a deficiency judgment where the note and deed of trust were executed and the trustee's sale was held prior to the effective date of the section. To the same effect *Smith, Ex'r, v. Davis* (Cal.App.) 52 P.(2d) 515, citing cases. In the instant case the court be-

low did apply this section without, however, any complaint being here made by respondents, plaintiffs below, from which we conclude that the most that may be said is that appellants received if anything more credit than they were entitled to.

We therefore conclude that section 2924½ of the Civil Code has no application to the contracts in suit, and that the judgment should be and is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.



11 Cal.App.2d 34

NIGHTINGALE v. BIRNBAUM et ux.
Civ. 9497.

District Court of Appeal, Second District,
Division 1, California.
Dec. 26, 1935.

1. Automobiles ☞245(8)

Where seven year old child was struck by automobile when he continued across street intersection after traffic signal had turned against him, and motorist's view of child was obstructed by automobiles to her left traveling in same direction, whether motorist was negligent *held* for jury.

2. Automobiles ☞245(74)

Where seven year old child was struck by automobile when he continued across street intersection after traffic signal had turned against him and motorist's view of child was obstructed by automobiles to her left, traveling in same direction, whether child was contributorily negligent *held* for jury.

3. Appeal and error ☞1064(1)

Where instructions fairly enunciated law of case and result of trial would not have been different had alleged errors in refusing and giving instructions not been committed, judgment would be affirmed, notwithstanding some points of appellant's criticism were not devoid of merit.

Appeal from Superior Court, Los Angeles County; Harry F. Sewell, Judge.

Action by Donald Nightingale, by and through his guardian ad litem, Gladys Nightingale, against Arthur Birnbaum

and wife. From a judgment for defendants, plaintiff appeals.

Affirmed.

Burke & Ball, of Long Beach (Joseph A. Ball, of Long Beach, of counsel), for appellant.

Paul Nourse, of Los Angeles, for respondents.

HOUSER, Presiding Justice.

Plaintiff appeals from a judgment which was entered against him, pursuant to a verdict that was rendered by a jury in an action that was brought by him against defendants to recover damages on account of personal injuries that plaintiff sustained in a collision between him and an automobile that was owned by one of the defendants and operated by the other.

[1,2] Appellant first urges the point that the verdict of the jury was not supported by the evidence. Although not in complete detail, the evidence was such that the jury was authorized to rely upon the following facts, to wit: The accident that resulted in the injuries of which plaintiff complains occurred at a controlled "Stop and Go" intersection of two streets. Plaintiff, who was a boy of seven years of age, attempted to cross one of the intersecting streets at a time when his course of travel was apparently protected by a "Go" signal; but when he was a little more than one-half way across the street, in due course as far as he was concerned, the signal was changed to "Stop." However, he continued on his way. When, as it affected the defendants, the "Go" signal was displayed, after looking in the direction from which plaintiff was then approaching, defendant, who was driving the automobile that afterward collided with plaintiff and which automobile had been stopped at its proper place before reaching the intersection of the two streets, proceeded in an attempt to drive the automobile across the intersection. However, at the time when said defendant "looked," two other automobiles, that likewise had been stopped before the intersection parallel to the position occupied by the automobile that was being operated by said defendant, obstructed her complete view of the situation in the direction from which plaintiff was approaching said defendant, and for that reason the latter failed to see plaintiff, who, as hereinbe-

fore stated, was a boy of seven years of age. The automobile was started very slowly and had traversed a distance of about two feet when its left fender came into collision with the boy, and thereby caused the injuries that were made the subject of his complaint. After striking the boy, the automobile was stopped "within a few inches." It also appeared in evidence that the boy was running both before and at the time when he was struck by the automobile.

In such circumstances it is clear that questions of fact were properly submitted to the jury for its determination of whether the defendants were negligent in the operation of the automobile, as well as whether the boy was guilty of contributory negligence in the premises; and those questions having been impliedly answered in favor of defendants, this court is powerless to interfere.

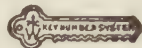
Appellant also predicates prejudicial error asserted to have been committed by the trial court not only in the giving of alleged improper instructions to the jury at the request of defendants, but also in the refusal to give to the jury at the request of plaintiff certain other specified instructions.

[3] It would be a task of some proportions to herein set forth each of such criticized instructions, together with other instructions that were given by the court to the jury, and which bore directly upon those which are either the subject of attack herein or those to which appellant has directed attention as having been refused, and then proceed to an analysis of each of the several instructions, and either to differentiate the criticized and the refused instructions from the other or the others, or to point out the practical effect of the language employed in each and all of said instructions—all to the end that our conclusion with reference thereto might thereby be sustained by appropriate reasoning. In such circumstances, it may suffice to state that, although from a consideration of the points presented by appellant with reference to the questions herein submitted, it would appear that some of them are not wholly devoid of abstract merit, nevertheless, considering all the instructions that were given to the jury, it manifestly appears that the jury was fairly instructed as to the law of the case; and that even had such assumed

(but not conceded) errors not been committed, the result would not have differed from that which obtained on the trial of the action.

It follows that the judgment should be, and it is, affirmed.

We concur: YORK, J.; DORAN, J.



11 Cal.App.2d 38

MARTINELLI et al. v. STABNAU et al.

Civ. 10020.

District Court of Appeal, Second District,
Division 1, California.

Dec. 26, 1935.

Hearing Denied by Supreme Court

Feb. 24, 1936.

1. Automobiles ⇨193(10)

Where automobile driven by insurance agent employed to solicit insurance business struck plaintiff while agent was driving home to lunch, employer held not liable for plaintiff's injuries, since agent was not performing any service for his employer "within scope of his employment."

[Ed. Note.—For other definitions of "Scope of Employment," see Words & Phrases.]

2. Automobiles ⇨245(30)

Whether automobile driver is acting within scope of his employment is conclusion of law where evidence upon subject is not conflicting, but where conflicting upon issue, it is finding of fact.

3. Appeal and error ⇨1008(1)

Finding upon question of mixed law and fact is binding on reviewing court.

Appeal from Superior Court, Los Angeles County; Philip C. Sterry, Judge.

Action by Bruno Martinelli and another against Brognard Stabnau and the Prudential Insurance Company of America. Judgment for plaintiffs against defendant Stabnau and in favor of defendant Insurance Company, and plaintiffs appeal.

Affirmed.

C. P. Monningh, of Pasadena, and A. W. Brunton and Lauren M. Handley, both of Los Angeles, for appellants.

Loeb, Walker & Loeb (by Herman F. Selvin), all of Los Angeles (Harry Friedman and Henry Duque, both of Los Angeles, of counsel) for respondent Prudential Ins. Co. of America.

SHINN, Justice pro tem.

Appeal by plaintiffs from a judgment in favor of defendant Prudential Insurance Company of America, in an action for personal injuries arising out of an automobile accident.

The appeal of plaintiffs comes to this court upon the judgment roll. Judgment was in their favor against defendant Stabnau and in favor of defendant Prudential Insurance Company. Gertrude Martinelli was struck and injured by an automobile operated by defendant Stabnau, who was employed by respondent Prudential Insurance Company under a written contract. By the terms of his employment Stabnau was to solicit insurance business, collect premiums, deliver policies, and attend meetings of agents whenever and wherever designated by the corporation. He was required to devote his entire efforts and time to the interests of his employer; he had a certain territory in which to work, but was allowed and was often required to leave that territory and perform services in other localities. Within a few minutes before the accident he had been engaged in the business of the company. The court made the following finding: "It is true that at the time of the accident defendant, Brognard Stabnau, was not engaged in any of the duties required by his contract of employment to be performed for and on behalf of defendant, The Prudential Insurance Company of America; that at the time of said accident said defendant, Brognard Stabnau, was engaged in returning to his own home for the purpose of eating lunch and had terminated his business dealings prior to the time said collision occurred."

[1] The case presents the sole question whether the employee, while on his way home to lunch, was acting in the service of his employer and not solely in his own behalf, while he was doing no act or thing which pertained to the business of his employer. The question contains its own answer. The finding we have quoted is conclusive as to the question of fact involved. The servant was not at the time of the accident actually performing any service for

his employer. Therefore, the latter was not responsible for his acts. *Kish v. California State Automobile Association*, 190 Cal. 246, 212 P. 27; *Adams v. Tuxedo Land Co.*, 92 Cal.App. 266, 267 P. 926; *Rapp v. Southern Service Co.*, 116 Cal.App. 699, 4 P.(2d) 195; *Bourne v. Northern Counties T. Ins. Co.*, 4 Cal.App. (2d) 69, 40 P.(2d) 583; *Humphry v. Safeway Stores, Inc.*, 4 Cal. App.(2d) 589, 41 P.(2d) 208.

[2, 3] Appellants contend that the finding to the effect that Stabnau was not acting within the scope of his employment is a mere conclusion of law. So it is in a case where the evidence upon the subject is not in conflict. *Humphry v. Safeway Stores, Inc.*, supra. But where the evidence is conflicting upon the issue it is a finding of fact (*Dillon v. Prudential Insurance Co. of America*, 75 Cal.App. 266, 242 P. 736), and if the finding was upon a question of mixed law and fact it would be binding on this court (*Hillen v. Industrial Accident Comm.*, 199 Cal. 577, 250 P. 570). The evidentiary facts found by the court do not show that Stabnau was engaged in the business of his employer at the time of the accident. If these findings be accepted as a statement of all of the evidence relating to this question (and they must be so accepted upon the record before us), they are wholly insufficient to warrant a conclusion that Stabnau was acting within the scope of his employment. Upon the contrary, they would support the opposite conclusion, for it does not appear from the evidentiary facts found that Stabnau was on any mission except one of his own.

It is unnecessary to discuss the numerous cases cited by appellants in which the courts have held evidence to be sufficient to support findings that the employees involved in accidents were acting within the scope of their several employments. Suffice it to say that we think no authority will be found for the proposition that as a matter of fact, and much less as a matter of law, an employee who is going home to lunch, after having temporarily laid aside the duties of his employment, still remains actively engaged in the business of his employer.

The judgment is affirmed.

We concur: HOUSER, P. J.; YORK, J.

10 Cal.App.2d 619

**ADVANCE AUTO BODY WORKS, Inc., v.
ASBURY TRANSP. CO., Inc.**

Civ. 10553.

District Court of Appeal, Second District,
Division 2, California.

Dec. 13, 1935.

Rehearing Denied Jan. 3, 1936.

Hearing Denied by Supreme Court
Feb. 10, 1936.

1. Contracts $\S$ 229(2)

Where, in contract for construction work to be done "on a cost plus 10 per cent." basis, quoted words were changed to read "on a time and material cost plus 10 per cent.," overhead expenses held improperly included in computation of contract charge.

2. Contracts $\S$ 229(2)

Unless expressly written into contract by defining exactly overhead intended to be covered, words "time and material," in contract provision for payment on "time and material" cost plus basis, will not include overhead charges, but refer solely to wages and salaries of men engaged in particular work contracted for and actual cost of materials furnished, and words will not be extended beyond their exact meaning, but will be given restricted meaning or at least considered in popular sense.

[Ed. Note.—For other definitions of "Time and Material Basis," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by the Advance Auto Body Works, Incorporated, against the Asbury Transportation Company, Incorporated. Judgment for plaintiff, and defendant appeals.

Reversed, with instructions.

Bart F. Wade, of Los Angeles, for appellant.

Courtney Lacey, of Los Angeles, for respondent.

WOOD, Justice.

Plaintiff, a corporation engaged in the business of building commercial trucks and auto bodies, and defendant corporation, entered into a written contract under the terms of which plaintiff agreed to construct a horse-van body for defendant; the construction work to be done "on a time and material cost plus 10%" basis. When the work was finished, plaintiff rendered a bill for \$2,008.41 covering the work, and defendant tendered payment of

\$1,107.27 plus sales tax as payment in full. The difference in the two amounts was made up of general overhead charges. The trial court rendered judgment in favor of plaintiff for \$1,843.98, and defendant appeals, seeking a modification of the judgment which will exclude the overhead charges. It was stipulated by the parties during the trial that the actual cost of labor was \$582.15 and the cost of material \$429.49, or a total of \$1,011.64 for labor and material. Appellant maintains that to this sum should be added the 10 per cent. additional sum called for by the contract, together with state and federal taxes, making a total of \$1,162.86. The sum of \$494.55 overhead expense which the trial court included in the judgment was made up as follows: Nonproductive labor, \$151.65; shop supplies, \$39.78; heat, light, power, and water, \$24.23; depreciation on machinery, \$48.30; insurance \$28.36; rent, \$130.61; taxes, \$34.97; miscellaneous, \$23.83; towel supply, \$.27; depreciation, factory equipment, \$12.55.

The sole question to be determined on this appeal is whether or not the trial court erred in including the charge for overhead expense, in view of the provision of the contract which provided for payment "on a time and material cost plus 10%" basis.

[1,2] Appellant contends that the evidence does not support the findings, for the reason that it was stipulated by the parties, and the evidence clearly shows, that the total cost of time and material was \$1,011.64, 10 per cent. of which is \$101.16, making a total of \$1,112.80, and that the sum of \$494.55 allowed by the court for overhead expenses, and the sum of \$97.98 for selling expense, were erroneously included by the trial court under the heading of time and material. This contention must be upheld. The contract herein sued upon contained the words "Cost plus 10%," through which appears a line, and following these words the contract provides, "On a Time and Material Cost Plus 10%." By the change in phraseology, it is apparent that appellant attempted to more definitely restrict the charges for which it would be liable, and to avoid liability for any overhead charges. The overhead expense should not have been included in the computation of the charge to be made under the contract. To justify its inclusion it would

be necessary to read into the contract terms which were obviously not intended to be included therein. In *Lytle, Campbell & Co. v. Somers, Fitler & Todd Co.*, 276 Pa. 409, 120 A. 409, 411, 27 A.L.R. 41, a leading case on this subject, the court said: "Unless expressly written into the contract by defining exactly the overhead intended to be covered, the words 'time and material,' and like expressions, will not include overhead charges, but refer solely to the wages and salaries of the men engaged in the particular work contracted for and the actual cost of the materials furnished. The words will not be extended beyond their exact meaning, and indeed they should be given a restricted meaning. At least they should be considered in the sense in which they are popularly understood. One thus contracting engages to furnish and keep in condition the tools and necessary equipment to do the work."

The judgment is reversed, with instructions to the trial court to render a modified judgment for respondent in the sum of \$1,162.86, appellant to recover its costs of appeal.

We concur: CRAIL, P. J.; McCOMB, Justice pro tem.



10 Cal.App.2d 623

BANDINI ESTATE CO. et al. v. PAYNE et al.
Civ. 5435.

District Court of Appeal, Third District,
California.

Dec. 13, 1935.

Hearing Denied by Supreme Court
Feb. 10, 1936.

1. Mandamus ⇨118

Mandamus held not to lie to compel county auditor and tax collector to change amounts of taxes levied against certain described properties and to accept greatly reduced figures in full payment thereof, where neither auditor nor tax collector was authorized to change valuation of property or amount of taxes levied thereon (Code Civ. Proc. § 1085).

2. Mandamus ⇨16(1)

Writ of mandamus will not issue to compel one officer to perform duties imposed by

law upon another officer, but will issue only against person, officer, or inferior tribunal to compel performance of act which law specially enjoins upon such individual or officer (Code Civ.Proc. § 1085).

3. Taxation ⇨497

Proceeding in which board of equalization, sitting as quasi judicial tribunal, passed upon conflicting evidence which was adduced in 11-day hearing before it, and formally sustained taxes assessed against petitioners' properties by assessor, could not be reviewed by mandamus.

4. Mandamus ⇨72

Mandamus will not issue to control exercise of discretion of judicial or quasi judicial tribunal in determination of controversy which is dependent on disputed facts.

5. Mandamus ⇨187(9)

District Court of Appeal must assume, in absence of evidence to contrary, that assessor and board of equalization ascertained and fixed values of properties on basis of lawful valuation and without discrimination.

6. Taxation ⇨497

Method of ascertaining valuation of property as basis for levying taxes cannot be interfered with by mandamus so long as taxes are lawfully and uniformly assessed without fraud or undue oppression.

7. Taxation ⇨469

Action of tax assessor, who formerly followed custom authorized by ordinance of accepting as basis of property valuations for purpose of taxation only 50 per cent. of "full cash value" of property, in increasing valuation of property held not to invalidate tax on ground of fraud or oppression, where increased valuation did not exceed maximum "full cash value" fixed by law, and all properties were assessed on same relative uniform basis (Pol.Code, § 3627, and § 3617, subd. 5).

8. Municipal corporations ⇨122(1)

Ordinance which was pleaded by reference to its number only was improperly pleaded (Code Civ.Proc. § 459).

9. Mandamus ⇨154(2)

Incorporation of transcript of record of proceedings of board of equalization in petition in mandamus to compel auditor and tax collector to change amounts of taxes levied against certain described properties and to accept reduced figures in full payment thereof held improper, as violating rule that evidentiary matters should not be pleaded (Code Civ.Proc. §§ 426, 1109).

10. Mandamus ⇨154(1)

General rules of pleading apply to mandamus proceedings (Code Civ.Proc. § 1109).

11. Pleading 11

Ordinarily, pleading of evidentiary facts is improper (Code Civ.Proc. § 426).

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Mandamus proceeding by the Bandini Estate Company and others against H. A. Payne, county auditor of the county of Los Angeles, and another. From a judgment of dismissal, the petitioners appeal.

Affirmed.

U. T. Clotfelter, L. W. Butterfield, W. Sumner Holbrook, Jr., Holbrook, Taylor, Tarr & Horton, LeRoy M. Edwards, O. C. Sattinger, Christian H. Hartke, Loyd Wright, H. B. Green, Paul R. Watkins, and Paul Overton, all of Los Angeles, for various appellants.

Everett W. Mattoon, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

The petitioners have appealed from a judgment of dismissal which was rendered against them following an order sustaining a demurrer and denying leave to amend the petition for a writ of mandamus brought to compel the auditor and the tax collector of Los Angeles county to change the amounts of taxes levied against certain described properties in that city for the year 1933-1934, and to accept greatly reduced figures in full payment thereof.

The petition alleges: That the appellants own 173 parcels of real property in Los Angeles county consisting of 2,463 acres of land which were assessed at a valuation of \$3,425,780 in the year 1933; that the assessor's valuations thus fixed and extended on the assessment rolls were grossly excessive, unjust, discriminatory, and fraudulent to the extent of the aggregate sum of \$1,287,770; that petitioners subsequently filed written protests against such assessments with the Los Angeles county board of equalization, which were regularly heard at an 11 days' session of the board held for that purpose, and at which a thousand pages of testimony were adduced. The entire record of that proceeding is made a part of the petition for a writ of mandamus as Exhibit K thereof. The board denied each and all of the protests, and approved the

valuations previously fixed by the assessor,¹ which were found to be fair, reasonable, and just. The alleged fraudulent, unjust, excessive, and discriminatory acts of the assessor are asserted to have been the result of his arbitrary and wrongful fixing of valuations, contrary to an ordinance previously adopted, in excess of 50 per cent. of the full and fair value of said properties in a time of unusual financial depression. A demurrer to the petition was sustained on the ground that it fails to state a cause of action against these respondents warranting the issuing of a peremptory writ of mandamus. The appellants were denied leave to amend their petition. A judgment of dismissal was accordingly rendered. From that judgment this appeal was perfected.

[1, 2] The granting of a peremptory writ of mandamus in this proceeding was properly denied. The petition fails to state a cause of action. The application for the writ is directed only to the auditor and tax collector of Los Angeles county, neither of whom has any legal duty or authority to fix or change the valuations of property or the amounts of taxes to be levied thereon. A writ of mandamus will not issue to compel one officer to perform the duties imposed by law upon another officer. A writ of mandamus will issue only against a person, officer, or inferior tribunal "to compel the performance of an act which the law specially enjoins" upon such individual or officer. Section 1085, Code Civ.Proc.; 16 Cal.Jur. 764, §§ 4 and 27; *Boggs v. Jordan*, 204 Cal. 207, 216, 267 P. 696.

[3-7] Even though this petition were directed to the board of equalization which has the legal authority to adjust taxes in a timely and proper proceeding therefor, it fails to state facts sufficient to warrant the issuing of a writ of mandamus for the reason that this is an evident attempt to review the proceedings of that board and control its judicial discretion to determine the valuations of properties for the purpose of taxation. It is an established principle of law that mandamus will not issue to control the exercise of the discretion of a judicial or quasi judicial tribunal in the determination of a controversy which is dependent on disputed facts. *Tilden v. Board of Supervisors*, 41 Cal. 68; *Sullivan v. Gage*, 145 Cal. 759, 767, 79 P. 537, 540; *La Grange, etc., Co. v. Carter*, 142 Cal. 560, 565, 76 P. 241; *Hammond Lumber Co. v.*

County of Los Angeles, 104 Cal.App. 235, 241, 285 P. 896; 16 Cal.Jur. 809, § 28. In the Sullivan Case, supra, it is said in that regard: "Whether the claim is a proper town or county charge, in a case where it is doubtful and rests upon disputed evidence, and what amount shall be allowed when not fixed by statute, are questions which the statute commits to the determination of the board of audit; and however much it may err in judgment upon the facts, so long as it keeps within its jurisdiction and acts in good faith, its audit cannot be overhauled, but is final."

The preceding language is applicable to the present proceeding in which the board of equalization sitting as a quasi judicial tribunal passed upon conflicting evidence which was adduced in an 11-day hearing before it, and formally sustained the taxes which had been previously levied against petitioners' properties by the assessor. The implied findings of the board that the properties were fairly and uniformly assessed without the exercise of fraud is amply supported by the evidence. Section 3627 of the Political Code provides that "all taxable property must be assessed at its full cash value." The term "full cash value," as it is used in the last-mentioned section, is defined as "the amount at which the property would be taken in payment of a just debt from a solvent debtor." Section 3617, subd. 5, Pol. Code. There is nothing in the record to indicate that the properties which are involved in this proceeding would not be so accepted at the valuations fixed by the assessor of Los Angeles county for the purpose of taxation and approved by the board of equalization. In the absence of evidence to the contrary, we must assume that the assessor and the board of equalization properly performed their respective duties and that the values of all Los Angeles properties were ascertained and fixed on the basis of a lawful valuation, and without discrimination. It is necessarily true that in times of great financial depressions the immediate market value of real property decreases and the comparative burden of taxes is therefore greater than in times of prosperity. The necessity of raising funds by taxation for the operating expenses of local, state, and federal government exists in times of depressions as well as in times of prosperity. So long as taxes are lawfully and uniformly assessed without fraud or undue oppression, the method of ascertaining the valuation thereof as a basis for levying taxes may not be inter-

fered with by means of mandate. The fact that an assessor formerly followed the custom which was authorized by a city ordinance of accepting as a basis of property valuations for the purpose of taxation only 50 per cent. of the "full cash value" thereof, and later increases that valuation, so long as he does not exceed the maximum "full cash value" fixed by law, furnishes no evidence of fraud or oppression, provided all other properties are assessed on the same relative uniform basis.

[8] The ordinance upon which the petitioners rely is improperly pleaded by reference to its number only. Section 459 of the Code of Civil Procedure requires at least a reference to the title of an ordinance and a statement of the date of its passage to constitute a proper pleading thereof. The ordinance is not before this court, and we are not informed of its exact provisions. It is not necessary for us to determine whether a city may lawfully authorize its assessor to accept 50 per cent. of the value of property within its limits as a basis for levying taxes, contrary to the state law which requires all taxable property to be assessed for "its full cash value." It does not appear the ordinance is mandatory in that regard.

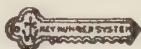
[9-11] We are of the opinion the petitioners have misapprehended their proper remedy for an alleged discrimination against them by the levying of illegal taxes, in seeking by mandate to compel the auditor and the tax collector to perform duties which are imposed by law only upon the assessor or the board of equalization. This is not a suit for reimbursement of alleged illegal taxes which have been levied and collected. No part of the taxes levied against any of the properties of these petitioners for the year 1933-1934 have been paid. This is an apparent effort to review the quasi judicial proceedings of a board of equalization by means of a writ of mandamus. It is evident that the proceedings of the board could not ordinarily be reviewed in a mandamus proceeding. In order to accomplish that purpose, the petitioners have attempted to make the proceedings of the board a part of their petition for a writ of mandamus by referring to a thousand-page transcript thereof as Exhibit K. This is certainly not an approved way of converting a mandamus proceeding into a writ of certiorari, and it violates the established principle that evidentiary matters should not be pleaded.

The general rules of pleading apply also to mandamus proceedings. 16 Cal.Jur. 858, § 60; section 1109, Code Civ.Proc.; *People v. Board of Supervisors*, 27 Cal. 655. The complaint must consist of a statement of facts "in ordinary and concise language." Section 426, Code Civ.Proc. It is usually improper to plead evidentiary facts. 21 Cal.Jur. 20, § 8; 21 R.C.L. 443, § 6.

For the reason that the petition for a writ of mandamus in this proceeding fails to state a cause of action against these respondents, and that it is apparently impossible to do so under the circumstances of this case, the demurrer was properly sustained without leave to amend.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



11 Cal.App.2d 30

BROWN et al. v. JONES et al.
Civ. 10762.

District Court of Appeal, Second District,
Division 2, California.
Dec. 24, 1935.

Judgment ☞303

Statute authorizing vacation of judgment and entering of another judgment for incorrect conclusions of law not consistent with or not supported by findings of fact held not to authorize amendment of judgment quieting title to realty in defendant effective upon defendant paying plaintiff sum expended by plaintiff for taxes, by modifying judgment to provide for judgment for plaintiff unless sum were paid within 30 days (Code Civ.Proc. § 663).

Appeal from Superior Court, Los Angeles County; Lester William Roth, Judge.

Action by G. M. Brown and another, copartners doing business under the copartnership name of Brown & Johnson against William Jones and another, in which the defendants filed a cross-complaint. Judgment was entered for the named defendant upon condition that he pay plaintiffs a specified sum. From an order thereafter

made modifying such judgment, the named defendant appeals.

Order reversed.

H. E. Gleason and Fred W. Heatherly, both of Los Angeles, for appellant.

R. Dechter, of Los Angeles, for respondents.

WOOD, Justice.

Plaintiffs commenced this action to quiet title to certain real property, basing their claim of title on a tax deed issued by the tax collector of Los Angeles county. Defendant and appellant William Jones, by cross-complaint, sought to have his own title quieted. The trial court found in favor of Jones, and also found that plaintiffs had expended the sum of \$302.08 in paying the taxes, assessments, penalties, and other costs. Under the heading "Conclusions of Law," there appears this language: "That the defendant William Jones is entitled to a judgment quieting the title in and to said real property as against the plaintiffs and each of them, upon his paying to the plaintiffs the sum expended by the plaintiffs in pursuit of the state's title to said property." In the judgment, which was filed on February 23, 1933, after adjudging that the title of Jones be quieted, the trial court inserted the following: "It is further ordered and decreed, however, that the foregoing provisions of this decree shall not become effective unless and until the said defendant William Jones shall have paid to the plaintiffs herein the sum of \$302.08, said sum being the full amount of taxes," etc.

In April of 1933 plaintiffs filed a notice of motion to amend the judgment to provide that unless the sum of \$302.08 be paid within thirty days from the date a judgment be entered in plaintiffs' favor. The record before us is very fragmentary. It appears from the bill of exceptions that this motion was ordered off calendar; and in another place therein it appears that a minute order was made as follows: "Motion to set aside conclusions of law and enter others and different judgment comes on for hearing; * * * Said motion is granted. Judgment to provide that amount be paid within thirty days from date." This order was made on May 1, 1933, and is the order from which this appeal is taken.

Appellant claims that the motion was filed too late, but the record is not sufficiently complete for us to pass upon this point, and counsel for respondents has filed no brief. The point may be regarded as of no consequence, since we have concluded that the judgment must be reversed for another reason.

Plaintiffs have attempted to obtain an order based upon section 663 of the Code of Civil Procedure, which provides that a judgment or decree may be set aside and vacated and another and different judgment entered for the following cause: "Incorrect or erroneous conclusions of law not consistent with or not supported by the findings of fact." The record discloses that the judgment and conclusions of law herein are consistent with and are supported by the findings of fact, and are not incorrect or erroneous. If the order appealed from has any effect whatever, it would bring about a modification of the judgment, which result may not be brought about under the circumstances disclosed by the record.

The order appealed from is reversed.

We concur: CRAIL, P. J.; McCOMB, Justice pro tem.



11 Cal.App.2d 41

SILVERMAN v. WRIGHT et al.
Civ. 10761.

District Court of Appeal, Second District,
Division 2, California.
Dec. 26, 1935.

1. Appeal and error Ⓒ1010(1)

Finding of trial court supported by substantial evidence cannot be disturbed on appeal.

2. Corporations Ⓒ547(4)

Finding that corporation's transfer of property to stockholder, in return for surrender of stock, was not fraudulent as to creditors of corporation, *held* justified, where there was evidence that corporation at time of transfer had other property more than sufficient to satisfy claim sued on.

3. Corporations Ⓒ547(4)

Assignee of deficiency judgment against corporation *held* not entitled to sue directors thereof upon directors' statutory liability for transfer in 1929, of corporation's assets to its stockholders (Civ.Code, § 309, as amended by St. 1917, p. 657).

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Action by Maurice Silverman against Loyd Wright and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

McManus & Caldwell, of Los Angeles, for appellant.

Charles E. Millikan, of Los Angeles, for respondents.

GOULD, Justice pro tem.

Earnest J. Krause, Inc., a California corporation, executed its promissory note for \$15,000 secured by a deed of trust upon real property. Upon default in payment of the note, the holder caused the trustee to sell the real property on February 28, 1929. After applying the proceeds of the sale to the indebtedness represented by the note, there remained a deficiency of \$4,742.24. Thereafter by two assignments the note passed into the ownership of plaintiff herein, who commenced suit thereon by filing a complaint February 11, 1930, upon which judgment was recovered in January, 1931, for the amount of the deficiency against the corporate maker of the note.

In the meantime defendant Frances A. Hinds Krause, one of the stockholders of said corporation, purchased all of the outstanding stock of the other stockholders other than Earnest J. Krause, paying them a total of \$31,750 therefor in March and April of 1929. This money was disbursed to the various stockholders in proportion to their respective holdings. Thereupon Frances A. Hinds Krause surrendered to the corporation all of the preferred stock in her possession (whether originally issued to her or acquired by her by purchase from other stockholders) and received in consideration therefor the transfer from the corporation to herself of a valuable piece of real property. This transfer was effectuated April 15, 1929, shortly after the trust deed sale hereinabove referred to, nearly ten months before plaintiff filed his suit against the corpora-

tion for the deficiency judgment and nearly two years before said deficiency judgment was entered. More than one year after the last-mentioned event, to wit, on April 4, 1932, being almost three years after said transfer to Frances A. Hinds Krause, the within action was filed by plaintiff as creditor of the corporation holding the deficiency judgment, upon which had been paid two small sums aggregating \$427.04.

This action attacks the whole transaction between the corporation and Frances A. Hinds Krause, asking equitable relief in various particulars, including a decree that the \$31,750 paid to the stockholders be declared subject to the claims of plaintiff as a creditor, and that the directors of said corporation be held personally liable to plaintiff because they had distributed, or permitted the distribution of, the assets of the corporation in consideration of the surrender of the corporate stock. Judgment in the lower court went for defendants, and plaintiff appeals.

Appellant asserts there is no evidence to support the trial court's finding that it is not true that the corporation was wholly insolvent at the time the complaint was filed and became insolvent by the transaction with the stockholder Frances A. Hinds Krause. Contrary to this assertion, there appears ample evidence to support the court's finding in the testimony of two of the defendants, Wright and Krause, who offered practically all the evidence adduced in the case when they were called by plaintiff for cross-examination under section 2055 of the Code of Civil Procedure.

[1,2] Similarly as to appellant's next contention of lack of evidence to support a finding as to knowledge on the part of the corporation or its officers as to the deficiency, we find substantial evidence to justify the finding and therefore it cannot be disturbed on appeal. The same observation is pertinent with respect to appellant's argument as to the finding that the transfer of the property to Frances A. Hinds Krause was valid and not in fraud of appellant as a creditor. Evidence of a substantial nature was before the court to the effect that at the time of the transfer in question the corporation was possessed of other property more than sufficient to satisfy appellant's claim.

[3] The only remaining point made by appellant is that the court erred in refusing to enter judgment against the defendant directors of the corporation for having distributed the assets of the corporation to its stockholders, thus placing it beyond the power of appellant as a creditor to satisfy his claim. It is claimed that the directors are liable under section 309 of the Civil Code (as amended by St. 1917, p. 657, as said section read at the time of the transfer); but even assuming that the pleadings in the case before us permit invoking the relief, we are compelled to the conclusion that appellant cannot prevail and that the trial court's judgment is correct. The right to sue directors upon the statutory liability in question has been held by our Supreme Court to be not assignable. *Western Mortgage, etc., Co. v. Gray*, 215 Cal. 191, 8 P.(2d) 1016, 80 A.L.R. 866. Therefore appellant, being assignee of the deficiency, is not entitled to seek satisfaction for his claim against the directors personally.

Judgment affirmed.

We concur: CRAIL, P. J.; WOOD, J.



11 Cal.App.2d 22

PEOPLE v. JOHNSON.

Cr. 2806.

District Court of Appeal, Second District,
Division 2, California.

Dec. 23, 1935.

1. Criminal law Ⓒ656(5)

Comment by trial court in jury's presence that witness for accused whose story at coroner's inquest was different from that at trial was lying either at inquest or at trial and should be held for perjury held improper, notwithstanding court's later statement that he did not want to be deemed to have made statement as to truth or falsity of testimony of witness.

2. Criminal law Ⓒ720(5)

Where witness for accused told different story at trial from that he told at coroner's inquest, comment by district attorney in argument that perjury had been committed

and witness had deliberately lied *held* not prejudicial error, since at most statements were comments upon evidence as prosecution viewed it.

3. Criminal law ☞728(2)

Question of impropriety of district attorney in speaking of witness for accused who told different story at trial than he had at coroner's inquest as having committed perjury was waived by accused by failure to object to statements and to request court to instruct jury to disregard them.

4. Criminal law ☞1186(4)

Misconduct of trial court in commenting that witness for accused either committed perjury at coroner's inquest or at trial *held* not reversible error where evidence clearly showed that accused's conviction was not miscarriage of justice (Const. art. 6, § 4½).

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Tom Johnson was convicted of murder, and he appeals.

Affirmed.

Wm. J. F. Brown, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

GOULD, Justice pro tem.

Charged with murder, tried by a jury, convicted and sentenced to life imprisonment, defendant appeals from the judgment and from the order denying his motion for new trial. Misconduct of the trial court and misconduct of the district attorney are the sole grounds advanced for reversal.

[1] When one of defendant's witnesses under cross-examination was confronted with a transcript of his testimony as previously given at the coroner's inquest and was asked concerning certain discrepancies between his story as told to the coroner and his story as told at the trial then in progress, the court undertook to assist the district attorney with this interjection, addressed to the witness: "Now * * * assuming that was your testimony, when were you lying, then or now?" More questions of the same nature were followed by this remark of the trial judge: "I think this witness should be held for a possible perjury complaint * * *; and he was either lying then or is lying now, and either way it is,

it seems to me he should be held for perjury." No citation of authority or recitation of principles of judicial decorum is necessary to brand this conduct of the trial court as improper and tending to prejudice defendant's rights. When the court belatedly attempted to remedy his judicial faux pas by telling the jury that he did not "want to be deemed as having made any statement as to the truth or falsity" of the testimony of the witness in question, it is obvious that the wrong done could not be cured.

[2, 3] Misconduct of the district attorney is charged, in that in the course of his argument to the jury, in speaking of the same witness, he told the jurors that perjury had been committed and that the witness had deliberately lied. We do not find that the remarks of the prosecutor can be assigned as prejudicial error. They were at most his comments upon the evidence as the prosecution viewed it, and if error was committed, it must be deemed to have been waived by defendant because he failed to object to the statements now complained of and did not request the court to instruct the jury to disregard them. *People v. Harris*, 219 Cal. 727, 28 P.(2d) 906.

[4] With reference to the misconduct of the trial court, we are confronted with the rule stated thus in *People v. Reese*, 136 Cal. App. 657, 29 P.(2d) 450, 456: "But flagrant as misconduct of the trial court in a given case may be, unless it clearly appear that its probable effect was prejudicial to the substantial rights of the party affected by the litigation, and that probably it resulted in a miscarriage of justice because thereof, an appellate tribunal is forbidden to set aside the judgment or to grant a new trial. Sec. 4½, art. 6, Const." Examining the evidence in the instant case, we are satisfied that in spite of the ill-considered remarks of the trial judge there was no miscarriage of justice, and that therefore the judgment may not be set aside. While defendant testified that he acted only in self-defense, by overwhelming and preponderant testimony the proof adduced at the trial showed a deliberate murder with no extenuating circumstances, and any other outcome than the conviction of the defendant would have been unthinkable.

Judgment and order affirmed.

We concur: CRAIL, P. J.; WOOD, J.

11 Cal.App.2d 37

In re THOR'S ESTATE.

THOR v. KUHN.

Civ. 10551.

District Court of Appeal, Second District,
Division 1, California.

Dec. 26, 1935.

Hearing Denied by Supreme Court
Feb. 24, 1936.**Executors and administrators** Ⓒ510(3)

Appeal of surviving but disinherited husband from order approving final account of executor of his wife's will and distribution of her estate was dismissed, since husband had no standing in court in matter either of settlement of account of executor or of manner in which distribution was ordered.

Appeal from Superior Court, Los Angeles County. Walton J. Wood, Judge.

Proceeding in the matter of the estate of Auguste Thor, also known as Judine Helfenstein Thor, deceased. From an order approving final account of Philip Kuhn, executor, and approving distribution of estate, Fred Thor appeals.

Appeal dismissed.

Edwin J. Miller, of Los Angeles, for appellant.

A. W. Brunton and Lauren M. Handley, both of Los Angeles, for respondent.

HOUSER, Presiding Justice.

This is an appeal by the surviving but disinherited husband of Auguste Thor, deceased, from an order made by the probate court, by which the final account of the executor of the will of said Auguste Thor was approved and distribution of the estate was ordered.

It is well settled that, in view of the admitted fact that since the surviving but disinherited husband occupied the position of a stranger to the estate of his deceased wife, he had no standing in court in the matter either of the settlement of the account of the executor of the will of Auguste Thor, or of the manner in which distribution of her estate should be ordered. Estate of Rowland, 74 Cal. 523, 526, 16 P. 315, 5 Am.St.Rep. 464; Estate of Burdick, 112 Cal. 387, 396, 44 P. 734; Estate of Wenks, 171 Cal. 607, 609, 154 P. 24; Estate of King, 199 Cal. 113, 117, 248 P. 519; Bauer v. Bauer, 201 Cal. 267, 256 P. 820; Shaw v. Palmer, 65 Cal.App. 441, 446, 224 P. 106; Johnson v. Superior Court, 102 Cal.

App. 178, 185, 283 P. 331; Texas Co. v. Bank of America (Cal.App.) 45 P.(2d) 1015, 1020.

It follows that, having no right to be heard in the matter before the probate court, the surviving husband likewise had no right of appeal from any order that might be made in the premises.

It becomes unnecessary to discuss other questions presented on the appeal. It is ordered that the appeal be, and it is dismissed.

We concur: YORK, J.; DORAN, J.



10 Cal.App.2d 658

CARLON v. GRAY.

Civ. 5305.

District Court of Appeal, Third District,
California.

Dec. 17, 1935.

1. Justices of the peace Ⓒ91(1)

Amended complaint that obligation was incurred by defendant to be performed in designated county, but which failed to refer to any court as proper one in which to prosecute action or to show nature of transaction or defendant's obligation, held insufficient, as stating a conclusion, to confer jurisdiction on justice's court in which action was commenced under statute requiring plaintiff to state "facts" from which jurisdiction of court could be determined (Code Civ.Proc. § 112, as amended by St. 1933, p. 1814, and § 396a, as added by St. 1933, p. 1841; St. 1935, c. 722).

2. Justices of the peace Ⓒ81(4), 82(1)

In serving complaint on adverse party in action in justice court by mail and presenting proof of such service to court to show jurisdiction to thereafter proceed, strict compliance must be had with statute authorizing such service (Code Civ.Proc. §§ 1012, 1013, 1013a).

3. Justices of the peace Ⓒ82(2)

Affidavit of service by mail of complaint, in action in justice court, which fails to show name and address of party serving and name and address of party to be served and fact of residence in different counties, is insufficient to give court jurisdiction to enter default judgment (Code Civ. Proc. §§ 1012, 1013, 1013a).

4. Justices of the peace ⚖️82(2)

Affidavit of service of amended complaint on defendant, in action in justice court, reciting that affiant was clerk in office of attorney for plaintiff and had mailed true copy of amended complaint in envelope addressed to defendant in another town, but which omitted statement that place to which letter was sent was residence or place of business or post office address of defendant, and failed to mention residence of affiant, *held* insufficient to confer jurisdiction to enter default judgment (Code Civ.Proc. §§ 1012, 1013, 1013a).

5. Justices of the peace ⚖️119(3), 129(4)

Failure to comply with statute in affidavit filed to prove service on defendant by mail of amended complaint in action in justice court *held* available to defendant at any time in attacking judgment, since judgment is void on its face when fact is made apparent by inspection of judgment roll or papers constituting judgment roll and may be attacked directly or collaterally, either by parties or strangers anywhere and whenever it presents itself (Code Civ.Proc. §§ 1012, 1013, 1013a).

6. Justices of the peace ⚖️59

Jurisdiction of justices' courts is special and limited, and law presumes nothing in favor of their jurisdiction, and party who asserts right under judgment rendered in such court must show affirmatively every fact necessary to confer such jurisdiction (Code Civ.Proc. § 112, as amended by St. 1933, p. 1814, and § 396a, as added by St. 1933, p. 1841).

Appeal from Superior Court, Tuolumne County; J. A. Smith, Judge.

Action by Donna T. Carlon against John R. Gray. Judgment for plaintiff, and defendant appeals. On rehearing. Affirmed.

For prior opinion, see 49 P.(2d) 324.

W. H. Hatfield and V. L. Hatfield, both of Sacramento, for appellant.

Rowan Hardin, of Sonora, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

In this action the plaintiff had judgment restraining the defendant as constable of the third township in and for the county of Tuolumne, from selling a Cadillac tow car and a Chevrolet truck under an execution issued by the justice's

court of Sacramento township, Sacramento county.

On the 31st day of August, 1933, Sacramento Board of Trade, a corporation, commenced an action in the justice's court of Sacramento township, against the plaintiff in this action. The sum claimed or the amount of the demand in that action was less than the sum of \$300, and was within the jurisdiction of justice's courts of class B jurisdiction, under the provisions of section 112 of the Code of Civil Procedure, as amended by the Statutes of 1933, p. 1814.

The complaint in the action begun in the justice's court was unverified; nor was any affidavit filed as provided by section 396a of the Code of Civil Procedure, added in 1933, St. 1933, p. 1841. Upon the filing of the unverified complaint, summons was issued thereon, and this summons, together with the unverified complaint, was served upon the defendant in that action (the plaintiff in this action), in the county of Tuolumne.

The pleadings, as thus filed in the justice's court of Sacramento township, and served upon the plaintiff, did not show, nor could it be determined therefrom, what court was the proper court for the trial of the action so commenced by the defendant on the 31st day of August, 1933.

On or about the 23d day of September, 1933, the plaintiff in the action begun in the justice's court of Sacramento township filed an amended complaint, and in its answer in this action alleged it served a copy thereof upon the plaintiff herein (the defendant in the justice's court action), and that the service was made by mail and proof of mailing was made by an affidavit, to which reference will hereafter be made.

On October 3, 1933, the plaintiff in this action (the defendant in the justice's court action) filed an affidavit setting forth the fact of service made upon her of the summons and unverified complaint, and also setting forth the defects therein, and pursuant to section 396a of the Code of Civil Procedure as added in 1933, moved the court to dismiss the action. This motion was denied. Thereafter a default judgment in the action begun by the Sacramento board of trade against the plaintiff was entered, and execution

issued thereon, and placed in the hands of the defendant in this action, who thereupon levied on the property hereinbefore mentioned. In the action to restrain the sale of the property so levied upon, plaintiff had judgment, as stated, and the defendant appeals.

Section 396a, *supra*, as it read at the time of this action, so far as material here, is as follows: "In all actions and proceedings within the subject matter jurisdiction of justices' courts of Class B, whether commenced in a justices' or municipal court, plaintiff must state facts in the complaint, verified by his oath, or in an affidavit of the plaintiff, from which it can be determined which court is, under the provisions of this title, the proper court for the trial of such action or proceeding. When such affidavit is filed, a copy thereof must be served with the summons. Unless such complaint or affidavit be filed, no further proceedings shall be had in the action or proceeding, except to dismiss the same, unless defendant consents in the manner hereafter provided to the keeping of the action or proceeding in the court where commenced."

The jurisdiction of the superior court of Tuolumne county to entertain this action and enter judgment is undisputed, and therefore citations are unnecessary.

In the presentation of this cause counsel in their briefs have devoted much attention as to whether, under the provisions of section 396a, *supra*, a defective complaint might be cured by the filing of an amended complaint under the general authority to amend pleadings granted by section 472 of the Code of Civil Procedure.

It appears that the Legislature in 1935 (St. 1935, c. 722) amended section 396a by inserting a provision specifically providing that the judge or justice of a municipal or justice's court might grant permission to file an amended complaint. On the part of the appellant it is urged that the general power existed under the provisions of section 472, *supra*, for filing an amended complaint, and on the part of the respondent herein it is strongly insisted that by amending section 396a, *supra*, specifically authorizing and empowering a judge or justice of the peace to permit the filing of an amended complaint, the Legislature had given a construction of section 396a,

supra, to the effect that prior to the amendment no such authority or power was vested in the judge or justice of the peace. By reason of what we have to say hereafter, it becomes unnecessary to decide this question. The authority to file an amended complaint is now specifically given, and whether it existed prior to the amendment of 1935 is wholly immaterial to the decision in this cause, and any decision on that question would simply be of no profit to the legal profession.

[1] Both as section 396a, *supra*, read prior to 1935, and as it now reads, the setting forth the facts necessary to show jurisdiction in the court where the action is begun is an indispensable prerequisite. The only change in the Code provision is that such facts may be supplied by an amended complaint, whereas, prior to the amendment, according to the literal wording of the section, it was required that the facts be set forth in the original complaint or in an affidavit. In either case, if such facts are not set forth, the defendant in such action is specifically granted the right to have the action dismissed. This right may be waived according to the provisions of the section, and not otherwise.

Assuming, without deciding that the provisions of section 472, *supra*, were applicable at the time of the beginning of the action in the justice's court by the Sacramento board of trade, the plaintiff had a right to file an amended complaint, it nevertheless appears from the record in this case, which contains a copy of the amended complaint filed by the Sacramento board of trade in the action begun in the justice's court of Sacramento township, that compliance with the provisions of section 396a, *supra*, was not had.

Paragraph VI of the amended complaint just referred to reads as follows: "That under the terms and conditions upon which said advertising services were, by said Foster and Kleiser Company, furnished to said defendant, the obligation herein mentioned was incurred in, and was to be performed in the above named county." No reference is made to the court, or to any court, as the proper court in which the action should be prosecuted. Not a single word is set forth from which it can be concluded that any par-

ticular one of the different justice's courts in the county of Sacramento was the proper court in which to institute and prosecute the action. The paragraph as it appears in the complaint does not state a single word showing what the transaction was, what the negotiations were, or what the acts performed or to be performed by Foster and Kleiser consisted of. The only idea conveyed by the paragraph is the conclusion of the pleader that a certain obligation was incurred, and was to be performed in the county of Sacramento. The opinion of the pleader cannot be substituted for the facts existing in the case, which would, or would not, give the justice's court of Sacramento township jurisdiction, and the setting forth of an opinion is not a compliance with the section of the Code requiring that the "plaintiff must state facts".

It unavoidably follows that irrespective of whether the Sacramento Board of Trade had a right to file an amended complaint at the time it did so, it utterly failed to set forth the necessary jurisdictional facts from which the justice's court could determine its authority to proceed in the action.

[2,3] This amended complaint, defective as we have just stated, was attempted to be served upon the defendant in that action (the plaintiff in this action), by inclosing the same in an envelope with the postage prepaid thereon, and addressed to "Donna T. Carlon, % The Carl Inn, Groveland, California." Here, again, counsel there presented the question that Donna T. Carlon never received a copy of the amended complaint. The appellant, countering such contention, cites authorities to the effect that when a copy of a pleading is inclosed in an envelope, properly addressed, the service is complete, and whether the person whose address appears on the envelope does, or does not receive the enclosed paper, is wholly immaterial, supporting this contention by citing the cases of *McKeon v. Sambrano*, 200 Cal. 739, 255 P. 178; *Steele v. Board of Trustees*, 121 Cal.App. 419, 420, 9 P.(2d) 217; *Traders' Credit Corporation v. Superior Court*, 111 Cal.App. 663, 666, 296 P. 99. These authorities clearly support the appellant's contention, but such fact alone does not justify the entering of a de-

fault judgment against a defendant or the person to whom the pleading is so addressed and sent by mail.

In making service by mail and presenting to the court in which the action is pending, proof of such service in order to show jurisdiction to thereafter proceed in the case, strict compliance must be had with sections 1012, 1013 and 1013a of the Code of Civil Procedure. Those sections provide that service by mail can only be made where the person making the service and the person on whom the service is made reside in different counties. The service to be made upon the party must either be made by sending the pleading to the office address of the person to be served, or to his place of residence. These facts must appear in the affidavit. An affidavit, if it does not show the name and address of the party serving, and the name and address of the party to be served, and the fact of residence in different counties, is insufficient to give the court jurisdiction to enter a default judgment.

[4] The affidavit in this case made of service of the amended complaint (omitting the title of the cause and the jurat), is as follows:

"State of California, County of Sacramento, ss.

"M. M. Bardsley, being first duly sworn, deposes and says: That on the 23rd day of September, 1933, she was a citizen of the State of California, over the age of eighteen years; and employed as a clerk in the office of V. L. Hatfield an attorney-at-law who has his office at #405-6-7 Ochsner Bldg., Sacramento, California; that on said date affiant, at the request of said V. L. Hatfield, enclosed a true copy of the following paper filed in the above entitled court and in the above entitled matter.

"First Amended Complaint

in an envelope, and which was addressed as follows:

"Donna T. Carlon

"% The Carl Inn

"Groveland, California.

"That said envelope was sealed and carried thereon full United States postage, and affiant deposited the same in the United States Post Office at said City of Sacramento, on said date; that at

said date there was a daily United States mail service between the City of Sacramento and the Town of Groveland, California.

"That affiant is in no wise interested in the result of said proceeding; that V. L. Hatfield is the attorney for plaintiff herein.

"M. M. Bardsley."

The place of employment of M. M. Bardsley is given; her residence is not mentioned; whether she resides in Sacramento county or Tuolumne county does not appear. The residence of Donna T. Carlon does not appear. The only fact stated is that the envelope in which the amended complaint was enclosed was addressed to Donna T. Carlon, % The Carl Inn, Groveland, Cal., without any statement whatever in the affidavit of such being the place of residence of Donna T. Carlon, or that it was her place of business or post office address. These facts are absolutely necessary to appear in the affidavit; otherwise, the proof of service is not made, and no jurisdiction is given to the court to further proceed in the action.

In the case of *Cunningham v. Warnekey*, 61 Cal. 507, an affidavit somewhat similar in form to that here presented was held insufficient. The court said: "The affidavit does not show where the affiant or where defendant (appellant) resided. The person making the service and the person served must reside, or have their offices in 'different places' to justify the service by mail." To the same effect is the case of *Reed v. Allison*, 61 Cal. 461, overruled by *Luck v. Luck*, 83 Cal. 574, 23 P. 1035.

In *Hogs Back Consol. Min. Co. v. New Basil Consol. Min. Co.*, 63 Cal. 121, the affidavit failed to state the residence of the respective parties, the court holding the affidavit insufficient, and further added: "The affidavit of service was insufficient, and therefore the default in the case was improperly entered." The judgment by default was reversed.

In *Townsend v. Parker*, 21 Cal.App. 317, 131 P. 766, an affidavit made by one O. L. Mars set forth that he was a resident of the state of California, over the age of 21 years; that he inclosed a certain notice of entry of judgment, and served the same by inclosing a correct copy in an envelope, postage prepaid

thereon, addressed to Edward Eccleston, 401-7 Hearst Building, San Francisco, California, which was the last-known residence of Edward Eccleston. The affidavit sets forth further that the envelope so addressed inclosing the notice was deposited in the post office at Stockton, Cal., and that there was a regular daily communication by mail between Stockton, Cal., and San Francisco, Cal. There was not a word in the affidavit as to the residence of the affiant. This affidavit was held insufficient by the trial court, affirmed by the Appellate Court of the First District, and hearing denied in the Supreme Court. This case is referred to and relied upon in the case of *Harris v. Minnesota Inv. Co.*, 89 Cal. App. 396, 265 P. 306, where a number of other cases holding such affidavits defective are also cited.

[5] The defect in the affidavit failing to comply with the sections of the Code relative to service of papers by mail appearing on the face of the record, advantage thereof could be taken at any time. The rule is thus clearly stated in 15 California Jurisprudence, p. 49: "A judgment absolutely void may be attacked anywhere, directly or collaterally whenever it presents itself, either by parties or strangers."

In the case of *Hahn v. Kelly*, 34 Cal. 391, 94 Am.Dec. 742, the question of when a judgment may be collaterally attacked, and when it may be attacked directly is set forth at great length. Where the court is presumed to have jurisdiction, if nothing appears to the contrary, it will be presumed, but if the record shows want of jurisdiction, that want may be taken advantage of whenever anyone seeks to rely upon such judgment. Thus, a judgment is void on its face when that fact is made apparent by an inspection of the judgment roll or the papers constituting the judgment roll. *People v. Harrison*, 84 Cal. 607, 609, 24 P. 311; *Jacks v. Baldez*, 97 Cal. 91, 31 P. 899.

[6] That the jurisdiction of justice's courts is special and limited we need only cite the case of *Antilla v. Justice's Court*, 209 Cal. 621, 290 P. 43, 44, where the following quotation, supported by numerous cases, is set forth: "The jurisdiction of Justices' Courts being special and limited, the law presumes nothing in favor of their jurisdiction; and a party

who asserts a right under a judgment rendered in such court, must show affirmatively every fact necessary to confer such jurisdiction."

As stated in the 1934 Supplement to California Jurisprudence under the title of "Inferior Courts," p. 135, § 85, this seems to have been recognized by the Legislature in the adoption of section 396a, supra.

In view of what we have said, which is decisive of this case, we need not consider the contention of the respondent that the defendant not having appeared in the action instituted in the justice's court of Sacramento township service of an amended complaint could not be made by mail, but that an alias summons should have been issued, and summons and amended complaint thereafter served personally.

The judgment is affirmed.

We concur: PULLEN, P. J.;
THOMPSON, J.



11 Cal.App.2d 123

PEOPLE v. PEARSON.

Cr. 2820.

District Court of Appeal, Second District,
Division 2, California.

Jan. 6, 1936.

1. Embezzlement ☞44(5)

In embezzlement prosecution, evidence held sufficient to show that defendant was duly and regularly appointed, qualified, and acting person charged with receipt, safekeeping, and transfer of public moneys within statute (Pen.Code, § 424).

2. Criminal law ☞805(1)

Where instructions in embezzlement prosecution laying down principles to determine guilt or innocence of defendant were accurate and appropriate, defendant could not complain that instructions were not stated in language he would have preferred.

3. Criminal law ☞1130(2)

Alleged error in admitting and rejecting testimony in embezzlement prosecution would

not be considered by reviewing court, where defendant merely referred to record and did not set forth substance of such evidence, or state wherein such rulings were prejudicial.

4. Criminal law ☞1141(2)

Defendant may not shift to reviewing court burden of searching for grounds for reversal.

Appeal from Superior Court, Los Angeles County; Thomas P. White, Judge.

Harry Pearson was convicted of embezzlement, and he appeals.

Affirmed.

George A. Glover, of Los Angeles, for appellant.

U.S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

CRAIL, Presiding Justice.

The defendant was convicted upon several counts of embezzlement under section 424 of the Penal Code, and he appeals from the judgment and from an order denying a motion for a new trial.

[1] One of his contentions is that there was no evidence to support the allegation in the indictment that the defendant was a "duly and regularly appointed, qualified and acting person charged with the receipt, safe-keeping and transfer of public monies" as contemplated by said section. He contends that there is no evidence that he was actually employed. In support of this contention he refers us to the cross-examination of Mr. Edwin T. Keiser, who was sales tax administrator in charge of collecting the sales tax under the state board of equalization, and under whose supervision the defendant actually worked:

"Q. Before he came to work in your office, was that? A. Yes, sir. * * *

"Q. Did you hire him then? A. No, sir.

"Q. Did you hire him at any later date? A. No, sir.

"Q. You never did? A. No, sir."

The futility of the defendant's contention that he was never employed is apparent when we go to the direct examination of the same witness. He there testifies that the defendant was an employee under his direction in the tax division of the state board of equalization; first as an investigator; later, at the request of the assistant secretary of the board, at auditing work; and that he was

finally certified to him as an auditor. There was other evidence to support the allegation, including evidence that when he receipted for the money which he afterwards embezzled he placed at the bottom of the receipt with a rubber stamp "State Board of Equalization," and signed his name thereunder as a representative of the board.

[2] The defendant next complains because of two instructions which were given by the court in laying down the principles upon which the question of the guilt or innocence of the defendant might be determined. The instructions were general in their nature; one of them setting forth the law with regard to a person who assumes to act as the agent or servant of another, and the other one setting forth the distinctions between theft by larceny by trick and device, theft by false pretenses, and theft by embezzlement. The instructions stated the law accurately, and were appropriate. The defendant cannot complain merely because they were not stated in the language which he would have preferred, nor because they do not contain a speech in his favor.

[3, 4] The only other contention made by the defendant is that the court permitted certain testimony to be read to the jury, but erroneously refused to have read certain other testimony which the defendant requested. He contends that the court's denial of this request greatly prejudiced his rights. While the defendant cites us to the record where he claims the court made this refusal, the pages cited do not substantiate the defendant's contention that such a refusal was made. The defendant makes this bald claim of prejudice without setting forth either the evidence which was read or the evidence which he claims was refused, and without setting forth even its substance. He makes no explanation of his contention, and states no reason why the court's ruling, if made, would have prejudiced him. The defendant may not shift to this court the burden of searching for grounds upon which to reverse the judgment of the trial court. *People v. Titus*, 85 Cal.App. 413, 259 P. 465.

Judgment and order affirmed.

We concur: WOOD, J.; McCOMB, Justice pro tem.

10 Cal.App.2d 701

PRICKETT v. WHAPPLES et al.

Civ. 9862.

District Court of Appeal, Second District,
Division 1, California.

Dec. 18, 1935.

1. Automobiles ⇨193(3)

In pedestrian's action against owner of automobile for injuries sustained when struck by automobile which roomer at owner's home was driving to street car station to convey owner home, court held justified in inferring from roomer's practice of calling for owner at station that understanding to such effect existed between them, and that roomer in so doing was rendering personal services to owner as an employee (Civ.Code, § 2009).

2. Automobiles ⇨242(6)

In view of law making temporary use of an automobile without owner's consent a misdemeanor, a rebuttable presumption arises that one operating automobile of another has necessary consent to make his act lawful (Pen.Code, § 499(b); Code Civ.Proc. § 1963, subd. 33).

3. Witnesses ⇨317(1), 379(1)

Presumption that parties to action were speaking truth might have been repelled in ways specified by statute, or by showing they had made inconsistent statements, and if testimony was false in one part, it was to be distrusted in others, and if believed willfully false as to material point might have been rejected in toto (Pen.Code, § 499(b); Code Civ.Proc. §§ 1847, 2052, 2061(3), and § 1963, subd. 33).

4. Automobiles ⇨244(26)

In action by injured pedestrian against owner and driver of automobile which struck her, evidence held to sustain findings that driver, who was roomer at owner's home, was at time of accident proceeding to street car station to convey owner home, and that roomer in using automobile was acting within his authority and with consent of owner (Pen.Code, § 499(b); Code Civ.Proc. §§ 1847, 2052, 2061(3), and § 1963, subd. 33; Civ.Code, § 2009).

5. Appeal and error ⇨994(3)

Testimony of witness may be contradicted by inherent improbabilities in witness' own statement, by circumstances in evidence satisfying court of its falsity, and by manner of witness in testifying, and, as credit and weight of testimony is matter for trial court, appellate court cannot control its finding denying testimony credence, unless circumstances impairing its accuracy are entirely lacking.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Marguerite Prickett against Albert C. Whapples and one Mangan. Judgment for plaintiff as against both defendants, and the second-named defendant appeals.

Affirmed.

Murphy & Doherty, of Los Angeles, for appellants.

H. L. Breidenbach, of Los Angeles, for respondent.

SHINN, Justice pro tem.

Appeal by the owner of an automobile against whom judgment for damages was given following an accident. Judgment went against both defendants, Mangan and Whapples; the former does not appeal.

Plaintiff, a pedestrian, was struck by the car owned by appellant Whapples and driven by Mangan. Plaintiff was crossing a public street in a crosswalk at the end of a block. It was dark, but the streets were lighted. Plaintiff testified that she looked but did not see the car or its headlights and was struck after proceeding four or five steps into the street. Mangan testified that he ran into plaintiff before he saw her. The determination in plaintiff's favor of the issues of negligence and contributory negligence finds support in this evidence.

The judgment against Whapples was based on findings that Mangan was the agent of Whapples, and that he was driving the car with the latter's consent and within the scope of his employment. Defendant Whapples contends that there was not sufficient evidence to support these findings. Whapples was a police lieutenant, on duty during the daytime at San Pedro. Each evening he returned home by street car, alighting therefrom at a point about one mile from his residence. Mangan lived in Whapples' household. Each had a car, Mangan was accustomed to meet Whapples at the car line and drive him home. In so doing he used his own car, but on the evening of the accident, his car being out of order, he took Whapples' car. He drove to a store to make a purchase, and shortly thereafter became involved in the accident.

[1,2] The finding of agency is amply supported by the evidence. From the fact that Mangan made a practice of calling for Whapples at the station the court properly

inferred that there was an understanding between them pursuant to which Mangan, in so doing, was rendering personal services to Whapples. As Mangan in performing these services very clearly was not following an independent calling, he was an employee. Civ.Code, § 2009. He was acting within the general line of his duties, from which fact, as appellant properly concedes, the inference arose that he was acting within the scope of his authority. *Wagnitz v. Scharetg*, 89 Cal.App. 511, 265 P. 318. The law makes the temporary use of an automobile, without the owner's consent, a misdemeanor (Pen.Code, § 499(b); hence the presumption arises that one operating the automobile of another has the necessary consent to make his act lawful (Code Civ.Proc., § 1963, subd. 33). Such inference and presumption, of course, may be overcome and are overcome when there is sufficient evidence to the contrary. We do not undertake to state generally what evidence would be sufficient to overcome them. Each case must be judged upon its own facts. Our discussion of the facts of the present case is from the limited viewpoint that a presumption or inference of fact is not overcome in a case where the evidence to the contrary thereof is properly disbelieved and rejected by the trial court.

[3,4] There is no evidence that Whapples gave express consent to the use of his car. The question whether there was implied consent is involved in the question of agency. In the view we take the only question of fact which requires answer is whether there is sufficient evidence to support the finding that the taking of the Whapples car for the particular purpose of calling for the latter at the station was an act within the terms of Mangan's employment. The defendants both testified that Mangan had not been given permission to use the car. The court did not believe this testimony, and found the facts to be contrary thereto. This conclusion necessarily follows from the findings upon the questions of consent and authority of Mangan to take the car, for if the court had believed the testimony of the defendants, these findings would have been in their favor.

The court was not bound to believe the testimony of the defendants. The presumption that they were speaking the truth might have been repelled in several of the ways specified in section 1847 of the Code of Civil Procedure, or by showing that they had made inconsistent statements.

Section 2052, Code Civ.Proc. If their testimony was false in one part it was to be distrusted in others (section 2061 (3), Code Civ. Proc.), and if believed willfully false as to a material point might have been rejected in toto. *People v. Sprague*, 53 Cal. 491; 10 C.J. 1147. We have read the testimony with much care, and we find therein ample evidence to dispel any thought that the court was without justification in refusing to give credit to the testimony of the defendants upon this crucial question of fact. Each defendant denied under oath that Mangan was to call for Whapples that evening, yet at the time of the accident Mangan was headed in the direction of the station, at the exact time to meet Whapples, and the accident happened close to the station. While still at the scene of the accident, Mangan directed the witness Davis to go to the station and explain to Whapples that he had had an accident, and he told the officers that he would "catch the devil" for not meeting Whapples. Several hours after the accident, two police officers talked to Whapples at his home and he admitted to them that he had been expecting Mangan to call for him that evening and that he wondered why he did not come. These statements were not denied by Whapples. Furthermore, Mangan testified that he only occasionally picked up Whapples at the station, while the latter stated to the officers that Mangan called for him each evening. Neither of the defendants testified to the terms of the arrangement they had made for Mangan's services, nor to the time that it had been in effect, nor whether the services were rendered gratuitously or for a consideration. The court was compelled to judge from their actions what their agreement was. Their silence in this all-important matter is strongly indicative of a disinclination to place all of the facts before the court. The very incompleteness of their explanations, which consisted wholly of monosyllabic denials of Mangan's authority, gives added weight to the facts and circumstances from which the court concluded that Mangan was not acting without the authority of his employer. The relationship between the two men was undoubtedly a close one. Mangan had lived at the Whapples home for some four years and, as stated to the officers by Whapples, did some work around the place as a carpenter. He paid the small sum for

room and board of \$5 per week. His taking of the car was not surreptitious, for if he had not believed his action would be approved he would not have taken it with the intention of driving it to the station where he was to meet his employer. There are other minor inconsistencies and contradictions in the testimony of the defendants, but the matters we have called attention to are considerations which, it seems to us, fully justified the trial court in refusing to accept the testimony upon the particular point involved.

[5] In the leading case of *Davis v. Judson*, 159 Cal. 121, 113 P. 147, 150, the court states the rule as to the right of a trial court to reject uncontradicted testimony and the duty of an appellate court in a case where such testimony has been rejected. A brief quotation is sufficient for our purposes. The court said: "The most positive testimony of a witness may be contradicted by inherent improbabilities as to its accuracy contained in the witness' own statement of the transaction, or there may be circumstances in evidence in connection with the matter, which satisfy the court of its falsity. The manner of the witness in testifying may impress the court with a doubt as to the accuracy of his statement, and influence it to disregard his positive testimony as to a particular fact, and, as it is within the province of the trial court to determine what credit and weight shall be given to the testimony of any witness, this court cannot control its finding or conclusion denying the testimony credence, unless it appears that there are no matters or circumstances which at all impair its accuracy." This rule has exact application to the facts of the instant case. This court cannot with propriety say that the trial court should have believed the testimony of the defendants Mangan and Whapples. Upon the contrary, it appears that the trial court, in a situation where a minimum of effort was made by the defendants to place all of the facts in evidence, carefully and correctly appraised the testimony that was given and reached a just and proper conclusion therefrom. The inference that Mangan was acting within the scope of his authority, and the presumption that he was acting with Whapples' consent, therefore, stand unopposed.

The sole ground for affirming the judgment is that it clearly appears that the court rejected the entire evidence which

tended to overcome the evidence that Mangin, in using the car, was acting within his authority, and with the consent of appellant, and that the finding to that effect is, therefore, sufficiently supported.

The judgment is affirmed.

We concur: HOUSER, P. J.; YORK, J.



ELLWOOD v. NIEDERMEYER.*
Civ. 9939.

District Court of Appeal, Second District,
Division 1, California.
Dec. 19, 1935.

Rehearing Granted Jan. 17, 1936.

1. Vendor and purchaser ⇨8, 144(2)

Vendor may contract to sell realty which he does not own, but must be able to make good title at time fixed by his contract.

2. Vendor and purchaser ⇨144(2), 145

Vendor has reasonable time in which to prepare and deliver a deed after time for performance, but he does not have reasonable time in which to acquire title to property to enable him to perform his contract.

3. Exchange of property ⇨8(4)

Evidence that defendant owned only one-half undivided interest in realty he contracted to convey within certain time in fee and that defendant was allowed five days' additional time to prepare deed during which time he delivered deed conveying all title in himself, and that later defendant perfected title in himself to other undivided half interest and was then ready to perform, *held* not to support finding that defendant performed his contract for exchange of realty.

4. Exchange of property ⇨4

Clause in contract for trade of realty that, in event of errors appearing in titles to properties, agreement should be extended for reasonable time that errors might be corrected, *held* to refer to defect subject to correction and not to allow additional time to perfect title to party to contract who had only undivided one-half interest in realty which he contracted to convey in fee simple.

Action by Harriet Ellwood against Arthur Niedermeyer. From an adverse judgment, plaintiff appeals.

Reversed.

Alfred T. Cluff, of Los Angeles, Allan F. Bullard, of San Francisco, and Sawyer & Cluff, of Los Angeles, for appellant.

Felix F. Bangs, John Beardsley, and Charles E. Beardsley, all of Los Angeles, for respondent.

EDMONDS, Justice pro tem.

This action is for damages for breach of a contract for the sale of real estate.

In her complaint plaintiff pleaded a contract entered into between herself and the defendant. Under it she was to receive some lots in exchange for a furnished house owned by her. By a further provision defendant agreed to loan \$10,000 to her upon the security of the lots she was to acquire. Plaintiff alleged that she had performed all of the conditions of the contract; that defendant in bad faith and without just cause had refused to perform within the 45 days limited by its terms for performance, or at all, notwithstanding her demand therefor; and that the value of the property she would have received had the exchange been carried out was some \$12,000 more than that of her own. The defendant alleged that the contract had been entered into by him because of certain misrepresentations of the plaintiff, but that he had, notwithstanding them, performed all of the conditions required of him. He also denied plaintiff's allegations of value.

The court found that at the time the contract was made plaintiff was the owner of the property agreed to be conveyed by her, but that the property to be conveyed by the defendant was owned by him and his wife, for whom he was guardian, in joint tenancy; that prior to the expiration of the 45 days fixed for the consummation of the exchange defendant had not deposited either his deed or money in the designated escrow; that plaintiff then gave defendant notice requiring him to perform within 5 days, but that this notice did not allow defendant sufficient time to perform. By a further finding the court declared that it was the intention of the plaintiff at the time of giving such notice and demand to withdraw from the agreement if the exchange could not be completed within the 5 days fixed by her notice and to sell her fur-

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

niture, although she had been able and willing to perform at all times before. Other findings are that within the 5 days fixed by plaintiff's notice, defendant deposited \$10,000 in escrow with a deed to the lots executed by him; that he immediately thereafter commenced proceedings for authority to sell his wife's interest in the lots, and some two months thereafter deposited in the escrow a deed executed by him as guardian of his wife's estate conveying her interest therein under an order of court confirming the sale; that appellant had made no misrepresentations; that the value of the properties plaintiff was to receive under the contract was not in excess of that which she was to give; and that defendant had acted in good faith at all times. Judgment was entered in favor of defendant.

The evidence shows that at the time the contract was made the appellant was the owner of a furnished house, and that the real property was subject to a deed of trust to secure a note for \$25,000 made by a previous owner. She entered into a written contract with Mr. Niedermeyer to exchange the house and furniture for three vacant lots. The lots which he was to convey to her were owned by him and his wife. Two days after the contract was signed, Mrs. Ellwood signed escrow instructions at a bank, and thereafter deposited with the bank a deed to her property and other papers.

The 45-day period provided for in the exchange agreement expired on January 10. On that date Mr. Niedermeyer had not signed any escrow instructions nor deposited any documents nor otherwise indicated any intention to carry out his part of the agreement. On January 19th Mrs. Ellwood by written notice informed Mr. Niedermeyer that she had deposited in the escrow instruments of conveyance of her property, and stated that she required him "on or before the close of business on January 24, 1933, to complete and perform the said exchange on your part, and to execute and deliver to me proper instruments of conveyance of your said three lots, and to pay to me the sum of \$10,000.00."

At that time the note secured by the deed of trust on Mrs. Ellwood's property was in default, and the trustee was about to make a sale of the security. Pressed by her financial difficulties she had arranged for a sale of her furniture at auction on Janu-

ary 25th, the day following the expiration of the 5-day period. On the afternoon of January 24th, the last of the 5 days fixed in Mrs. Ellwood's notice to Mr. Niedermeyer, he deposited in the escrow the sum of \$10,000 and a grant deed to the three lots executed by him alone. He gave notice of this to Mrs. Ellwood, calling her attention to the fact that their exchange agreement provided "that in the event errors appear in the titles to either or any of the properties, then the agreement shall be extended for a reasonable time that the same may be corrected." He demanded "an extension for a reasonable time to cure any defect which such title certificate, when secured, may show in the title to the three lots * * * conveyed."

It is conceded by the defendant and impliedly found by the court that the deed which Mr. Niedermeyer deposited in the escrow only conveyed an undivided one-half interest in the lots. Title to the remaining interest was in his wife. She was under disability at the time, and her estate was being administered by Mr. Niedermeyer as her guardian. On the following day Mr. Niedermeyer, as guardian, caused proceedings to be commenced in his wife's estate for an order confirming a sale of an undivided one-half interest in the lots to one D. H. Carleton. On March 17th Mr. Niedermeyer's attorney deposited in the escrow a deed executed by Carleton conveying his interest in the lots, the sale to him having been confirmed by the probate court. However, Mrs. Ellwood's property had in the meantime been sold under the provisions of the deed of trust, and none of the deeds was ever delivered.

As the basis of her appeal from the judgment appellant contends that respondent did not perform his contract within the time limited for performance and made no valid tender of performance. She insists that where one who has agreed to convey property in which he only has an undivided one-half interest fails to acquire the outstanding interest within the time limited for performance, he may not thereafter perform by tendering a deed executed only by himself but purporting to convey the full title, and claim further time for performance under the guise of correcting an error in the title. Specifically her claim is that the evidence on the issue of performance does not support the findings. She also makes the point that the evidence does not support the finding of the court

that the value of the property which she was to receive by the exchange was not in excess of that which she was to convey.

[1,2] It was not necessary for the respondent in this case to have owned the fee-simple title to the property which he agreed to convey to appellant in order to enter into the contract with her. But in such a case the vendor must be able to make good title at the time fixed by his contract. In the early case of *Burks v. Davies*, 85 Cal. 110, 24 P. 613, 20 Am.St.Rep. 213, the court quoted from and followed a Minnesota case (*Goetz v. Walters*, 34 Minn. 241, 25 N.W. 404) holding that the vendor under a contract for the sale of land which he did not own must be prepared at all times within the period fixed by his contract to convey a good title. When the vendee complied with his contract, the vendor, the Minnesota court said, "would have been entitled to no more time than was reasonably necessary for the execution of the papers." In the later case of *Hanson v. Fox*, 155 Cal. 106, 99 P. 489, 490, 20 L.R.A.(N.S.) 338, 132 Am.St.Rep. 72, which is one of the leading cases on the subject, being widely cited, it was declared to be the settled rule in this state that "it is perfectly legal for one to contract to convey title to land which he does not own, and he is in default under such contract only when the vendee has performed his part of the contract and made demand for a title which the vendor is unable to furnish." This language was quoted with approval in *Lemle v. Barry*, 181 Cal. 6, 183 P. 148, and states the general rule.

Thus in *Haight v. Salter*, 260 Mich. 6, 244 N.W. 209, 210, the court said: "The fact that a person lawfully may contract to sell real estate which he does not own does not extend the contract time for delivery of a deed. He must take steps to acquire title in anticipation of his duty to deliver. After payment of the contract price, the vendor is not entitled to time to make title. He is entitled only to a reasonable time to execute the proper conveyance. 39 Cyc. 1326 et seq.; 27 R.C.L. 524."

In *Myers v. Fidelity-Philadelphia Trust Co.*, 290 Pa. 283, 138 A. 834, 835, the court had occasion to pass upon a case where several joint owners were sued to recover money paid on an unconsummated agreement for the purchase of real estate. The defendants could not deliver title to the property at the time called for by the contract because it was subject to a lien for

debts. The court said: "Defendants frankly admit that plaintiff was entitled to have a marketable title, and that at the time of settlement, they were unable to give it, because of the lien of those debts. They claim, however, that plaintiff had no right to rescind the contract at that time, because (1) he should have given them an opportunity to apply to the orphans' court, * * * for leave to sell the property free from the lien of those debts; and (2) he had made no tender of performance on his part. These objections are unavailing." The obligation of the vendor is succinctly stated in *Walsh v. Colvin*, 53 Wash. 309, 101 P. 1085, 1088, as follows: "While a vendor may have a reasonable time in which to prepare and deliver a deed, he does not have a reasonable time in which to acquire title to the property to enable him to perform his contract. If a vendor agrees to convey title at a given time and has no title when the date for performance arrives, the question of a reasonable time for preparing a deed does not enter into the case."

[3] In the case at bar respondent agreed to convey property to which he only had title to an undivided one-half interest. The time which he asserts he was entitled to was used by him for the purpose of procuring by purchase title outstanding in another individual. Under the authorities, in such a case he was entitled only to the time reasonably necessary to execute and deliver the deed. The time fixed by the appellant was manifestly sufficient for this purpose because respondent delivered his deed conveying all the title in him, as demanded by the vendee. Respondent contracted at his peril for the delivery of title to property which he did not own, and having so contracted, appellant was entitled to call for delivery of a deed conveying a marketable title in fee simple at any time she complied with her part of the agreement and within the period provided for performance. The court found that Mrs. Ellwood was able and willing to deliver title to her property at all times up to the expiration of the period fixed by her notice and demand. This finding is not challenged by respondent. It follows that the evidence does not support the finding that respondent performed his contract.

[4] Respondent contends that he has a complete defense to this action, notwithstanding his failure to deliver title, by the following provision of the exchange agree-

ment: "In the event that errors appear in the titles to either or any of said properties, then this agreement shall be extended for a reasonable time that the same may be corrected. In the event any error cannot be corrected, this agreement shall be null and void, except as to the payment of commissions, unless the title to the property affected is accepted subject thereto." However, this provision relates to "errors" in the title. It would be an unusual construction of this language to apply it to an absence of title. It obviously refers to some defect in the title which is subject to correction, or, at least, one which it might reasonably be assumed could be corrected even though it was afterward found that the assumption was erroneous. It is not so broad as the language of the contract in the case of *Crosby v. Wynkoop*, 56 Wash. 475, 106 P. 175, which is relied upon by respondent, which provided that the agreement there considered should be void "if said abstract does not show such title, or cannot be made to do so within ten days from notice of defects."

The judgment is reversed.

We concur: HOUSER, P. J.; DORAN, J.



10 Cal.App.2d 685

SAN FRANCISCO BRIDGE CO. v.

CHARLES NELSON CO. et al.

Civ. 9407.

District Court of Appeal, First District,
Division 1, California.

Dec. 18, 1935.

As Modified on Denial of Rehearing
Jan. 17, 1936.

1. Towage ☞14

Provision of towage contract relieving towing vessel and its owners from liability for negligence *held* void.

2. Towage ☞15(2)

In action against tower for loss at sea of derrick barge and property stowed thereon, refusing to admit letter written on stationery of one of defendants and signed by person connected therewith and accepted on behalf of plaintiff which contained admitted terms of contract and void provision that towing vessel or its owners took no responsibility for safe towage *held* not error.

3. Towage ☞15(1)

Instruction that master of towing vessel is bound to notice defects which "could" or "should" have been ascertained *held* proper, as requiring master of towing vessel to notice obvious defects or those which master was capable of ascertaining with reasonable diligence in exercise of due care.

4. Towage ☞15(1)

Instruction that owner of barge represented her to be seaworthy and fit for voyage when offered for towage, and limiting duty of master of towing vessel to conditions only that were obvious, *held* properly refused, where first part of instruction was given and limitation of duty of master of towing vessel to conditions only that were obvious was contrary to law under facts of case.

5. Towage ☞4

Tow company contracting to tow barge is not "insurer" or "common carrier," but is bound to exercise ordinary care in handling tow, and is liable for failure to fulfill agreement, unless prevented by causes not contributed to by negligence of tower.

[Ed. Note.—For other definitions of "Common Carrier" and "Insurer," see Words & Phrases.]

6. Towage ☞11(1)

Tower is not responsible for damages resulting from deficiency in condition or structural design of tow unless it knew or should have known of such deficiency, but tow company is responsible for failure of master of towing vessel to exercise prudence of person of ordinary maritime skill and experience in accepting for towage barge or other vessel that is obviously unable to make trip.

7. Towage ☞12(1)

Although ordinarily owner guarantees seaworthiness of tow by offering it for towage, where barge is offered for towage, master of towing vessel is required to exercise due care to examine vessel to ascertain if weakness exists in regard to constructive condition or loading of tow, and if such imperfections appear prior to commencement of voyage, owner of tow may be relieved of responsibility for its unseaworthiness unless it knew or should have known of possible imperfections, and failed to give notice thereof.

8. Towage ☞11(9)

Where tow is accepted, tower must consider type, construction, and condition of towed vessel in regulating speed of navigation in accordance with danger that may be confronted, and, when overtaken by bad weather, master must take such action as good seamanship may require.

9. Towage ⇨15(2)

In action against tower for loss at sea of derrick barge and property stowed thereon, evidence *held* to support implied findings that in operating at excessive speed after observance of damage to barge defendants were negligent.

10. Towage ⇨11(5)

Where barge being towed by steamship at full speed shipped water and showed list, failure of master to exercise due care by slowing speed or going into port of refuge or pumping out barge, or by adopting any precautionary measures, *held* willful and wanton conduct rendering owners of towing vessel responsible for loss of tow.

11. Towage ⇨12(1)

In action against tower for loss at sea of derrick barge and property stowed thereon, unseaworthiness of barge was not defense unless it caused or contributed to loss, or if, subsequent to plaintiff's negligence in delivering unseaworthy barge, defendants committed willful and wanton act which was proximate cause of loss of barge.

12. Trial ⇨243

In action against tower for loss at sea of derrick barge and property stowed thereon, instructions relating to determination of seaworthiness of tow, care required of towing vessel, and contributory negligence *held* not so conflicting when read together as to require reversal of judgment for plaintiff, although standing alone certain instructions might be construed as misstatements of law applicable to facts.

13. Negligence ⇨100

Contributory negligence of plaintiff is not defense for defendant's commission of willful and wanton act which was committed with knowledge of plaintiff's negligence, and which resulted in injury.

14. Towage ⇨15(1)

In action against tower for loss at sea of derrick barge and property stowed thereon, whether plaintiff was guilty of negligence in sending barge out to meet conditions which might be encountered on ocean, and whether defendants by speeding recklessly committed willful and wanton act, *held* for jury.

15. Towage ⇨15(1)

In action against tower for loss at sea of derrick barge and property stowed thereon, refusal of instruction that if negligence of plaintiff contributed proximately to loss of barge, whether negligence of defendants was gross or ordinary was immaterial *held* not error, where no offered instruction attempted to define gross negligence as distinguished from willful and wanton act.

16. Towage ⇨4

Unless terms of contract so indicate, towage does not constitute "bailment."

[Ed. Note.—For other definitions of "Bailment," see Words & Phrases.]

17. Towage ⇨14

Equipment of tow *held* included in towage contract, though not mentioned in letter of agreement, regardless whether equipment was regular or accessory, provided that it was to be used only by owners of tow necessarily and exclusively therefor; whatever supplies or articles are necessarily used to obtain efficient action of tow during or at destination of voyage being classifiable as "equipment."

[Ed. Note.—For other definitions of "Equipment," see Words & Phrases.]

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by the San Francisco Bridge Company against the Charles Nelson Company and others. Judgment for plaintiff, and defendants appeal.

Modified and affirmed.

Irving H. Frank, Nathan H. Frank, and L. C. Gay, all of San Francisco, for appellants.

Lillick, Olson, Levy & Geary and Theodore M. Levy, all of San Francisco, for respondent.

WARD, Justice pro tem.

This is an appeal from a judgment in the sum of \$12,500 awarded by a jury in an action to recover damages for the loss at sea of plaintiff's floating derrick barge and property stowed thereon, which was under tow of one of defendant company's steamships from the port of Los Angeles to the port of San Francisco. The appeal is based upon errors of law in the rulings and instructions of the court. For the sake of brevity the steamship will be referred to as the Griffdu and the barge as No. 31 or as the barge.

[1,2] The only alleged error relative to the admission of evidence was the trial court's refusal to permit defendants to introduce a certain letter directed to the plaintiff, written upon the stationery of the Charles Nelson Company, one of the defendants, signed by J. Michael-

sen, connected therewith, and accepted on behalf of plaintiff by Fred R. Muhs. The body of the document reads as follows:

"We hereby confirm arrangement to furnish motor power to tow your Barge No. 31 from San Pedro to San Francisco Harbor, delivered to our steamer by tug for your account. We are to drop the barge at San Francisco Harbor to be picked up by tug here for your account.

"We understand your barge will be ready for the venture on June 17th, 1929, subject to your judgment of weather conditions indicating the probability of a safe tow.

"[The following paragraph is pasted on over the original paragraph of the letter: "In case of foundering or burning at sea the amount to be paid shall be an amount proportional to the tow which had been completed; that is, the towage fee would be pro-rated as to the time in transit; in case of loss as above."]

"The tow service is to be entirely at the risk of the tow and the Steamer 'Griffdu' and her owners take no risk or responsibility whatsoever for the safe towage of the said tow, and agree solely and only to furnish the motor power.

"The charge for this service is to be \$500.00."

The original arrangements for the towage of the barge were made verbally by the president of the defendant company and the vice president of the plaintiff company. The instrument in writing was simply a confirmation of such arrangements. That the barge was to be towed from San Pedro to San Francisco, that delivery was to be made to and received from the Griffdu by the plaintiff, that the barge should be ready for tow on a certain date, and that a pro rata hire was to be paid in case of foundering or burning at sea, which seems to have been subsequently paid, were all facts admitted in the pleadings or presented as stipulated evidence in the trial of the case. The provision relative to "weather conditions indicating the probability of a safe tow" subject to the judgment of plaintiff was immaterial in so far as the admissibility of the letter was concerned, for the reason that the evidence showed that the weather was calm when the Griffdu "picked up the barge" and commenced the tow. This

leaves the written instrument with only the following pertinent provision: "The tow service is to be entirely at the risk of the tow and the Steamer 'Griffdu' and her owners take no risk or responsibility whatsoever for the safe towage of the said tow, and agree solely and only to furnish the motor power." The motor power was a necessary adjunct to towing the barge, but when defendants sought to so limit their responsibility that they would not be liable for their own negligence, they incorporated a provision in the instrument which was opposed to public policy, and therefore illegal and void. In *The Somers N. Smith* (D.C.) 120 F. 569, 575, a contract provided, "The owners of the tug were to furnish simply the motive power to propel the tow, and to be in no way responsible for her navigation"; and the court held (120 F. 569, page 576): "In the opinion of the court, even if the contract claimed by the owners of the tug had been established, it would not relieve the tug nor her owners from the negligence of the tug or her crew." *Compania de Navegacion v. Fireman's Fund Ins. Co.* (The Wash Gray), 277 U.S. 66, 48 S.Ct. 459, 72 L.Ed. 787; *The Jonty Jenks* (D.C.) 54 F. 1021; *The Skagway*, 1925 A.M.C. 1133. Appellants seek to distinguish the terms of the letter in this case with the communications and contracts in the cases last cited by pointing out in their brief that the letter in this case does not embody a stipulation against negligent towage, but only against responsibility for the condition of the barge and its ability to withstand the perils of the voyage. Appellants contend that the letter was admissible to determine the duties resting upon the towing vessel, and that there is in the contract letter an element of ambiguity susceptible of explanation. The agreement to tow was prepared by appellants, and there should be no ambiguity in expressing any stipulation in reference to protecting appellants against loss. The letter contains no provision with respect to the condition of the barge or its ability to withstand the voyage, and it does not outline and limit the extent and character of the duties devolving upon the towing vessel. The citations submitted by appellants are therefore not in point. The stipulations contained in the letter include a void provision and admitted facts. It was not contemplated by either party that the tower would not be responsible

for his own negligence. *Wooden v. Austin*, 51 Barb.(N.Y.) 9; *Wells v. Steam Navigation Co.*, 8 N.Y. 375. "If the point to prove which the evidence is competent can just as well be proven by other evidence, * * * the trial judge might well be justified in excluding it entirely." *Adkins v. Brett*, 184 Cal. 252, 258, 193 P. 251, 254.

[3] Attention is called to a number of instructions wherein it is claimed that the correct rule of law was not stated, or that certain instructions were in conflict with other instructions. These alleged erroneous instructions may be classified as instructions with regard to the determination of the seaworthiness of the tow, instructions with regard to the care required of the towing vessel, and instructions upon contributory negligence. There is considerable repetition in the instructions, and standing alone certain instructions might be construed as misstatements of the legal principles applicable to the facts of this case; but when one instruction is read in conjunction with others, the true legal problem is unfolded sufficiently clear to enlighten the lay mind upon the law of the case. The pivotal point around which all of appellants' objections on this score may be urged was the refusal of the court to give defendants' requested instruction No. 8, and the use of the words "could" and "should" in the given instructions in reference to the ascertainment of the weakness, if any, of the barge. The word "could," as used, simply stated to the jury that the master of the towing vessel was bound to notice the obvious defects, or such defects as the master was capable of ascertaining with reasonable diligence in the exercise of due care.

[4] The refused instruction No. 8 read as follows: "The owner of the barge, when it offered her for towage to San Francisco, represented her to be seaworthy and fit for the voyage. If the barge was unfit for the voyage, and her unseaworthiness was not obvious to the master of the 'Griffdu', and was not made known to him, he was required to exercise only that degree of care which is proper and necessary for the management of a sound and seaworthy barge, such as the master had a right to presume her to be." The first portion of No. 8 was actually given. The remaining portion of the instruction was not

entirely accurate. It limited the duty of the master of the towing vessel to conditions only that were obvious. Under the facts of this case such limitation was not in accord with the correct legal rule.

The facts of this case are as follows: The barge was a square-ended and flat-bottomed vessel designed for harbor work, but of a type similar to other barges that had been towed up or down the Coast. There was evidence introduced to the effect that there was nothing about No. 31 or her structure that would indicate any weakness that would prevent her being towed through the conditions of the weather and the sea which she subsequently encountered on the Ocean steamer lane between San Pedro and San Francisco. Respondent obtained from a marine surveyor, who subsequently testified in the case, a certificate that the barge was seaworthy. There was stowed on the barge certain equipment. The master of the *Griffdu* went to the side of the barge and inspected her. Before the tow commenced he was asked if he thought the barge was all ready with respect to the make-up of the tow and the stowage of the material on her, and he replied, "She will go all right." At the time the barge left San Pedro there was fuel on board, water in the boilers, and a regular pump and siphon. There was no evidence of leakage. On the morning of the second day of the trip, the wind increased and the sea became rougher. The barge was pounding against the seas and shipping considerable water. From the vibration of the ship it appeared that the engines were at full speed. On the afternoon of the second day the wind grew stronger. At this period the barge was lower in the water and had a slight starboard list. The *Griffdu* continued "full speed ahead." It was possible to put men on the barge and "pump her out," but this action was not taken. In the evening the hawser was permitted to run out and the barge cast loose. The *Griffdu* stood by the barge for about 10 minutes after the barge was cast loose. Four days later the United States Coast Guard Cutter *Shawnee* located the wreck near the passenger steamer lane, bottom up, without holes as far as could be ascertained. Unsuccessful attempts were made to tow the wreck to Monterey bay, so the barge was blown up with mines.

[5-10] Legal rules applicable to the above facts are as follows: A tow company contracting to tow a barge is liable in damages for failure to fulfill the agreement unless prevented by causes not contributed to by the negligence of the tower. *Wooden v. Austin*, *supra*. A tower is not an insurer, and not a common carrier, but is bound to exercise ordinary care in every respect in handling the tow. *Dameron-White Co., Ltd., v. Angola Transfer Co.* (C.C.A. 5th Cir.) 19 F.(2d) 12. The tower is not responsible for damages resulting from a deficiency in the condition or structural design of the tow, unless the tower knew or should have known of such deficiency. 54 A.L.R. 133. If the master of the towing vessel shows lack of such prudence as should be possessed by one of ordinary maritime skill and experience in accepting for towage a barge or other vessel that is obviously unable to make the trip, the tow company is responsible for the master's failure to exercise ordinary care. *Maryland Transp. Co. v. Dempsey* (C.C.A.) 279 F. 94, 98; *The William H. Yerkes, Jr.* (D.C.) 214 F. 881. The tower is not responsible for the results of accidents occurring through the unseaworthiness of the tow, unless such condition is disclosed or is obvious, or should be obvious to the master of the towing vessel. *Henry Du Bois Sons Co. v. Pennsylvania R. Co.* (C.C.A.) 47 F.(2d) 172. Ordinarily, the owner of a towed vessel guarantees its seaworthiness by offering it for towage, but if it is obvious that a vessel such as a barge is designed for navigation in smooth waters and not for heavy ocean buffeting, then the master is put upon his guard in the exercise of due care to observe, and if necessary to examine, the construction and the condition of the vessel to be towed, to ascertain if any weakness or imperfection exists in regard to the constructive condition or the loading of the tow. If imperfections appear or could have been observed and ascertained by the use of reasonable diligence prior to the commencement of a voyage, then the owner of the tow may be relieved of responsibility for the tow's unseaworthiness, unless the owner knew or should have known of the possible faults or imperfections and failed to give notice thereof to the proper representatives of the towing vessel. If the tow is accepted, the tower must consider the type, construction, and condition of the towed

vessel in regulating the speed of navigation in accordance with the danger that may be confronted. *The Syracuse* (D.C.) 18 F. 828. When overtaken by bad weather or choppy seas, the master must take such action as good seamanship may require. *The William H. Yerkes, Jr.*, *supra*. If the tow is abandoned except in compelling emergency, the tower must stand by or place himself in the position of responsibility for inexcusable negligence. *Maryland Transp. Co. v. Dempsey*, *supra*. Whether a proximate causal relation exists between the loss of the tow and the action of the master of the towing vessel depends upon the facts and circumstances of each case. There is sufficient evidence in the record to justify the implied findings of the jury that in operating at an excessive speed when they observed the damage that occurred appellants were guilty of negligence. Also in failing to exercise due care by slowing the speed or by going into a port of refuge or by pumping out the barge or by failing to adopt any precautionary measures, but, on the contrary, continuing with reckless speed, appellants were guilty of a willful and wanton act. Under all the circumstances of this case, the failure to "stand by" after casting the barge adrift seems to be inexcusable.

[11, 12] Under the facts as recited and the law as enunciated, we fail to find such conflict in the numerous objections to the instructions heretofore referred to that requires a reversal. There were different theories upon which the jury could return a verdict against appellants. The jury could find that respondent did not deliver an unseaworthy barge for towage and appellants were liable in damages for negligence. The unseaworthiness of the barge was not a defense unless it caused or contributed to the loss or injury. 63 Cor.Jur. p. 55. Respondent may have delivered an unseaworthy barge, which fact remotely contributed to the accident. Respondent may have been guilty of negligence, but if thereafter a willful and wanton act was committed by appellants which was the proximate cause of the loss of the barge, appellants would be liable. To quote *Center v. Yellow Cab Co.*, 216 Cal. 205, 207, 13 P.(2d) 918, 920,—though the facts are different the legal principle is the same: "The real issue in cases of this character is not whose negligence came first or last, but

rather whose negligence, however, it came, was the proximate cause of the injury." It was necessary to give instructions covering these various theories. When applied to each theory the instructions were not conflicting.

[13-15] The complaint alleged that the barge was lost as the result of "carelessness, negligence, gross negligence * * * of the said wilful and wrongful conduct of the defendants." Appellants requested an instruction to the effect that if "the negligence of the plaintiff contributed proximately to the loss of the barge * * * it is immaterial whether the negligence of the defendant was gross or ordinary negligence." No offered instruction attempted to define gross negligence, or to distinguish gross negligence from a willful and wanton act. If one party is guilty of negligence in failing to exercise ordinary care to a degree that could be classified as contributory negligence, and a second party, nevertheless realizing the negligence of the first party, commits a willful and wanton act that results in injury to the first party, the so-called contributory negligence ceases to be a defense for the commission of the willful and wanton act. *Girdner v. Union Oil Co.*, 216 Cal. 197, 13 P.(2d) 915; *Davies v. Mann*, 152 Eng.Reprint 588, Parke, B. Whether plaintiff was guilty of negligence in sending the barge out to meet possible head seas and strong winds and other conditions that might be encountered on the ocean, and whether the defendants by speeding recklessly committed a willful and wanton act, were questions for the jury to decide, but the proposed instruction as presented could only result in confusing the jurors' minds upon the issue; namely, were the defendants guilty of a willful and wanton act.

[16,17] The requested instruction on the subject of bailment was properly refused. A towage unless the terms of the contract so indicate does not constitute a bailment. *Stevens v. The White City*, 285 U.S. 195, 52 S.Ct. 347, 76 L. Ed. 699. Whatever supplies or articles are necessarily used or to be used to obtain efficient action during or at the destination of the voyage may be classified as equipment. The equipment was part of the contract, though not mentioned in the letter of agreement, and it does not matter if the equipment was regular or casual or accessory, provided

that it was to be used only by the owners of the barge necessarily and exclusively for No. 31. Part of the equipment was lashed to the deck of the barge and was observed by one of the officers of the *Griffdu*.

Certain articles, including an orange peel bucket, etc., were suitable for use and had been used on "the barge." Other articles, namely, a Fordson tractor valued at \$300, a plow valued at \$90, and a scraper valued at \$90, were not a part of the regular or accessory equipment of the barge. The amount of the judgment is therefore reduced to the sum of \$12,000, and, as thus modified, the judgment will stand affirmed; respondent to recover its costs of appeal.

The petition for rehearing is denied.

We concur: TYLER, P. J.; CASHIN, J.



10 Cal.App.2d 730

PROVENCHER et ux. v. CITY OF LOS ANGELES et al.

Civ. 9681.

District Court of Appeal, Second District,
Division 1, California.

Dec. 19, 1935.

1. Dismissal and nonsuit ☞6

Statutory right of plaintiff to dismiss before "trial" allows dismissal at any time before case is taken under advisement at close of evidence and argument (Code Civ. Proc. § 581, subd. 1).

[Ed. Note.—For other definitions of "Trial," see Words & Phrases.]

2. Dismissal and nonsuit ☞11

"Trial" within statute allowing plaintiff to dismiss action before trial may be trial on law, as well as on the facts, and judgment entered after order sustaining demurrer without leave to amend, is judgment after trial (Code Civ.Proc. § 581, subd. 1).

3. Dismissal and nonsuit ☞10

Order sustaining demurrer to amended complaint with permission to make further amendment held not to render ineffective, dismissal filed by plaintiff within time allowed for amendment, since statute giving plaintiff right to dismiss before "trial" was applicable (Code Civ.Proc. § 581, subd. 1).

4. Judgment ☞11

Judgment entered for defendant after plaintiffs had filed dismissal under statute authorizing dismissal before trial was void, and order for vacation thereof was proper (Code Civ.Proc. § 473, and § 581, subd. 1).

Appeal from Superior Court, Los Angeles County; Isaac Pacht, Judge.

Action by Joseph Provencher and wife against the City of Los Angeles and others. Judgment was entered for defendants, and from an order vacating the judgment, defendants appeal.

Order affirmed.

Everett W. Mattoon, Co. Counsel, and W. B. McKesson, Deputy Co. Counsel, both of Los Angeles, for appellants.

Manley C. Davidson and E. H. Delorey, both of Los Angeles, for respondents.

SHINN, Justice pro tem.

This is an action brought by the plaintiffs for damages alleged to have been caused to the real property of plaintiffs by the construction of a pedestrian subway across the highway upon which plaintiffs' property abuts. At the time of trial on September 18, 1933, the court sustained a general demurrer of one defendant to the amended complaint, and also sustained an objection of another defendant to the introduction of any evidence upon the ground that the amended complaint failed to state a cause of action. In so ruling, the court made the following statement: "At this time I will sustain the demurrer and I will sustain the objections to the introduction of any evidence under this amended complaint; but I will continue the matter one week—if that is sufficient time for you; if not, take whatever reasonable time you think is necessary—for the purpose of enabling you to prepare and serve upon counsel and present to the Court a proposed amendment, if you desire to amend; that is, a proposed second amended complaint; at which time the Court will then determine whether or not to grant you leave to file it or to deny you the permission and let the ruling stand without leave to amend." The minutes of the court show that the matter was continued for the purpose of affording plaintiffs' counsel an opportunity to present a proposed second amended complaint. On September 23, 1933, counsel for plaintiffs filed with the clerk a written request for dismissal of the action. On September 25, when the matter came on for hearing, plaintiffs' counsel did not appear, and the case was marked off calendar. On September 29, the court signed a judgment in favor of the defendants. On November 29, on motion of plaintiffs' counsel, this judgment was vacated. Defendants Los Angeles City

School District of Los Angeles County and the Board of Education of the City of Los Angeles appealed from this order.

Appellants base their appeal upon the following propositions: That plaintiffs could not dismiss their case because (a) the hearing on the demurrer was a trial; and (b) that the ruling on the demurrer was a decision of the court. For these reasons, they contend that the attempted dismissal was ineffectual, that the judgment in their favor was properly entered, and that the court was without power to set aside the same.

[1,2] If the described proceedings amounted to a trial, plaintiffs thereafter had no right to dismiss the action, but if they did not amount to a trial, plaintiffs had such right. Code Civ.Proc., § 581, subd. 1. The words "before trial" are construed to mean before final submission of the case, that is to say, before the case is taken under advisement at the close of the evidence and argument, and up to this time a plaintiff may dismiss his action. 9 Cal.Jur. 510; *MacDermot v. Grant*, 181 Cal. 332, 184 P. 396; *Strupelle v. Strupelle*, 59 Cal.App. 526, 211 P. 248. There may be a trial on the law as well as on the facts. A judgment entered after an order sustaining a demurrer without leave to amend is a judgment after trial. *Goldtree v. Spreckels*, 135 Cal. 666, 67 P. 1091.

[3] As we construe the remarks of the court in sustaining the demurrer, the court did not order the demurrer sustained without leave to amend. Leave was granted to serve and present to the court a second amended complaint. The court did not decide that an amendment would not be allowed, and until that point was decided, there was no refusal to allow an amendment. The rules of the superior court of Los Angeles county provide that when a demurrer to a pleading is sustained ten days are allowed for amendment unless it is otherwise ordered by the court. Plaintiffs therefore had a right to amend unless the order of the court deprived them of that right. From the remarks of the court which we have quoted, an intention was manifested not to rule finally in the matter until plaintiffs' counsel had had an opportunity to cure the defects in the pleading. Whether the court believed that could be done is not material. The important thing is that plaintiffs' counsel were granted another opportunity to draw their complaint so that it would state a cause of action for

the recovery of damages from the defendants.

Plaintiffs are not in the position of having elected to stand upon their complaint after a demurrer thereto had been sustained. By the dismissal of the action they relieved themselves of the necessity of making a choice between standing upon the complaint to which the demurrer had been sustained or presenting a further amended complaint. The action was therefore effectually dismissed by the act of plaintiffs in filing their written dismissal with the clerk. *Strupelle v. Strupellé*, supra.

[4] The court was without power to render a judgment in favor of the defendants after the action had been dismissed. This judgment was void, and was properly set aside. Code Civ. Proc. § 473; *Home Real Estate Co. v. Winnants*, 39 Cal.App. 643, 179 P. 534.

The order vacating the judgment in favor of defendants is affirmed.

We concur: HOUSER, P. J.; DORAN, J.



10 Cal.App.2d 734

HARRIS v. HARRIS. *
Civ. 10109.

District Court of Appeal, Second District,
Division 1, California.
Dec. 19, 1935.

Hearing Denied by Supreme Court
Feb. 17, 1936.

1. Divorce ⇨271

Where wife brought action in municipal court for amount allegedly accrued after child's death on divorce decrees awarding certain amount weekly for support of wife and child, superior court's judgment rendered on appeal pursuant to statute, and determining that decrees were too uncertain to be enforceable, *held* conclusive in subsequent action for similar relief (Code Civ.Proc. §§ 988i, 1908).

2. Judgment ⇨407(1)

Action in equity lies to obtain relief from judgment, or to fix rights thereunder, provided no remedy is available in action wherein judgment was rendered.

3. Divorce ⇨255

Superior court having retained jurisdiction in divorce action to modify decree

awarding certain amount weekly for support of wife and child, modification thereof after child's death by terminating requirement for support *held* to preclude divorced wife from maintaining subsequent action to recover amount allegedly accrued after child's death and prior to such modification (Civ.Code, § 139).

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by Adabelle Harris against W. Glen Harris. From a judgment of dismissal, plaintiff appeals.

Affirmed.

Goodspeed, Pendell & McGuire, and G. Roy Pendell, all of Los Angeles, for appellant.

Frank S. Hutton, of Los Angeles, for respondent.

EDMONDS, Justice pro tem.

The plaintiff in this action was formerly the wife of the defendant. Some years ago she sued him for divorce. This action is brought to recover the amount claimed to have accrued under the interlocutory and final decrees of divorce in her favor, awarding her the sum of \$25 per week for the support of herself and a minor child.

In the first cause of action of the complaint it is alleged that by the interlocutory decree of divorce entered in 1928, the superior court of Los Angeles county ordered the defendant here to pay to plaintiff for the support of herself and their minor child the sum of \$25 per week until the further order of the court. In the following year, it is alleged, the court made its final decree of divorce ordering that any provision for support contained in the interlocutory decree should continue to bind the parties affected. It is further alleged that the final decree of divorce was never modified prior to October 18, 1932; that the weekly payments were made to August 13, 1930; and that the payments accruing between these two dates remain due and unpaid.

By a second cause of action plaintiff pleads all of the allegations of the first cause of action, and also that the minor child of the parties died in April, 1930. She further alleges that in June, 1931, she commenced an action in the municipal court of the city of Los Angeles for the amount accrued upon the decree since a date subsequent to the death of the child, and that this

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

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*Hearing denied by Supreme Court 54 P.(2d) 459.

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action was determined adversely to her. The pleadings in the municipal court action and the findings and judgment thereon are included in the complaint in the instant action. It is also alleged that she appealed from that judgment to the superior court which made findings of fact, conclusions of law, and judgment against her in lieu of those made by the municipal court under the provisions of section 988i of the Code of Civil Procedure. The complaint also shows that after her petition for a rehearing of this decision was denied she petitioned the District Court of Appeal of the Second Appellate District and the Supreme Court for a writ of certiorari to review the action of the superior court, each of which courts denied her petition.

By further allegations plaintiff shows that in October, 1932, the defendant here applied to the superior court for a modification of the provisions of the interlocutory and final decrees of divorce providing for support; that this application, after a hearing in which plaintiff appeared, was granted and the requirement for support was terminated effective October 18, 1932, but without prejudice to rights or obligations accruing prior to that date.

In addition to these allegations of matters of record in former litigation between plaintiff and her former husband, she alleges that the community property belonging to herself and her husband was not divided at the time of the divorce, and that it was of considerable value. She also pleads two promises, each of which is alleged to have been made by the defendant and not fulfilled by him. The first is said to have been made prior to the date of the interlocutory decree. She alleges that defendant promised her that if she would qualify herself to teach school that he would assist her in meeting the expense of attendance at a university. The second, she asserts, was made after the death of the child. This allegation is that defendant promised that if plaintiff would buy a new automobile for herself, that he would make the monthly payments required for its purchase. She also alleges that the income of defendant from the date of the interlocutory decree to the date of its modification was in excess of \$6,200 per year.

The prayer of the complaint is first, for the sum of \$25 per week from August 13, 1930, to October 18, 1932, the latter being the date of the order modifying the decrees of divorce; second, for judgment making certain the weekly amounts to which plain-

tiff is entitled under the decree of divorce for the period between these dates; and, finally, for a judgment that the judgment of the superior court rendered on appeal from the municipal court is void.

To this complaint the defendant demurred both generally and specially. The demurrer was sustained with leave to amend. Plaintiff declined to amend, and a judgment of dismissal was entered, from which this appeal is prosecuted.

The points presented by the appellant are, first, that uncertainties in a judgment may be cured by an equitable action, and, second, that the judgment rendered by the superior court on appeal is void, section 988i of the Code of Civil Procedure being unconstitutional.

[1] It is conceded by the complaint that defendant paid all amounts required by the decrees of divorce to the date of the death of the child. The superior court determined that the provisions of the decrees concerning the amounts to be paid to plaintiff by the defendant have, since the date of the death of the child, been too uncertain to be enforceable. That judgment became final before the complaint in this action was filed and is conclusive upon the parties here. "It is a doctrine of law too long established to require the citation of authorities that where a court has jurisdiction it has a right to decide every question arising in the cause, and, whether its decision be correct or otherwise, its judgment until reversed is binding on every other court. Errors which it may make must be corrected from within by motion or appeal." *Bradford v. Trapp*, 49 Cal.App. 493, 193 P. 584, 585; section 1908, Code Civ.Proc.

[2] As to the other point raised by appellant, it is well settled that an action in equity for relief from a judgment or to fix rights under a judgment may be maintained under certain circumstances. But it is elementary that the assistance of equity cannot be invoked so long as there is a remedy available in the action in which the judgment was rendered. *Ede v. Hazen*, 61 Cal. 360; *California Beet Sugar Co. v. Porter*, 68 Cal. 369, 9 P. 313.

[3] The superior court retained jurisdiction in the original proceeding for divorce to modify its order for support from time to time upon a proper showing. *Parker v. Parker*, 203 Cal. 787, 795, 266 P. 283; section 139, Civ.Code. That jurisdiction was exercised and the decree was modified

terminating the requirement that the defendant make further payments to plaintiff. This is the equivalent of a judgment that plaintiff is not entitled to any further amounts from the defendant, and she cannot maintain this action to secure another determination of an issue which has been adjudicated adversely to her in the divorce proceeding.

The judgment is affirmed.

We concur: HOUSER, P. J.; DORAN, J.



10 Cal.App.2d 698

ABOS et ux. v. MARTYN.
Civ. 10155.

District Court of Appeal, Second District,
Division 1, California.
Dec. 18, 1935.

1. Death ☞11

Right to recover damages for wrongful death is statutory (Code Civ.Proc. §§ 376, 377).

2. Death ☞42

Husband and wife ☞249

Since proceeds of father's judgment for death of child is community property, mother has an interest in the action and may be joined as a plaintiff (Code Civ.Proc. §§ 376, 377).

3. Death ☞29

Where father and mother brought action for wrongful death of child and father died before trial, mother could prosecute action in her own name (Code Civ.Proc. §§ 376, 377).

4. Appeal and error ☞110

Order denying motion for new trial is not appealable.

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action by G. Abos and Lucia Abos against Clyde A. Martyn for damages for the alleged wrongful death of their minor child. After the complaint had been filed and before trial, the father G. Abos died. From a judgment of dismissal as to both plaintiffs and an order denying her motion

for a new trial, plaintiff Lucia Abos appeals.

Judgment reversed and appeal dismissed.

De Forrest Home and Eugene Kelly, both of Los Angeles, for appellant.

Thomas Morris and Roy J. Farr, both of Los Angeles, and George G. Rinier, of Indianapolis, Ind., for respondent.

EDMONDS, Justice pro tem.

This action was brought by a father and mother to recover damages for the alleged wrongful death of their minor child. Subsequent to the filing of the complaint and before trial the father died, and the question on this appeal concerns the right of the mother to further prosecute the action.

When the case was called for trial more than one year after the death of the child, the mother moved the court to substitute her as plaintiff in the place of herself and her deceased husband. This motion was denied. She thereupon moved to file an amendment to the complaint, alleging the death of the husband. This motion was granted. Defendant then moved to dismiss the complaint, first, as to the deceased father, and by another motion, as to the mother. Each of these motions was granted and a judgment of dismissal was entered. Plaintiff Lucia Abos, the mother, has appealed from this judgment and from an order denying her motion for a new trial.

Appellant contends that it was error for the trial court to deny the motion to substitute her as sole party plaintiff, and that it was also error for the court to dismiss the action as to her.

[1,2] The right to recover damages for the wrongful death of a person is entirely statutory. *McLaughlin v. United Railroads*, 169 Cal. 494, 147 P. 149, L.R.A. 1915E, 1205, Ann.Cas. 1916D, 337. A cause of action for the death of a minor exists only by virtue of section 376 of the Code of Civil Procedure, which provides that "a father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a minor child, * * * when such injury or death is caused by the wrongful act or neglect of another." The proceeds of a favorable judgment in an action brought by a father under this section are community property, and "the mother,

having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as a plaintiff." *Keena v. United Railroads of San Francisco*, 57 Cal.App. 124, 130, 207 P. 35, 38.

[3] The amendment to the complaint which the trial court allowed to be filed showed that the father had died after the filing of the complaint and nine months after the death of the child. The status of the mother, who it must be remembered was an original party plaintiff in the action, was by the death of the father changed from that of a proper party to the action to that of a necessary party, indeed the only person who could thereafter maintain the action.

There is no reason, having any foundation upon principle or justice, to take from a mother the right to further prosecute her action for the claimed wrongful death of her child under such circumstances. Neither she nor the defendant is in any different position than each would have been if a new complaint had been filed by her as plaintiff after the death of her husband and before the expiration of the statutory period of limitation. The situation is similar to that considered in *Rowman v. Southern Pacific Co.*, 55 Cal.App. 734, 204 P. 403, 404, where in an action for wrongful death, brought under the provisions of section 377 of the Code of Civil Procedure, the trial court allowed an amendment by which the personal representative of the deceased was substituted as plaintiff for the widow and minor children of the deceased after the statute of limitations had run against the cause of action. In that case this court held: "The law of this state permits such actions to be maintained by the heirs or personal representatives. * * * And, in such cases as the one now at bar, the beneficiaries are the widow and minor children. These are the real parties in interest, whether the action be brought in their own names or by an administrator of the estate of the deceased. This being so, the substitution of parties as made by the court in this case, so far as the second cause of action is concerned, cannot be regarded in any sense as the beginning of a new action."

[4] The record shows, notwithstanding the contentions of respondent in that regard, that the notice of appeal was filed within the statutory period. However, no

appeal lies from an order denying a motion for a new trial.

The judgment is reversed and the appeal from the order is dismissed.

We concur: HOUSER, P. J.; YORK, J.



**GRAND CENTRAL PUBLIC MARKET, Inc.,
v. KOJIMA.***
Civ. 9891.

District Court of Appeal, Second District,
Division 1, California.

Jan. 4, 1936.

Rehearing Granted Jan. 27, 1936.

1. Landlord and tenant ⇨230(1)

Lessor's complaint seeking delinquent rentals and other charges, and not mentioning certain three-day notices to pay rent or quit, nor requesting forfeiture of leases or removal of lessee, held not to warrant judgment of forfeiture or removal.

2. Landlord and tenant ⇨223(2)

Where leases provided that consideration therefor was lessee's covenants, plus certain cash payments to be credited on final months' rent, or to be returned if lessor failed to restore premises after fire, unless lessee was in default, court properly found that such payments constituted consideration and not security for leases, precluding set-off against claim for rentals and other charges.

3. Landlord and tenant ⇨184(2)

Title to money paid as consideration for lease passes to lessor when lease is executed, and belongs to lessor, even though lessor agrees to give credit for certain final months of term.

4. Landlord and tenant ⇨94(1)

Notice to pay rent or quit does not automatically terminate lease; lease being terminated only if notice is acted upon.

5. Landlord and tenant ⇨94(1)

Lease is forfeited by agreement if lessee quits premises within period specified in notice to pay rent or quit.

6. Landlord and tenant ⇨112(3)

Lessor claiming or collecting rents in legal proceeding, or otherwise, waives existing right to effect termination of lease, notwithstanding prior service of notice to pay rent or quit.

7. Landlord and tenant ⚡94(1)

Letter from lessor's counsel referring to prior notice to pay rent or quit, and announcing intention of commencing suit to remove lessee unless lessee immediately took care of back rent, *held* not to reiterate or extend prior notices to pay rent or quit, and parties' rights were governed by precise terms of such notices (Code Civ.Proc. § 1161, subd. 2).

8. Landlord and tenant ⚡94(1)

Notice to pay rent or quit being intended to lay foundation for forfeiture, terms of notice should be strictly construed.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by the Grand Central Public Market, Incorporated, against J. I. Kojima. Judgment for plaintiff, and defendant appeals.

Affirmed.

Randall & Bartlett and Kenneth W. Kearney, all of Los Angeles, for appellant.

Walter S. Coen, of Los Angeles (Horace W. Danforth, of Los Angeles, of counsel), for respondent.

ROTH, Justice pro tem.

Plaintiff and respondent filed a complaint setting forth several causes of action for the recovery of rental in arrears and other charges delinquent and unpaid, pursuant to the terms of three several written leases, executed by it with the defendant and appellant on certain stalls in the Grand Central Market in Los Angeles. The complaint was filed on January 6, 1933, and included a demand for rental for the month of January, 1933. Prior to the filing of the complaint, plaintiff on two occasions in the month of December, 1932, separated by an interval of two weeks' time, served upon defendant two several three-day notices to pay rent or quit; said notices affecting all of said leases and the premises therein demised. Defendant ignored each of said notices and did not pay the rent, nor did he quit the premises. On January 4, 1933, which date was subsequent to the expiration of the second of the three days' notice, plaintiff through its counsel wrote a letter to defendant substantially as follows, to-wit:

"Some time ago you were served with notice either to pay rent or vacate the stalls now occupied by you in Grand Central Market.

"The Public Market feels that as you have been a tenant for such a length of time, they dislike very much to bring suit to remove you from these premises. However, unless you immediately take care of the back rent, I shall commence suit to remove you from these premises."

[1] On January 7, 1933, one day after the filing of plaintiff's complaint, defendant quit the premises demised in the several leases. Plaintiff in its complaint, as already suggested, says nothing about the notices to quit or the letter of January 4th. It pleads the several leases executed, the entry thereunder by defendant, the fact that certain rentals and other charges under the lease have not been paid, and requests judgment for the full delinquent amount. The complaint does not ask for a forfeiture of the leases, or any of them, or that defendant be removed from the premises, and under the allegations of the complaint no forfeiture could be legally decreed, nor could defendant be removed. Defendant in his answer sets forth as exhibits the two several three-day notices and the letter, which has been referred to, and avers that he quit the premises pursuant thereto, and that as a consequence thereof the several leases were forfeited or terminated pursuant to the terms of said notices and said letter. Defendant admits that plaintiff is entitled to rental in arrears, but asserts that plaintiff should not have had judgment for rental for the month of January, as provided for by the lease, since the lease was terminated when he quit the premises on January 7, 1933.

One of the leases in question provided, among other things, as follows:

"* * * in consideration of the covenants and agreements of the Lessee hereinafter set forth, and the sum of Six Hundred Dollars—Dollars (\$600.00) now paid to the Lessor by the Lessee, the receipt whereof is hereby acknowledged, said Lessor does hereby lease and demise unto the Lessee, * * *.

"The cash payment now made of Six Hundred Dollars (\$600.00), shall, in the event of the full and faithful performance of this contract by the said Lessee, be credited in payment of the rent for the last Two (2) months of the said term; otherwise the said payment this day shall belong to the Lessor as a part of the consideration to it for the execution of this lease. * * *"

Other paragraphs of the same lease provided that if the lessee shall go into volun-

tary liquidation and become bankrupt or have receiver appointed, that lessee or his successors would not be entitled to the return of any money theretofore paid to the lessor; and that in the event of the destruction of the premises by fire, and the failure on the part of lessor to restore the same, that the cash payment of \$600 made would be returned to lessee, on the condition that the lessee were not then in default under the terms of the lease. The other two leases had identical provisions, except that in the second lease the amount of consideration was \$2,000, and in the third, \$400. Under the three leases a total consideration of \$3,000 was thus paid for the execution thereof.

[2, 3] Defendant, with reference to these payments, contends that they were made by way of security, and that, since the lease was terminated by plaintiff, he is entitled to an offset of \$3,000 against plaintiff's judgment. The court found in appropriate language that the \$3,000 paid for the respective leases was by way of consideration for their execution, and not as security for the performance of their terms by defendant. The finding is amply supported by the written terms of the lease itself and by oral evidence on the same subject, which seems to have been given without objection. We are satisfied that the finding and conclusion of the court is correct and is amply sustained by authority. There is no doubt that money paid as consideration to the lessor for the execution of the lease belongs to the lessor. The fact that the lessor may agree to give the lessee credit for certain final months of the lease, if the lessee observes the covenants thereof, does not change the situation. Title to the money passes to the lessor when the lease is executed. *Ramish v. Workman*, 33 Cal.App. 19, 21, 22, 164 P. 26; *Curtis v. Arnold*, 43 Cal.App. 97, 103, 184 P. 510; *Anderson v. Julius Levin Co.* 71 Cal.App. 73, 76, 234 P. 442; *Wetzler v. Patterson*, 73 Cal.App. 527, 535, 536, 238 P. 1077; *Wood v. Hipwell*, 107 Cal.App. 680, 682, 683, 290 P. 1040; *Harvey v. Weisbaum*, 159 Cal. 265, 266, 268, 113 P. 656, 33 L.R.A. (N.S.) 540, Ann.Cas. 1912B, 1115.

[4-8] On the first point lessee's theory seems to be that a notice to pay rent or quit automatically terminates the lease. Such is not the law. *Costello v. Martin Bros.*, 74 Cal.App. 782, 786, 241 P. 588. The lease is terminated only if the notice is acted upon by one of the parties. If the lessor had brought an unlawful detainer suit based upon the notices to quit, as they were framed in this case, then the court trying such unlawful detainer action would, upon a proper showing, have the undoubted right to decree a forfeiture of the lease. *Ramish v. Workman*, 33 Cal.App. 19, 21, 164 P. 26; *Myers v. Herskowitz*, 33 Cal.App. 581, 585, 165 P. 1031; *Bonetti v. Treat*, 91 Cal. 223, 230, 27 P. 612, 14 L.R.A. 151. Or, if the lessee within the three-day period specified in the notices had quit the premises, the respective lease would have been forfeited by agreement of the parties, since the lessee would be in the position of accepting lessor's offer to terminate the same. *Costello v. Martin Bros.*, 74 Cal.App. 782, 786, 241 P. 588; *Downing v. Cutting Packing Co.*, 183 Cal. 91, 96, 97, 190 P. 455. Neither of these methods was followed or taken advantage of by either of the parties. When a lessor, as did the lessor in this case, claims or collects rent in an action, or otherwise, as the result of a legal proceeding, or otherwise, he waives his existing right to effect a termination. The letter of January 4, 1933, which has been substantially excerpted, cannot be considered as a reiteration or extension of either of the previous notices. The object of a notice to quit is to lay the foundation for a forfeiture. The terms of the notice here involved are therefore strictly construed. Its terms were not extended by the letter, and the respective rights of the parties are governed by the precise terms of the notice. Code Civ.Proc. § 1161, subd. 2; *Redmon v. Graham*, 211 Cal. 491, 494, 295 P. 1031; *Downing v. Cutting Packing Co.*, 183 Cal. 91, 95, 190 P. 455.

The judgment is affirmed.

We concur: HOUSER, P. J.; DORAN, J.

CLARK v. WESTERN FEEDING CO. et al.

Civ. 10441.

District Court of Appeal, Second District,
Division 1, California.

Dec. 19, 1935.

Hearing Denied by Supreme Court

Feb. 17, 1936.

1. Corporations ⇨123(9)

Assignment of certificate of stock, accompanied by physical delivery of duly indorsed certificate for value as a pledge, took priority over title to such stock acquired by purchaser at execution sale, notwithstanding pledgee did not cause certificate to be re-issued, or serve notice on corporation that it held as pledgee (Civ.Code, § 330.1 et seq.).

2. Corporations ⇨125

Pledgor's indorsement, as "L. G. Clark," of certificate of stock issued to him as "Dr. Lawrence G. Clark," held sufficient.

3. Trial ⇨397(5)

Where trial court upon sufficient evidence found on all material allegations of pleadings, its failure to find on immaterial allegations was not error.

Appeal from Superior Court, Los Angeles County; J. O. Moncur, Judge.

Action by Merl R. Clark against the Western Feeding Company, W. A. Teagarden, and others. Judgment for plaintiff, and the named defendants appeal.

Affirmed.

R. D. McLaughlin, of Los Angeles, and Walter L. Jenkins, of Glendora, for appellants.

Bernard Potter, Donald M. Keith, and Gwartney & Gall, all of Los Angeles, for respondent.

ROTH, Justice pro tem.

Merl R. Clark, respondent herein, as plaintiff, brought this action to quiet his title to eighty-one shares of the stock of Western Feeding Company, a corporation, hereinafter referred to as "corporation," to compel said corporation to issue to him in his name a new certificate for shares of its stock in that number, and to cancel a certificate for said number of shares which had been issued by said corporation to defendant W. A. Teagarden. Upon a judgment in favor of respondent against both defendants, the latter prosecute this appeal.

The evidence shows that a bona fide pledge of the stock in question was made by L. G. Clark, the original owner thereof, on January 10, 1933, to his brother Merl R. Clark, the respondent herein, as security for the payment of a promissory note, by delivery of the stock certificate duly endorsed by L. G. Clark. There is some controversy as to whether defendant corporation had notice of this transfer at any time before the accrual of the claim of defendant Teagarden, but it is established without controversy that the stock was never transferred on the books of the corporation at any time. L. G. Clark defaulted in payment of the note for which he had pledged the certificate of stock as security, and a default having been declared by respondent, the stock pledged as security for the note was thereupon sold by respondent as a pledge on June 8, 1934, and purchased by respondent on that date at the pledge sale. On May 17, 1934, pursuant to a writ of execution issued by the superior court of Los Angeles county, the sheriff thereof served defendant corporation, and levied upon the stock of L. G. Clark which still stood in the name of L. G. Clark on the books of the corporation. The stock was sold at execution sale and purchased by defendant Teagarden. Thereafter, the corporation issued to Teagarden a new certificate for the eighty-one shares.

[1] The primary question presented on the appeal is whether the assignment accompanied by the physical delivery of the duly indorsed certificate of stock for value as a pledge to respondent takes priority over the title to said stock acquired by Teagarden, by virtue of his purchase thereof at the execution sale.

Prior to the adoption of the Uniform Stock Transfer Act in 1931 (St. 1931, p. 1790), section 324 of the Civil Code (as amended by St. 1907, p. 854) provided in part, with reference to the relative rights of parties growing out of facts such as have been here detailed, that, "Such transfer is not valid, except as to the parties thereto, until the same is so entered upon the books of the corporation as to show the names of the parties by whom and to whom transferred, the number of the certificate, the number or designation of the shares, and the date of the transfer." Under the law prior to 1931, if the pledgee or assignee did not cause the certificate

to be reissued or serve notice on the corporation that it held, as assignee or pledgee, the purchaser at an execution sale would prevail over the claim of such pledgee or assignee. *Security Commercial & Savings Bank v. Imperial Water Co.* No. 1, 183 Cal. 488, 192 P. 22; *West Coast Safety Faucet Co. v. Wulff*, 133 Cal. 315, 65 P. 622, 85 Am.St.Rep. 171. Under the Uniform Stock Transfer Act of 1931, § 330.1 et seq., of the Civil Code, there is no requirement for the issuance of a new certificate or of notice to the corporation. The transfer of stock is protected without compliance with the provisions of the old law, except if dividends declared by the corporation are paid to the book owner of the stock. *Ballentine's Corporation Law*, 1932, § 207, p. 255; 17 Cal. Law Review, 403; 6-A Cal.Jur. 374, p. 668; *Bay City Bank v. St. Louis Motor Sales Co.*, 255 Mich. 261, 238 N.W. 241; *Connolly v. People's State Bank*, 260 Mich. 352, 244 N.W. 500.

It is said in *Ballentine's Corporation Law*, 1932, § 207, p. 255:

"The delivery of the endorsed certificate to the pledgee is all that is needed to protect the pledgee against assignments, attachments, subsequent liens or any other kind of adverse claim. The pledgee does not have to notify the corporation of the existence of the pledge in order to protect himself. As a matter of precaution, however, the pledgee would do well to notify the corporation with a request that he be notified of any attachments or notices of any other kind of adverse claim which may be brought home to the corporation.

"It is ordinarily preferable that pledged shares remain registered on the books of the corporation in the name of the owner, the pledgor, in order that he may retain the voting power, the right to dividends and be liable for assessments, if any. The law does not provide for the registration of a pledge as such."

[2] Defendants also complain that the stock in question was not properly indorsed by L. G. Clark to respondent. The stock, it appears, was issued to Dr. Lawrence G. Clark. It was indorsed by him as L. G. Clark. There is no claim that L. G. Clark is not the same person as Dr. Lawrence G. Clark. The indorsement is sufficient. *A. M. Ferguson v. Frank Smith*, 10 Kan. 396; *Northern Pac. Ry. Co. v. Frank Waterhouse & Co.* (D.C.) 279 F. 750.

[3] It is also urged that the trial court failed to find on certain allegations of the pleadings. The court did, however, upon sufficient evidence, find on all the material allegations, and its failure to find on immaterial allegations is of no moment. *Hertel v. Emireck*, 178 Cal. 534, 174 P. 30; *Platnauer v. Forni*, 131 Cal.App. 393, 21 P.(2d) 638.

The judgment is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.



10 Cal.App.2d 592

PACIFIC EMPLOYERS INS. CO. v.

CARPENTER.

Civ. 9875.

District Court of Appeal, First District,
Division 2, California.

Dec. 12, 1935.

1. Corporations ⇨370(1), 377½
Physicians and surgeons ⇨6(½)

Neither a corporation nor any other unlicensed person or entity may engage directly or indirectly in the practice of the legal, medical, and dental professions.

2. Corporations ⇨370(1), 377½

Corporation may not indirectly practice legal, medical, or dental profession for profit by engaging professional men to perform professional services for those with whom the corporation contracts to furnish such services.

3. Corporations ⇨370(1)

Proposed "medical service policy," providing that insurer would furnish, in consideration of premiums paid by insured, services of doctors and dentists who were to be appointed or employed by insurer for purpose of furnishing such services, held invalid, since issuance of such policies would result in insurer engaging in unlawful practice of medicine and dentistry (St. 1917, p. 957).

4. Mandamus ⇨10

Regardless of alleged lack of authority in state insurance commissioner to refuse to approve form of policy on ground it would result in insurer engaging in unlawful practice of medicine and dentistry, mandamus writ should not issue to compel approval of pol-

ley where approval and issuance of policy would result in insurer committing an unlawful act.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Mandamus proceeding by the Pacific Employers Insurance Company against Samuel L. Carpenter, Jr., substituted for E. Forrest Mitchell as Insurance Commissioner of the State of California. From a judgment directing the writ to issue as prayed, defendant appeals.

Reversed.

U. S. Webb, Atty. Gen., and Neil Cunningham, Deputy Atty. Gen., for appellant.

F. Britton McConnell, of Los Angeles, and Christopher M. Bradley, of San Francisco, for respondent.

Hartley F. Peart, Howard Hassard, and A. B. Bianchi, all of San Francisco, and Anthony J. Kennedy, of Sacramento, amici curiæ for appellant.

SPENCE, Justice.

Petitioner is an insurance corporation qualified under the laws of this state to engage in the business of accident and health insurance. In 1931, it obtained approval by the insurance commissioner of one of its policy forms designated as MSP-2. See Stats. 1917, p. 957. In 1934, it sought approval of its form designated as MSP-5. It is agreed that, with certain additions, this last-mentioned form was substantially the same as the form previously approved. The question of the legality of these forms was then raised and was decided by the insurance commissioner adversely to petitioner. Form MSP-5 was therefore disapproved by the insurance commissioner and the approval theretofore given of form MSP-2 was revoked. Thereupon petitioner filed his petition for a writ of mandate in the superior court seeking to compel the respondent insurance commissioner to approve said forms. Copies of said forms were attached to the petition. Respondent filed a demurrer to the petition which demurrer was overruled and respondent was given time to answer. Respondent failed to answer, and the trial court thereafter entered judgment directing the writ to issue as prayed. This appeal is taken from said judgment by the respondent insurance commissioner and, in order to avoid confusion, we will refer to the parties as

petitioner and respondent throughout this opinion.

The respondent commissioner and amici curiæ contend that the action of the commissioner was justified as the approval and issuance of the policies would result in petitioner's engaging in the unlawful practice of medicine and dentistry. Petitioner on the other hand contends that the issuance of these policies would not result in petitioner's engaging in the unlawful practice of medicine and dentistry. It claims that the policies are purely indemnity contracts containing all the "standard provisions" prescribed by statute (Stats. 1917, p. 957) and that the respondent commissioner "acted in an unjust, arbitrary manner and thus without lawful authority" in withholding approval of said policies. It therefore appears that the main question for consideration is whether the issuance of the policies would result in such unlawful practice as claimed by the respondent commissioner.

[1,2] Before setting forth the terms of the policies, it may be stated that it is well settled that neither a corporation nor any other unlicensed person or entity may engage, directly or indirectly, in the practice of certain learned professions including the legal, medical, and dental professions. *Painless Parker v. Board of Dental Examiners*, 216 Cal. 285, 14 P.(2d) 67; *People v. Merchants' Protective Corporation*, 189 Cal. 531, 209 P. 363; *Pilger v. City of Paris Dry Goods Co.*, 86 Cal.App. 277, 261 P. 328; *People v. California Protective Corporation*, 76 Cal.App. 354, 244 P. 1089; *In re Eastern Idaho Loan & Trust Co.*, 49 Idaho, 280, 288 P. 157, 73 A.L.R. 1323; *In re Otterness*, 181 Minn. 254, 232 N.W. 318, 73 A.L.R. 1319; *People v. Association of Real Estate Taxpayers*, 354 Ill. 102, 187 N. E. 823; *Unger v. Landlords' Management Corporation*, 114 N.J.Eq. 68, 168 A. 229; *People v. John H. Woodbury Dermatological Institute*, 192 N.Y. 454, 85 N.E. 697; *State v. Baker*, 212 Iowa, 571, 235 N.W. 313; *Godfrey v. Medical Society of New York County*, 177 App.Div. 684, 164 N.Y. S. 846; *People v. Painless Parker Dentist*, 85 Colo. 304, 275 P. 928; *State v. Bailey Dental Co.*, 211 Iowa, 781, 234 N.W. 260; *State Board of Dental Examiners v. Savelle*, 90 Colo. 177, 8 P.(2d) 693, 82 A.L.R. 1176; *State Board of Dental Examiners v. Miller*, 90 Colo. 193, 8 P.(2d) 699; *Hannon v. Siegel-Cooper Co.*, 167 N.Y. 244, 60 N.E. 597, 52 L.R.A. 429; *Winslow v. Kansas State Board of Dental Examiners*, 115 Kan. 450, 223 P. 308; *State v. Laylin*, 3

Ohio N.P. (N.S.) 185, affirmed 73 Ohio St. 90, 76 N.E. 567; 6A Cal.Jur. p. 1260, § 722; 14A Cor.Jur. pp. 296, 297, 298, § 2145. Under the foregoing authorities, it is clearly declared unlawful for a corporation to indirectly practice any of said professions for profit by engaging professional men to perform professional services for those with whom the corporation contracts to furnish such services. In other words, said authorities declare that said professions are not open to commercial exploitation as it is said to be against public policy to permit a "middleman" to intervene for profit in establishing the professional relationships between the members of said professions and the members of the public. *Hightower v. Detroit Edison Co.*, 262 Mich. 1, 247 N.W. 97, 86 A.L.R. 509.

In *Painless Parker v. Board of Dental Examiners*, 216 Cal. 285, at page 298, 14 P.(2d) 67, 72, the court said: "The practice of dentistry is not open to commercial exploitation. Such would be its fate if the methods adopted by petitioner should become general. That a corporation may not engage in the practice of the law, medicine, or dentistry is a settled question in this state. None of those professions which involves a relationship of a personal as well as a professional character, which has to do with personal privacy, can be placed in the same category as druggists, architects, or other vocations where no such relationship exists."

In *Pilger v. City of Paris Dry Goods Co.*, 86 Cal.App. 277, at pages 281 and 282, 261 P. 328, 330, the court said: "A corporation can neither practice law nor hire lawyers to carry on the business of practicing law for it any more than it can practice medicine or dentistry by hiring doctors or dentists to act for it."

The subject is treated in 6A California Jurisprudence, page 1260, as follows: "There are certain professional occupations which a corporation is functionally incapable of engaging in, such as the practice of law, medicine and dentistry. A corporation is incapable of the relation of personal confidence and trust requisite to the attorney's relation to his client, and this is also true of the other professions in which there is a personal confidence. A corporation cannot evade these rules by hiring others to perform professional functions." The subject is also considered in 14A Corpus Juris on pages 296, 297, and 298, and after stating that there are statutes in many states which prohibit corporations from

practicing said professions, it is declared that "Such statutes are merely confirmatory of the already existing law."

[3] We now turn to a consideration of the policies before us. These policies are substantially the same for the purposes of this discussion and we will confine our consideration to policy form MSP-5. Said policy was entitled "Medical Service Policy." It provided for "Aggregate Service Benefits \$1,250.00" and for "Accidental Death Benefits \$1,000.00" payable in the manner hereinafter described. No provision was made for the payment of any disability benefits. The material provisions of said policy were as follows:

"Pacific Employers Insurance Company * * * agrees * * * that (the Insured) is entitled to, and the company agrees to pay for:

"Medical Services.

"In the manner and to the extent herein provided in the event of disease or injury, which may have inception after the effective date hereof and while this Policy is in force, and which does not arise out of the occupation of the Insured so as to come within the provisions of any Workmen's Compensation Law, scheme or plan."

"Aggregate Service Benefits \$1,250.00.

"The total amount of liability of the Company payable for medical, surgical, hospital and other services combined, either consecutively or in the aggregate, shall in no event exceed the amount specified above as Aggregate Service Benefits, during any twelve month period from the date of this Policy or from any anniversary date thereof."

"Service Conditions.

"The Company shall appoint a Medical Director who shall be a licensed physician and surgeon and the term 'Medical Director' used herein shall mean only such physician and surgeon appointed by the Company in writing and while such appointment is in effect and unrevoked.

"The Company or its Medical Director shall make written appointment of Licensed physicians and surgeons to render services in accordance with the provisions hereof who shall be termed 'designated physician.' The Company or its Medical Director shall also make written appointment of licensed dentists, oculists and optometrists to render service in accordance with the provisions hereof who shall be termed 'designated specialist'. The terms 'designated physician'

and/or 'designated specialist' used herein shall mean only such physicians, surgeons, dentists, oculists and optometrists so appointed and while such appointment is in effect and unrevoked.

"Physicians and Surgeons, Hospital and Other Services Provided.

"Medical or surgical treatment by the Medical Director or a designated physician and hospitalization and the services of consultants and specialists when authorized by the Medical Director as hereinafter provided:

"Office: The Insured is entitled to office care for a period not exceeding fifty-two (52) weeks for any one disease or injury or complications thereof for the purpose of treatment of the Insured therefor and may call at the offices of the Medical Director or any designated physician during office hours for physical examination, diagnosis and treatment which shall include:

"Any recognized diagnostic, preventive and curative medical and surgical measure, also necessary drugs, dressings and other materials, when dispensed by the attending physician, x-rays, massage, diathermy, ultra violet and other physio-therapeutical treatments, microscopical and other laboratory tests and analyses.

"Home: The Insured is entitled to care at his or her home, at any time, day or night, for a period not exceeding twenty-six (26) weeks for any one disease or injury or complications thereof by a designated physician and to the services of consultants and specialists when authorized by the Medical Director, when the Insured is necessarily confined to bed or unable to call at the offices of the Medical Director or any designated physician.

"Emergency Treatment: In case of extreme emergency (where any delay may prove fatal or cause additional disability) the Insured may call the nearest physician (M. D.) for First Aid Only. For such emergency treatment an allowance will be made to the attending physician in accordance with the schedule of fees adopted by the Company, providing the total amount for such emergency service shall not exceed \$25.00. All further treatments must be rendered by a physician or surgeon approved by the Company.

"Health Preservation and Life Extension Service: The Insured is entitled to annual complete physical examination at the office of the Medical Director or any designated physician and to consultation at such offices

at any time while this Policy is in force relative to proper health preservation and life extension measures.

"Dental Service. The Insured is entitled to annual examination and cleaning of the teeth by designated specialists.

"Oculist and Optometrist Service: The Insured is entitled to annual examination of the eyes with prescription for glasses, also treatment for acute eye disease and injuries by designated specialists.

"Additional Provisions.

"The Insured is entitled to the Medical Service herein specified only when under the exclusive care and supervision of the Medical Director and/or designated physician and/or designated specialist. In the event that the Insured places himself under the care of any person other than the Medical Director and/or a designated physician and/or a designated specialist, except as otherwise herein provided, the rights of the insured to all further benefits under this policy shall forthwith terminate."

With regard to payment of the benefits under the policy, the policy itself provided, "Indemnity for loss of life of the Insured is payable to the beneficiary if surviving the Insured, and otherwise to the estate of the Insured. All other indemnities of this policy are payable to the Insured." It should be noted, however, that the application form which was attached to and made a part of the policy, contained the following provision: "I hereby request and authorize the Company to pay any indemnities due me under any policy issued upon this Application directly to the physicians, institutions or agencies rendering services. This request and authority is revokable by written notice to the Company at any time but such notice shall not affect the above request and authority with respect to medical services for any condition or its complications having inception prior to such written notice."

Taking the policy by its four corners and considering all of its provisions, including those above set forth, we cannot escape the conclusion that it is basically and primarily an agreement by petitioner, in consideration of the premium paid by the insured, to furnish the designated professional services through its appointed staff consisting of its medical director, its designated physicians and its designated specialists. It necessarily follows that the issuance of such policies would result in petitioner's engaging in the unlawful practice of at least two of the

learned professions, to wit, medicine and dentistry.

Petitioner takes the position that the policy constitutes a "contract of indemnity between the insurer and the assured—nothing more," but this position may not be sustained. It is true that the policy contains certain provisions regarding the payment of indemnities as required in all standard form contracts, but the policy is more than a mere contract of indemnity. We believe petitioner's own designation of the policy as a "Medical Service Policy" more nearly describes the true nature of the agreement. It is essentially an agreement by petitioner to furnish medical services and other professional services through its own appointed staff of professional men rather than an agreement to indemnify petitioner against indebtedness incurred by the insured for such services with professional men of his own choosing.

We believe that an examination of the various provisions of the policy fully sustains the conclusions above set forth. Throughout this "Medical Service Policy" it is specified that "The Insured is entitled to" various professional services, including medical and dental services, under the terms and conditions set forth. One of the main headings of the policy reads "Physicians and Surgeons, Hospital and Other Services Provided." It is provided that petitioner will appoint a medical director, designated physicians and designated specialists "to render services in accordance with the provisions" of the policy, and that "The Insured is entitled to the Medical Service herein specified only when under the exclusive care and supervisions of the Medical Director and/or designated physician and/or designated specialist." It is further provided that if "the Insured places himself under the care of any person" other than those appointed by petitioner, "the rights of all further benefits under this policy shall forthwith terminate." The only exception made in this connection is for emergency treatment for first aid only, in which event "an allowance will be made to the attending physician in accordance with the schedule of fees adopted by the company, providing the total amount for such emergency treatment shall not exceed \$25.00." The insured is further entitled to annual complete physical examination by petitioner's appointees and to office consultation at any time, to annual dental examination and cleaning of teeth by petitioner's appointees and "to annual exam-

ination of the eyes with prescription for glasses, also treatment for acute eye diseases and injuries by designated specialists." It requires no further comment to show that the agreement was one by petitioner to furnish all the services mentioned other than first-aid treatment, through its own appointees.

Petitioner makes much of the fact that the so-called indemnities are payable to the insured under the terms of the policy and to the further fact that the provision contained in the application authorizing petitioner to pay the so-called indemnities directly to its appointees may be revoked at any time by the insured. We attach but little significance to these considerations. The policy provision regarding the payment of indemnities to the insured was necessarily inserted because required by the act (Stats. 1917, p. 957) and the provision in the application was no doubt inserted to modify the requirement of the act as far as possible. It is apparent that the appointees of petitioner were to be compensated according to a schedule of fees adopted by petitioner and we cannot agree with petitioner's apparent claim that petitioner would not be liable to its appointees for services rendered to the policyholders. The authorization of direct payment in the application was merely a convenient method of insuring payment to its appointees for services rendered to the policyholder and of avoiding the possibility of being required to pay both the policyholder and its appointees in the event that the policyholder failed to pay said appointees after receiving the so-called indemnities from the petitioner. It may be further noted that the notice of revocation by the insured was not to affect petitioner's authority with respect to services "for any condition or its complications having inception prior to such written notice."

Petitioner also takes exception to the word "employees" as applied by respondent and amici curiæ to petitioner's appointees. It may be true that a member of the learned professions may not be an "employee" of a corporation in the strict sense of the word, if that term is used to signify such right of control over the practitioner in the details of his work as to render the corporation liable under the doctrine of respondeat superior. See *Pilger v. City of Paris Dry Goods Co.*, supra. But we need not quibble here over the use of terms, as it is immaterial whether the appointed practitioners are termed employees, agents, or appointees of the petitioner. The fact remains that

petitioner's agreement was to furnish, in consideration of the premium paid by the insured, the services of doctors and dentists who were to be appointed, engaged, hired, or employed by petitioner for the purpose of furnishing such services. Any such agreement is clearly condemned as unlawful and against public policy by the authorities above cited.

Petitioner discusses at some length the social and economic need for health insurance. We assume that petitioner refers to compulsory health insurance or some form of health insurance similar to that offered in petitioner's policy as health insurance policies are now provided for under the above-mentioned act. It is a matter of common knowledge that the general subject of health insurance has provoked much discussion in recent years and it is also a matter of common knowledge that there is a great diversity of opinion concerning this subject. There are those who believe that the time has come when the rules so firmly established by the authorities above cited should be changed or modified in certain respects. We do not feel called upon, however, to discuss this question, for if the established rules are to be changed or modified, we deem it to be the province of the Legislature rather than the courts to determine when, to what extent, and under what conditions and restrictions, the change or modification should be made. In this connection it is of interest to note the legislative history of Senate Bill No. 471, introduced at the 1935 session of the Legislature, as shown by the legislative journals of which we may take judicial notice. French v. Senate, 146 Cal. 604, 80 P. 1031, 69 L.R.A. 556, 2 Ann.Cas. 756. Said bill was apparently introduced for the purpose of legalizing the type of insurance provided by the policy before us. In the Assembly Journal of May 23, 1935, at page 22, it appears that the assembly amended the bill to eliminate all reference to dentistry. In the Assembly Journal of June 12, 1935, at pages 42 to 46, it appears that the bill was amended to eliminate all reference to medicine and the following was added: "This chapter shall not authorize and nothing in this chapter shall be construed as authorizing any corporation or any insurer licensed hereunder or any person other than a holder of a valid and unrevoked physicians and surgeons certificate to practice medicine and surgery directly or indirectly or to furnish professional services of physicians and

surgeons." The bill was thereafter permitted to die on the files without being brought up for final passage. It thus appears that the Legislature was not yet prepared to change or modify the established rules prohibiting the corporate practice of medicine and dentistry.

Petitioner cites and relies upon Physicians' Defense Co. v. Cooper (C.C.A.) 199 F. 576, 578, 47 L.R.A.(N.S.) 290. There the company failed to comply with the insurance laws requiring an insurance company to file a bond and to obtain a certificate of authority. The company claimed the right to do business without complying with the requirements of the insurance laws and sought an injunction against the insurance commissioner. This was denied. On appeal the court stated: "But one question is presented on this appeal, which is whether the plaintiff is transacting an insurance business within the meaning of the statutes of California relating to the subject." The court decided that the company was transacting an insurance business and affirmed the judgment. That case is not in point as no question was raised concerning the legality of the company's contract, and said question was not considered or determined by the court. Petitioner also relies upon the language of the court in Pilger v. City of Paris Dry Goods Co., 86 Cal.App. 277, at page 283, 261 P. 328, 330, where it is indicated that a corporation may undertake to furnish the services of a physician. It is sufficient to state that said language was not necessary to the decision, but we may further state that if said language is to be construed as sustaining petitioner's position here, it is not in line with the great weight of authority.

[4] Upon oral argument, it was contended by petitioner that the power of the respondent insurance commissioner in determining whether the policy complied with the "requirements of law" was limited to a determination of whether the policy contained the standard provisions prescribed by the act. Stats. 1917, p. 957. In other words, petitioner took the position that regardless of whether the approval and issuance of the policy would result in petitioner's engaging in the unlawful practice of medicine and dentistry, respondent was required to approve the policy if it contained the standard provisions prescribed by said act. While we are of the opinion that this contention may not be sustained, we believe

that in any event petitioner was not entitled to judgment directing the issuance of the writ of mandate. If the approval and issuance of petitioner's policy would result in petitioner's engaging in the unlawful practice of medicine and dentistry as above stated, then the writ should not issue to compel the approval of the policy as the writ should never issue to compel an act which will tend to aid an unlawful purpose. 16 Cal.Jur. p. 780.

The judgment is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.



10 Cal.App.2d 713

GACKSTETTER v. MARKET ST. RY. CO.
et al.

Civ. 9482.

District Court of Appeal, First District,
Division 1, California.

Dec. 19, 1935.

Rehearing Denied Jan. 18, 1936.

1. Evidence ⇨43(2)

Courts may take judicial knowledge of their own proceedings in same case.

2. Appeal and error ⇨994(3)

Credit to be given positive testimony of witness is question for trial court, except where testimony in light of undisputed facts is inherently so improbable as in effect to constitute no evidence at all (Code Civ.Proc. § 1847).

3. Appeal and error ⇨994(2)

Where three witnesses who had not appeared at previous trials of case testified at third trial, determination of jury as to their credibility *held* conclusive on appeal (Code Civ.Proc. § 1847).

4. Appeal and error ⇨1002, 1011(1)

Where there arises substantial conflict in evidence which is capable of supporting finding either way, determination by jury or trial court of effect of such evidence is conclusive on appeal (Code Civ.Proc. § 1847).

5. Street railroads ⇨117(31)

In action for injuries received by child struck by street car, reconciliation of conflicting testimony as to position and actions of

child immediately before being struck *held* for jury (Code Civ.Proc. § 1847).

6. New trial ⇨105

Where only effect of newly discovered evidence was to impeach one witness, motion for new trial on ground of such evidence *held* properly denied.

7. New trial ⇨99

Granting of motion for new trial on ground of newly discovered evidence is discretionary with trial court.

8. Appeal and error ⇨981

Discretion of trial court in granting new trial on ground of newly discovered evidence cannot be interfered with unless evidence is such as must, if proved upon new trial, change result, in which case, if proper diligence is shown, order denying new trial must be reversed.

9. New trial ⇨42(4)

Conduct of juror in giving false answers to questions as to his acquaintance with counsel in case constitutes sufficient misconduct to warrant new trial.

10. New trial ⇨42(4)

Denial of motion for new trial on ground of misconduct of juror in concealing his acquaintance with attorneys for plaintiff *held* proper where affidavit of attorney stated that he told one of opposing attorneys of extent of acquaintance.

11. Attorney and client ⇨104

Knowledge of one of defendants' attorneys, who sits with their attorney of record throughout trial, of service of one of jurors in another case to which plaintiff was party is imputed to defendants.

12. Damages ⇨130(1)

Where physician had given substantially same testimony as to plaintiff's injuries at each of three trials, award at third trial which was approximately three times amount given in first two trials *held* excessive.

13. New trial ⇨76(1)

Where award of damages is so disproportionate to compensation reasonably warranted by facts as to shock sense of justice and raise presumption that it was result of passion, prejudice, or corruption, new trial should be granted.

14. Damages ⇨132(6)

\$14,000 for four year old girl struck by street car whose leg was broken and lacerated, necessitating its elevation for six weeks while healing, resulting in its being shortened three-eighths of an inch and leaving permanent scars, but which did not limit its ordinary use, *held* excessive by \$9,000.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Betty Gackstetter, a minor, by John Gackstetter, her guardian ad litem, against the Market Street Railway Company and another. Judgment for plaintiff, and defendants appeal.

Judgment affirmed on condition of remittitur.

Abbott, Cannon, Appel & Dains, Walter H. Linforth, and William M. Cannon, all of San Francisco, for appellants.

Vincent W. Hallinan and William F. Herron, both of San Francisco, for respondent.

GRAY, Justice pro tem.

On June 24, 1925, at about 3:30 p. m., respondent, then approximately four years of age, was struck by a street railway car owned by appellant Market Street Railway Company and then operated by its motorman, appellant L. McClelland, in an easterly direction on Hayes street, between Divisadero and Broderick streets, in the city and county of San Francisco. On August 6, 1926, she, by her guardian ad litem, filed a complaint charging appellants with negligence in the operation of the street car and seeking to recover damages for the injuries which she suffered thereby. After trial, a jury, on July 27, 1933, returned its verdict in her favor for the sum of \$14,000. Their motion for a new trial having been denied, appellants have appealed from the judgment entered on the verdict.

[1] "It is an established principle that courts may take judicial knowledge of their own proceedings in the same case. *Hollenbach v. Schnabel*, 101 Cal. 312, 35 P. 872, 40 Am.St.Rep. 57; *Sewell v. Price*, 164 Cal. 265, 128 P. 407." *People v. Clinton*, 78 Cal.App. 451, 453, 248 P. 929, 930; *Benton v. Industrial Accident Comm.*, 74 Cal. App. 411, 240 P. 1021. "The record on a prior appeal in the same case in the same court is judicially noticed by the latter." 23 C.J. 111. "An appellate court will take notice of its own records of its own motion when properly suggested, as far as they pertain to the case before it for consideration; and in accordance with this rule it has been held that the appellate court will take judicial notice of the record on a former appeal in the same case. * * *" 4 C.J. 561; accord 15 R.

C.L. 1113. An application of this rule discloses the following facts. The present judgment is the result of a third trial of this action. In the first trial, held in June, 1927, the jury returned a verdict in respondent's favor for \$5,000, but the judgment entered thereon was reversed by an opinion found in 104 Cal.App. 89, 285 P. 409. A similar verdict was given by the jury in the second trial, occurring in May, 1931, and again the judgment was reversed. 130 Cal.App. 316, 20 P.(2d) 93. In the three trials respondent contended that when struck, she was running from the north to the south side of Hayes street; that the motorman was negligent in not observing her and stopping his street car before it struck her and also in operating the street car at a speed excessive under the circumstances and beyond the limit fixed by ordinance. In the last trial she added an additional claim that the motorman was intoxicated. Police Officer McDonald, called by the respondent, was the only witness who testified at the first and second trials as to the car's excessive speed, but, as stated in both opinions, such testimony was worthless because of his lack of knowledge. On the third trial, respondent did not question this officer as to speed. The officer, however, on all trials testified as to the positions of the street car and child after the accident and as to a conversation with the motorman immediately after the collision in which, when he asked from where the child had come, the latter pointed to the north. Mrs. Blass, a witness for respondent, was unable, due to loss of memory, to reiterate, at the third trial, her testimony, given at the former trials, that respondent ran from the north to the south side of Hayes street as the street car left Broderick street and that the left corner of the car's fender struck the child, throwing her to its right onto a rock pile, from which she rolled under the car.

[2] On the third trial, respondent sought to supply the deficiency created by the failure of Mrs. Blass to testify at all and of the police officer to testify as to speed by the testimony of two new witnesses—N. C. Nicklassen and William K. Donnell. She also produced a third witness—Phoebe Lambert—to establish the motorman's intoxication. The judgment in so far as negligence is concerned rests for its support upon their testimony, without which it cannot stand. Hence appellants, to destroy such support, attack their credibility,

because of their belated appearance in the case, under suspicious circumstances, and because they are contradicted by other evidence. The following excerpt from the case of *Fox v. Oakland Con. St. Ry.*, 118 Cal. 55, 60, 50 P. 25, 26, 62 Am.St.Rep. 216, addressed to a similar attack, is so apt an answer to appellants' argument as to warrant its repetition: "Appellant devotes a considerable portion of its brief to an effort to convince us that the evidence fails to show any negligence on the part of defendant. The task has proven fruitless. An examination of the evidence discloses a substantial conflict upon that issue, however much it may be said to preponderate in defendant's favor. Much of counsel's argument in this behalf is expended in endeavoring to demonstrate that the two witnesses whose testimony tends to create the conflict were wholly unworthy of credence, and that, therefore, the evidence, while apparently conflicting, is not so in substance. But the credibility of witnesses is a question for the jury, so long as the testimony which they give has a legal tendency to establish the fact and where, as here, there is nothing so inherently or otherwise manifestly improbable in its character as to justify the court in ignoring it." The amount of credit to be given to the positive testimony of any witness is solely a question for the trial court, except perhaps where the testimony in the light of the undisputed facts is inherently so improbable and impossible of belief as in effect to constitute no evidence at all. *De Arellanes v. Arellanes*, 151 Cal. 443, 90 P. 1059. The reviewing power of an appellate court is limited by the declaration found in section 1847 of the Code of Civil Procedure, that the jury are the exclusive judges of the credibility of a witness, except where the record demonstrates that in the very nature of things certain testimony of a witness cannot be true. *Badover v. Guaranty Trust, etc., Bank*, 186 Cal. 775, 200 P. 638. "Where such conflict exists it is for the jury to judge the credibility of the witnesses, and the weight, effect, and probative force to be given their testimony (*Hanton v. Pacific Electric Ry. Co.*, 178 Cal. 616, 174 P. 61), the duty of the reviewing court on appeal being to construe the evidence so as to support the verdict, if it may be done so reasonably; that is to say, to accept as true such evidence as tending to sustain the verdict, unless it be inherently incredible, and to reject as untrue those

portions which conflict therewith (*Neher v. Kauffman*, 197 Cal. 674, 242 P. 713)." *Truitner v. Knight*, 83 Cal.App. 655, 661, 257 P. 447, 449.

[3] In explanation of her failure to testify in the first and second trials, Phoebe Lambert testified that although respondent's attorney had represented her in a divorce action against her former husband, the motorman McClelland, and that the same was tried in the same month as the first trial of this case, his employment commenced after such first trial; that she was out of town at the time of the second trial; and that she first learned of this case on March 4, 1932, from reading a newspaper account of the reversal of the second judgment. As to the manner in which he became a witness in the third trial, William K. Donnell stated that, although he resided, during the month of the accident, at an address which other evidence showed to be a flat adjoining that where respondent then lived, he had never advised her family in any manner as to his knowledge of the facts of the accident; that one morning about two or three months before the third trial, he had read a press account of the reversal of the second judgment because of prejudicial remarks of respondent's counsel; that later in the same day he had met an attorney of eight or ten years acquaintance, whom he knew to be associated with respondent's attorney, without appointment in the vicinity of the city hall; and that he had then told such attorney what he had observed as to the happening of the accident. N. C. Nicklassen swore that he had told what he had observed of the accident to a carpenter working on the same apartment house in which he also was working, immediately after the accident and to the owner of the apartment house the same day. In this he was corroborated by their testimony. He further testified that a law clerk, employed by respondent's attorney, came to his home about six weeks before the third trial and that, upon his inquiry, he had told such law clerk what he knew of the accident; that he had met respondent's attorney twice, once at the law clerk's home two weeks before this trial, but had refused to discuss the case with him. Whether the testimony of these witnesses was false or not was a question exclusively for the determination of the jury, whose determination is conclusive on appeal. *McFarland v. Matthai*, 7

Cal.App. 599, 95 P. 179. Even if full force is given to appellants' argument that the above circumstances, under which these three witnesses appeared at the third trial, are sufficient to generate a suspicion that their testimony was fabricated, still it cannot be justly said those circumstances render their testimony inherently improbable. It was for the jury to consider these circumstances and determine whether they were of such force and consequence as to destroy the verity of their testimony and their acceptance of such testimony is conclusive upon this court. *Hironymous v. Hiatt*, 52 Cal.App. 727, 199 P. 850.

Phoebe Lambert further testified that she married motorman McClelland in 1917 or 1918 and divorced him in June, 1927; that she was living with him in June, 1925; that on the day of the accident when he came home for lunch somewhere between 12 m. and 2 p. m., he was very intoxicated, staggered some, and smelled of liquor, but when he returned home between 5 p. m. and 6 p. m. he was partially sobered up; that, when employed, she did not return home at lunch time. She was contradicted by the following evidence. The record of a steamship company showed that she was employed by it during the time she claimed to have prepared his lunch. The street railway company's records disclosed that on the day of the accident, motorman McClelland started work at 5:21 a. m., was relieved at 10:07 a. m., returned to work at 11:42 a. m. and finished work at 5:43 p. m., making eleven round trips for the day, of which two were after the accident. The motorman who relieved him at 10:07 a. m., the motorman whom he relieved at 11:42 a. m., his conductor on the eleven trips and police officer McDonald, who conversed with him immediately after the accident, each testified that he was not intoxicated at the respective times each observed him. Although the route traveled by his street car was through an area of heavily congested traffic, nothing unusual, except this accident, occurred. According to William K. Donnell, as he was walking on the north side of Hayes street westerly from Divisadero street towards Broderick street, he saw an eastbound street car, crossing Broderick street at a speed of between thirty and thirty-five miles per hour and respondent in the middle of the westbound tracks, running towards the south side of Hayes street; the motorman rang his bell, but did not decrease his speed; the fender struck respondent, throw-

ing her southerly onto a sand pile and then stopped within twelve feet. N. C. Nicklasen testified that, on the day of the accident, he was working, as an electrical contractor, in an apartment house then being constructed on the south side of Hayes street between Divisadero and Broderick streets; that, as he was standing in a bay window of the apartment house he saw respondent start to cross Hayes street from its north side and immediately thereafter the street car about twenty-five feet east of Broderick street coming towards Divisadero street at a speed of thirty to thirty-five miles per hour; that, when he first saw her, respondent was running between the curb and the westbound tracks and then standing, facing south; that he then looked away, but, upon hearing the clanging of the bell and the application of brakes, he paid attention and saw the child standing, confused and throwing her hands up; and that the fender of the car hit her, her legs were thrown under the fender, then she was thrown in front of the car and then rolled under the car.

[4, 5] Appellants introduced evidence which contradicted in detail the testimony given by these last two witnesses. The motorman testified that he had stopped at Broderick street and intended to stop at Divisadero street; that, after leaving Broderick street, his speed never exceeded seven or eight miles an hour; that he first saw respondent when she was standing close to the sand pile in front of the apartment house, not far from the curb and about sixty or sixty-five feet in front of his car; that when the front of the car was about twenty feet away from her, she ran in a northwesterly direction, towards the car; that instantly he sounded the gong and reversed the current, making the quickest possible emergency stop; and that, when stopped, the car's front was twenty feet past the point where she started to run and her body was against the brake shoe, which was twelve feet back of the fender. He was corroborated by a passenger and the conductor as to the speed, emergency stop, and the position of the child and car, where the latter had stopped. A subsequent test showed that, at this place, a car going at eight miles per hour could make an emergency stop within twenty-five feet and at fifteen miles per hour within sixty feet. Appellants assert that the credibility of Phoebe Lambert was destroyed by her inability to recall the exact time of her husband's return for lunch; of Nicklas-

sen by his vague memories of previous interviews by respondent's attorney, and of Nicklassen and Donnell by their lack of sympathetic interest in the child after injury, and by their assurance, in describing events eight years old without contemporaneous memoranda or other aid to refresh their memories. Such matters were proper tests to be applied by the jury as the exclusive judges of their credibility. Code Civ.Proc. § 1847. Appellants further argue that the testimony of Phœbe Lambert, as to the motorman's intoxication, and of Nicklassen and of Donnell, as to facts of the accident, was impeached by contradictory testimony of eyewitnesses, produced by them. Where there arises a substantial conflict in the evidence which is not inherently improbable and which is capable of supporting a finding either way, the determination by the jury or trial court of the effect of such evidence is final and conclusive and not open to review. *Weaver v. Carter*, 28 Cal.App. 241, 152 P. 323. Conceding, as appellants have pointed out in their briefs, that there are self-contradictions in the testimony of Nicklassen and Donnell and that the testimony of each conflicts with that of the other, as to the position and actions of the child immediately before the collision, it was nevertheless the duty of the jury to reconcile such contradictions and its finding made thereon cannot be reviewed. *Parker v. Herndon*, 19 Cal.App. 451, 126 P. 183; *Pedrow v. Federoff*, 77 Cal.App. 164, 247 P. 212.

[6-8] Appellants argue that their motions for a new trial on the ground of newly discovered evidence showing that the witness Donnell was in Pocatello, Idaho, on June 24, 1925 (the day of the accident), should have been granted. Such motions were supported by the affidavits of five residents of that city that each had frequently seen him in that city during the months of June, July, and August, 1925. Another affiant stated that he had frequently seen such witness in that city during the months of May and June, 1925. The fact that Donnell was seen frequently in Pocatello on unspecified days in the month of June did not establish that he was not in San Francisco on the day of the accident. However, the physical impossibility of Donnell's presence in San Francisco on the day of the accident was shown by two additional affidavits, which respectively stated that he was in Pocatello during the entire month of June, 1925, and

during the third week of that month. The counteraffidavit of Donnell denied that he was in Idaho at any time during the year 1925. His mother also deposed that he was residing with her during June, 1925, at the address given by him in his testimony. Since the only effect of the newly discovered evidence was to impeach Donnell, the motion for a new trial was properly denied. *Hanton v. Pacific Electric Ry. Co.*, 178 Cal. 616, 174 P. 61. The destruction, by this new evidence, of Donnell's credibility would not cause a different verdict, for the testimony of the other eyewitness—Nicklassen—sufficiently established the same facts of negligence. A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court, which must be presumed to have been properly exercised in denying the same, unless it appears that the evidence is such as must, if proved upon a new trial, change the result, in which case, if proper diligence is shown, the order must be reversed; but when it cannot be held that the result would probably be different if the new evidence were received, the discretion of the court cannot be interfered with. *Miller v. Scoble*, 8 Cal.App. 344, 97 P. 93.

[9-11] Appellants claim that the trial court erred in denying their notions for a new trial upon the ground of a juror's misconduct in concealing his acquaintance with respondent's attorney and the latter's associate. It is undisputed that, although respondent's attorney had previously announced to the entire panel his name and that of his associate, this juror, in answer to questions asked by the court collectively of all prospective jurors and by appellants' attorney individually of him, denied he knew either. It also appears, without conflict, that this juror had served, within a month of the present trial, in another case which was tried on behalf of the plaintiff, mainly by such associate, but with some participation by respondent's attorney and in which such juror returned a verdict for plaintiff. Appellants' attorney, in his affidavit, states that if he had known these facts and had not been misled, he would have exercised a remaining peremptory challenge. The poll of the jury shows that this juror was one of the nine which returned the verdict. The conduct of the juror in giving false answers to the questions constituted misconduct or irregularity on his part sufficient to warrant the granting of a new trial therefor. *Sherwin*

v. Southern Pacific Co., 168 Cal. 722, 145 P. 92. But the denial of a new trial was warranted because of these additional facts. The affidavits of the juror, the associate and Joseph F. Leonard all agree that, during the course of the present trial, the juror spoke to the associate in a manner which showed he knew him. The associate's affidavit stated that, on the second day of the trial while he was talking in the corridor during recess to Joseph F. Leonard, who was one of appellants' attorneys and sat with their attorney of record throughout the trial, the juror, in passing, greeted him in a friendly manner, and that, upon Leonard's inquiry, he had advised him that this juror had served in the previous case. Leonard's affidavit denied that he was one of appellants' attorneys and that the associate had informed him of the juror's service in the other case. The trial court was entitled to accept either version. If Leonard knew of the juror's service in the previous case, such knowledge is imputed to appellants. 1 Cal.Jur. 846. "If the defendant or its attorneys had discovered these facts at any time during the trial, it would have been their duty, if they desired to take advantage thereof, to apply to the court for leave to reopen the examination of the jurors, elicit the facts, and thereupon offer a challenge to the juror guilty of the misconduct." *Sherwin v. Southern Pacific Co.*, supra, 168 Cal. 722, at page 726, 145 P. 92, 93.

[12] Appellants contend that their motions for a new trial upon the ground of excessive damages, appearing to have been given under the influence of passion or prejudice should have been granted. In passing upon this question, attention will be given only to the testimony most favorable to respondent, which was that given by her attending physician, and the contradictory testimony of appellants' experts ignored. This attending physician gave substantially the same testimony in each of the three trials except that the actual condition at the third trial—eight years after the accident—showed a much better result than that he had anticipated at the former trials. Each of the first two verdicts was for \$5,000, but the third awarded \$14,000. In *Grant v. Los Angeles Transfer Co.*, 45 Cal.App. 731, 188 P. 294, a verdict was held not excessive because it was for the same amount as was awarded on two previous trials. In *Maede v. Oakland High School Dist.*, 212 Cal. 419, 298 P. 987, the

Supreme Court concluded that a verdict was excessive because it greatly exceeded an award for similar injuries in a case recently before it. In reducing an award, the court, in *Alabama Power Co. v. Goodwin*, 214 Ala. 15, 106 So. 239, 241, said: "There had been two trials on practically the same evidence as to the extent of plaintiff's injuries and damage, and there was a large discrepancy between the two awards of damages by the respective juries. Cent. of Ga. Ry. Co. v. White, 175 Ala. 60, 63, 56 So. 574. This is a pertinent fact to be considered on the motion." The fact that the verdict on the previous trial was for a greatly lesser amount, persuaded the court in *Tunnel Mining & L. Co. v. Cooper*, 50 Colo. 390, 115 P. 901, 39 L.R.A.(N.S.) 1064, Ann.Cas. 1912C, 504, to hold an award to be excessive. The present award for approximately three times the amount given in the first two trials is clearly excessive.

[13] If the recovery is so grossly disproportionate to any compensation reasonably warranted by the facts as to shock the sense of justice and raise at once a presumption that it was the result of passion, prejudice, or corruption, rather than honest and sober judgment, the motion should have been granted. 8 Cal.Jur. 834. The only means of discovering the existence of passion and prejudice as influencing a verdict is by comparing the amount of the verdict with the evidence before the trial court. *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 116 P. 513. Her physician described her injuries as an oblique, spiral fracture of the middle of the right femur and a laceration of the right calf exposing the bone, with loss of skin, one-half the size of a hand, some muscle and tissue, and with considerable damage to the remainder. In treating the injury he elevated the leg in a Hogden splint with traction and cradled the raw wound to relieve pressure and give access for dressing. Respondent remained in this painful position for six weeks until the leg healed, during which time the physician daily dressed the wound. He continued to dress the wound for another month thereafter. Unquestionably, respondent suffered severe pain as a result of the injury and during the period of its healing. At the time of the third trial the fracture had completely healed with good union, but with a slight anterior bowing and shortening of the leg to the extent of three-eighths of an inch.

The wound on the calf had healed, leaving permanent, irremovable scars and adhesions to the muscles which did not limit ordinary use, but would prevent her from dancing, walking long distances, or engaging in athletic sports. She limped for two years after the accident, but thereafter walked normally.

[14] A comparison of the injuries suffered with the amount awarded shows that the latter is grossly excessive. Therefore, in conformity with the procedure followed in the cases of *Livesey v. Stock*, 208 Cal. 315, 281 P. 70, and cases cited therein; *Slaughter v. Van Winkle*, 213 Cal. 573, 2 P.(2d) 789, and *Shaffer v. Arnaelsteen*, 54 Cal.App. 719, 202 P. 946, it is ordered that the judgment herein be and the same is hereby reversed and the cause remanded for a new trial unless within thirty days from the filing of the remittitur in the trial court plaintiff shall remit from the judgment all except the sum of \$5,000 and the costs taxed therein. If such remission be so made, then the judgment shall stand affirmed, and plaintiff shall recover her costs of appeal.

We concur: KNIGHT, Acting P. J.; CASHIN, J.



10 Cal.App.2d 726

GACKSTETTER v. MARKET ST. RY. CO.
et al.

Civ. 9482.

District Court of Appeal, First District,
Division 1, California.

Dec. 19, 1935.

Appeal and error ☞1127

Where appeal in case had been decided on merits, motion to affirm judgment or dismiss appeal became moot, requiring dismissal of motion.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Betty Gackstetter, a minor, by John Gackstetter, her guardian ad litem, against the Market Street Railway Com-

pany and another. Judgment for plaintiff, and defendants appeal, wherein a motion was made to affirm the judgment or dismiss the appeal.

Motion dismissed.

Abbott, Cannon, Appel & Dains, Walter H. Linforth and William M. Cannon, all of San Francisco, for appellants.

Vincent W. Hallinan and William F. Heron, both of San Francisco, for respondent.

PER CURIAM.

The appeal in the above-entitled cause having been this day decided (Cal.App.) 52 P.(2d) 998, upon the merits, the motion heretofore made to affirm the judgment or dismiss the appeal becomes moot. The motion is therefore dismissed.



11 Cal.App.2d 144

PURKISER v. FOGLER.

Civ. 1536.

District Court of Appeal, Fourth District,
California.

Jan. 7, 1936.

Hearing Denied by Supreme Court
March 5, 1936.

1. Judgment ☞585(4)

Failure of vendor in action by purchaser for specific performance to demand payment of purchase price held no bar to subsequent action by vendor to recover price, since such demand would have been inconsistent with defense made.

2. Judgment ☞725(6)

Where specific performance suit had established existence of contract subsequent to default of vendor in refusing tender of purchase price, purchaser who later sought enforcement of part of contract could not rely upon such default as making remainder of contract void.

3. Vendor and purchaser ☞198

Where purchaser in possession of land under contract silent as to payment of taxes had not paid purchase price, judgment for amount of price from which amount of unpaid taxes and taxes paid by purchaser was not deducted held proper, since purchaser could not compel payment by vendor.

4. Vendor and purchaser ☞172

Purchaser held liable for interest on purchase price of land only from date he be-

came in default by refusing to pay purchase price when deeds were tendered.

Appeal from Superior Court, San Bernardino; Charles L. Allison, Judge.

Action by May N. Purkiser against Irving R. Fogler. Judgment for plaintiff, and defendant appeals.

Judgment modified, and, as so modified, affirmed.

Fred A. Wilson, of San Bernardino, for appellant.

Burton E. Hales, of Redlands, for respondent.

BARNARD, Presiding Justice.

The parties hereto are sister and brother. After the death of their mother, the plaintiff recorded deeds purporting to convey the mother's property to her. This defendant and another brother started proceedings to establish their right to a two-thirds interest in the properties conveyed. A compromise was effected, and on November 23, 1928, the three children of the deceased executed an agreement which provided that the two brothers would discontinue their contest, that the sister would convey the south half of a certain forty-acre tract of land to the two brothers, that she would convey the north half of this tract to this defendant, and that he would pay to her the sum of \$10,000 for the same.

On March 18, 1929, this defendant tendered to this plaintiff the sum of \$10,000 and the two brothers demanded conveyances in accordance with the agreement. On March 22, 1929, the two brothers brought an action against this plaintiff for specific performance of the contract. This plaintiff answered, alleging, among other things, that this defendant had repeatedly refused to comply with the conditions of said agreement. After a trial in that action the court found in favor of the plaintiffs therein and, as a conclusion of law, found that said plaintiffs were entitled to a judgment specifically enforcing the provisions of the agreement referred to. Judgment was entered in that action specifically enforcing the agreement and directing the defendant therein to convey to the two plaintiffs the south half of the tract in question free of encumbrances created by her subsequent to the date of the agreement, and to convey to this defendant upon payment of the sum of \$10,000, the north half of the tract in

question free from similar encumbrances. This plaintiff took an appeal and that judgment was subsequently affirmed. *Fogler v. Purkiser*, 127 Cal.App. 554, 16 P.(2d) 305.

Two days before the remittitur was filed in that action, this plaintiff tendered deeds to both halves of the tract in question, respectively, and demanded payment of the \$10,000 from this defendant. This demand was not complied with and this action was begun to recover the sum of \$10,000 with interest from November 23, 1928, the date of the agreement. This defendant answered setting up, among other things, that the judgment in the first action was a bar, that the property in question had declined in value, and that this plaintiff had not paid the taxes since the date of the agreement. The court found in favor of the plaintiff and entered judgment against the defendant for \$12,916.67, from which judgment this appeal was taken.

[1] The appellant's main contention is that his obligation to pay the \$10,000 might have been litigated in the first action, that the judgment in the prior action did not order him to pay that amount, that the respondent here could have asked for and secured such relief in the other action, and that, therefore, the prior judgment constitutes a bar to this action. He relies upon *Elm v. Sacramento Suburban F. L. Co.*, 217 Cal. 223, 17 P.(2d) 1003; *Price v. Sixth District Agricultural Ass'n*, 201 Cal. 502, 258 P. 387, 390; *Bingham v. Kearney*, 136 Cal. 175, 68 P. 597; and similar cases, following the general rule that a judgment operates as *res judicata* not only as to the existence of the plaintiff's cause of action but as to the nonexistence of a defense which was not pleaded, and that a judgment between the same parties is conclusive not only as to the subject-matter in controversy in the action but also upon all matters involved in the issues which might have been litigated and decided in the case.

While the general rule thus relied upon is well established, we think it cannot be applied here without extending the rule in a manner not warranted by the reasons upon which it is based and not justified by the circumstances here appearing.

As applied to a defendant this rule is based upon the principle that such a party, when given his day in court, should set up all of his defenses including all matters upon which he relies in opposition to the claims of the plaintiff. This is well illustrated in the case of *Elm v. Sacramento*

Suburban F. L. Co., *supra*, where the defendant's claim for a balance of the purchase price of certain real property could well have been presented and decided in a former action wherein the vendee sought and recovered a judgment for damages for misrepresentations in the sale of the land. In that case the court pointed out and applied the general rule that the judgment in the former action was conclusive on all matters involved in the issues and which might have been litigated and decided in the former case. In *Price v. Sixth District Agricultural Ass'n*, *supra*, the court said: "But an issue may not be thus split into pieces. If it has been determined in a former action, it is binding notwithstanding the parties litigant may have omitted to urge for or against it matters which, if urged, would have produced an opposite result. In other words, when an issue has been litigated all inquiry respecting the same is foreclosed, not only as to matters heard but also as to matters that could have been heard in support of or in opposition thereto."

In the former action, with which we are here concerned, the issue was as to whether the contract between the parties was still in force and whether the brothers were entitled to a specific performance thereof. No issue was presented as to whether the appellant here should be compelled to pay the \$10,000 in question and no such issue was decided by the court. In the former action the brothers alleged that they were then ready and willing to pay that amount, which was not denied by this respondent. If it could be assumed that this respondent could, in that action, have asked that they be compelled to pay that amount, this would not have been in opposition to the issues there presented by the brothers but would rather have been in support thereof. While such an estoppel as is here contended for would extend to every matter which was or might have been urged to defeat the determination actually made, we think the rule cannot be so extended as to require the defendant in an action for specific performance to abandon her defense in that action and, in effect, to request the court to grant the relief asked for by the other party.

A further consideration is that this respondent was in no position to demand, in the other action, that the amount called for in the contract be paid to her since she had not then tendered the deeds which were requisite to such a payment, she was then unwilling to give the deeds and the very purpose of that action was to compel her

to deed the property. She had a right to defend that action, and although she did not prevail therein, in our opinion, she did not lose all of her rights under the contract by failing to ask for the payment when her entire defense was based upon the contention that she was not obligated to convey the land or accept the payment. The rule that a judgment is conclusive as to things incidental thereto and which might just as well have been litigated in that action does not go so far as to compel a party to confess judgment therein or to set up and claim something which is directly opposed to the relief he seeks in that action. The respondent was not required in the former action to defend against the validity of the contract in question and at the same time to ask for its enforcement.

[2] The appellant next contends that the respondent was in default when she refused to accept the money tendered in March, 1929, and that having been in default she may not maintain this action based upon a breach of the contract by the other party. While the appellant had a right at that time to treat the contract as broken and at an end, he did not elect to regard it as discharged but brought an action and succeeded in having it established that the contract was still in force. Under such circumstances he cannot rely upon the original default of the other party as making the contract void in part while it remains valid in another part. The appellant's position is that the respondent is still obligated to convey to him and to his brother, without further compensation, the south half of the land in question, but that the other part of the contract is void.

[3] It is further urged that the judgment is erroneous in that it did not require the respondent to do equity. This is based upon the fact that the court did not deduct the amount of the unpaid taxes which had accumulated against the property in question or which had been paid by the appellant. The appellant had paid the taxes for one or two years but not for the rest of the time after the contract was executed. Not only is this not an equity case, but the court found upon sufficient evidence that the appellant had been in possession of the land and had received the benefits thereof at all times after the date of the agreement. Having taken possession under an executory contract which was silent as to who should pay the taxes, the vendees could not compel the vendor to pay the same. *Havens v. County of Alameda*, 30 Cal.App. 206, 157 P. 821.

[4] It is finally urged that the judgment is erroneous, in that it includes interest from February 6, 1930, the date of the judgment in the former action, to April 7, 1934, the date of the judgment in this action. We think this contention is correct in so far as that portion of this time during which the respondent was unwilling to accept the payment is concerned. The vendee was not in default until January 16, 1933, when deeds were tendered to him and at which time he refused to pay the money. The amount allowed for interest should have been \$875 instead of \$2,916.67.

The judgment is reduced from \$12,916.67 to \$10,875 and, as so modified, is affirmed; each party to the action to pay his own costs.

We concur: MARKS, J.; JENNINGS, J.



HERBERT v. LANKERSHIM et al. *
Civ. 10264.

District Court of Appeal, Second District,
Division 2, California.
Dec. 13, 1935.

Rehearings Denied Jan. 6, 1936.

Hearing Granted by Supreme Court
Feb. 10, 1936.

1. Contracts ⇨350(1)

Evidence *held* to support judgment for plaintiff for amount of \$500,000 made payable to her one month after death of decedent, by instrument executed by decedent prior to his death to reimburse plaintiff for services rendered by her over three-year period in capacity of companion, nurse, and personal attendant.

2. Appeal and error ⇨1001(1)

Jury findings supported by substantial evidence may not be disturbed on appeal.

3. Appeal and error ⇨930(2)

Appellate court must presume in support of verdict that jury followed court's instructions and found facts to be such as to sustain their verdict.

4. Appeal and error ⇨930(4)

Where there is substantial evidence of valid consideration, it must be presumed that verdict of jury rested thereon.

5. Contracts ⇨53

Where agreement rests on valid consideration, jury may not inquire into its adequacy.

6. Contracts ⇨71(1)

Where plaintiff and decedent reduced to writing agreement on amount of payment for services, rendered by plaintiff to decedent, by execution of instrument extending time for payment until after decedent's death, plaintiff's implied forbearance on obligation until after decedent's death constituted consideration for agreement (Civ.Code, § 1605).

7. Contracts ⇨71(1)

Forbearance alone may constitute sufficient consideration (Civ.Code, § 1605).

8. Account stated ⇨5

Written agreement entered into by plaintiff and decedent fixing amount of payment for services previously rendered by plaintiff to decedent, and extending time for payment until after decedent's death constituted "account stated" on which plaintiff could recover after decedent's death (Civ.Code, § 1605).

[Ed. Note.—For other definitions of "Account Stated," see Words & Phrases.]

9. Contracts ⇨350(1)

Evidence *held* to sustain finding that plaintiff had unliquidated claim against decedent for services rendered to decedent in capacity of companion, nurse, and personal attendant during three-year period, and that terms of payment contained in writing executed by decedent and accepted by plaintiff were mutually agreed on.

10. Evidence ⇨546

Admissibility of expert testimony as well as qualifications of witness rest largely within discretion of trial court.

11. Evidence ⇨523

In action on claim for services rendered to old man in poor health as companion, nurse, and personal attendant, expert testimony as to value of services rendered *held* properly refused, since unnecessary to aid jury in determining value.

12. Contracts ⇨353(4)

In action on written instrument, executed by decedent, purporting to authorize payment for services rendered to him by plaintiff, instructions that jury should determine whether instrument was given for valuable consideration, whether sum promised was intended and agreed to be in payment for services, or was intended as gift or as testamentary disposition, and that plaintiff could not recover if intended as gift or testamentary disposition *held* proper.

13. Trial *⌚*251(4)

Where partial invalidity of consideration had not been presented by any defense to action on contract, court could not properly instruct jury that they could apportion contract or pass on adequacy of valid consideration.

14. Evidence *⌚*110

In action on written instrument executed by decedent purporting to authorize payment to plaintiff for services rendered to him by plaintiff, exclusion of certain remarks by plaintiff disparaging to decedent *held* not error, where not shown to have been made before date of instrument, since not material to issue and not admissions against interest.

15. Appeal and error *⌚*1046(5)

In action on written instrument, remarks of court in connection with appointment of expert to analyze instrument *held* not prejudicial where court instructed jury to disregard any expressions court might have made which seemed to indicate his opinion.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Irene Herbert, also known as Mrs. Edres Herbert, against Doria C. Lankershim and others, as executors of the last will and testament of J. B. Lankershim, deceased. Judgment for plaintiff, and defendants appeal.

Affirmed.

Edward M. Auslender, Loeb, Walker & Loeb, Irving M. Walker, Milton H. Schwartz, and Herman F. Selvin, all of Los Angeles, for appellants Doria C. Lankershim and John I. Lankershim.

J. Wiseman Macdonald, of Los Angeles, *in pro. per.*

Swaffield & Swaffield, Kenneth Sperry, and Joseph E. Madden, all of Long Beach, for respondent.

WOOD, Justice.

After the rejection of her claim by the executors of the will of the late Col. J. B. Lankershim, plaintiff commenced this action, basing her complaint upon an instrument signed by Col. Lankershim in his lifetime. Upon the trial by jury a verdict was returned in favor of plaintiff for \$500,000 and interest. From the judgment and an order denying a motion for judgment notwithstanding the verdict, the defendant executors appeal.

Under the heading "Why the Judgment Should Be Reversed," in a brief filed by two of the executors, Doria C. Lankershim and John I. Lankershim, the main contentions upon which a reversal of the judgment is sought are set forth. These contentions, which will be considered in the order set forth in the brief, are as follows: "1. The execution of exhibit 1 (to which the judgment gives effect and which is, of course, the sole basis for the judgment) is proven—if at all—by the testimony of Miss Stella McKee and since her testimony is irreconcilable with certain physical facts indisputably established, it has no probative force and must be disregarded. 2. Assuming, without admitting, that Exhibit 1 is proven to have been duly executed, Exhibit 1 constitutes an executory, express promise to pay a sum certain, and is not supported by a good consideration, since it was given solely in consideration of completed or past services for which the promisor was already obligated to pay their reasonable value. The trial court's rulings on the admission of evidence and in respect of the charge to the jury on this issue were erroneous. 3. Relevant and material declarations or admissions of Mrs. Herbert were excluded by the court's rulings. 4. Error was committed by limiting defendants' qualified handwriting experts in the statement of their reasons for their opinions to the physical facts observed by them in the questioned document and by not permitting them to state the general data and scientific principles and knowledge upon which, in conjunction with the physical facts, their opinions were based. 5. The trial court by inconsistent rulings, adverse comments in the jury's presence, and limitations on the introduction of evidence, denied defendants a fair trial."

[1] In their first contention defendants ask the court to hold in effect that there is no substantial evidence to support the implied findings of the jury. Mrs. Herbert, the plaintiff, was prevented by the provisions of section 1880 of the Code of Civil Procedure from testifying as to any matters of fact occurring before the death of Col. Lankershim. A witness in her behalf, one Stella McKee, testified that she was present when the instrument was signed by Col. Lankershim on October 10, 1927; that Col. Lankershim made remarks to plaintiff showing his appreciation of her services and said: "Now I am going to

make good the promise I made to you; I am going to pay you well for your services;" that he went to a dresser, secured a piece of paper and pen and ink, and asked Mrs. Herbert to write what he dictated; that he dictated something like this: "Payable to Irene Herbert or Mrs. Edres Herbert \$500,000 one month after my death from my estate or trust fund for her loving kindness and protection to me since January, 1924." These words are almost identical with the words appearing on the instrument admitted in evidence as Exhibit 1 and which was admittedly signed by Col. Lankershim. The witness further testified that Mrs. Herbert wrote the language dictated, read the document to Col. Lankershim, and handed it to him; that he looked at it and signed it and handed it back to Mrs. Herbert; that Mrs. Herbert said, "I appreciate what you have done for me for the services I have rendered"; that she brought the note over to the witness, who took it in her hands and read it and returned it to Mrs. Herbert; that Col. Lankershim told Mrs. Herbert to take it to the bank and keep it there until after his death and then to take it to his attorney, who would see that she received the money. The witness Ruth Allen testified that later in the day of October 10, 1927, Col. Lankershim said to her, "I told you that I was going to pay Mrs. Herbert. I have given her a note for a half a million dollars, payable a month after my death," and asked her not to mention it to any one; that he had made Mrs. Herbert his companion in 1924; that he had become very dependent upon her; that he was old and ill and had to employ people to take care of him. The witness Adele Hope testified that Col. Lankershim told her that he had given Mrs. Herbert a note for a sum sufficient to take care of her the rest of her life and more besides; that she would have plenty for some of her pet charities. Other witnesses testified of the many services performed by Mrs. Herbert during a period of three years and ten months beginning in January, 1924. Without setting forth these services in detail, they can be classified in general terms as services as companion, nurse, and personal attendant. Other witnesses testified that Col. Lankershim had admitted and acknowledged to others that Mrs. Herbert was rendering the services, his appreciation and gratitude for the services and the great value he attached to them, as well as his intention to pay for them. Mrs.

Herbert was of middle age; Col. Lankershim was a man of great wealth, advanced age, and in poor health.

To sustain their contention that there was no substantial evidence to support the implied finding of the jury, defendants rely mainly upon certain physical facts apparent upon the face of the instrument and the testimony of certain expert witnesses. They argue that some of the writing on the instrument was placed thereon after the signature and with different pen and ink and that the last cipher in the figure was added, thereby increasing the amount from \$500.00 to \$500,000. In the case of *Koeberle v. Hotchkiss*, 48 P.(2d) 104, 106, a case frequently referred to, this court clearly gave the reasons why it is inappropriate to set forth the evidence in detail in the opinions of the court: "We purposely refrain in this case as in other cases from setting forth the facts and circumstances upon which we rely for our decision that there is substantial evidence to sustain the findings of the trial court. Such a recital is not required by the constitutional mandate which directs that all decisions of this court shall be given in writing and the grounds of the decision shall be stated. To thresh through a reporter's transcript, and to then determine whether or not there is any substantial evidence, requires no more skill than to thresh through a transcript and determine on which side lies the greater weight of evidence. The threshing of evidence for either of these purposes is essentially the same task of finding and weighing evidence, requiring skill of the same kind and degree, and is primarily a task for the trial court. It required a somewhat lively imagination the first time an appellate court declared that the search for and the determination whether there was any evidence to support a finding was the determination of a question of law. Thereafter the doctrine of scintilla of evidence was rejected in California for the doctrine of substantial evidence. *Estate of Baldwin*, 162 Cal. 471, 123 P. 267, and cases cited. For a time there was a tendency to overlook the fiction that it was a question of law and not of fact. Thus in the *Estate of Wikman*, 148 Cal. 642, 84 P. 212, 214, we find the following language used: 'This is a finding of fact and must be sustained if there is any reasonable amount of evidence supporting it.' To the same effect see *McCarthy v. McColgan*, 99 Cal.App. 492, 278 P. 918. We are not approving

this quotation. The word 'reasonable' ordinarily involves a question for a fact finder. We are attempting to point out how nearly this so-called 'question of law' approaches to being a question of fact. All of this is in line with the thesis of this paragraph that this court purposely refrains from setting out the facts and circumstances in evidence upon which it bases its statement that there is substantial evidence to support the implied findings of the jury. The defendants are entitled to this explanation because of the length and eloquence of their briefs." In a concurring opinion, Presiding Justice Stephens adds this: "A short, concise opinion upon the law points presented by the facts, it seems, is very popular except, in some instances, with the lawyer whose case has thus been handled. If lawyers would carefully read the opinion in *People v. Davis*, 147 Cal. 346, 81 P. 718, and the Supreme Court's comment upon denying a hearing in *Burke v. Maze*, 10 Cal.App. 206, at page 211, 101 P. 438, 440, many pages in appellate briefs and petitions for rehearings and hearings before the Supreme Court would be saved, for the uselessness of pages of facts in opinions is therein plainly indicated."

[2] In the case before us counsel have filed briefs containing 927 pages of printed matter, the larger part of which is devoted to a review of the evidence. The present case affords ample justification for the doctrine set forth in the case of *Koeberle v. Hotchkiss*, *supra*. Unquestionably, there is a conflict in the evidence, with substantial evidence to sustain the findings of the jury, and such being the case, the findings may not be disturbed on appeal.

[3,4] The second contention of defendants, that the instrument was not supported by a good consideration for the reason that Col. Lankershim was on October 10, 1927, obligated to pay the reasonable value of plaintiff's services, cannot be upheld. It is well settled that in support of a verdict it must be presumed that the jury followed the instructions of the court and found the facts to be such as to sustain their verdict. 2 Cal.Jur. 510; *Olcese v. Hardy*, 40 Cal. App. 323, 180 P. 666. If there is substantial evidence of a valid consideration, it must be presumed that the verdict of the jury rested thereon. Section 1605 of the Civil Code provides: "Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to

which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise."

The record discloses that the following contentions of plaintiff must be sustained: "* * * Under the evidence and the implied finding of the jury, we have the existence of several types of present consideration as heretofore pointed out, viz: (1) A novation, whereby the existing obligation was extinguished and a new and different obligation substituted in lieu thereof. (2) An account stated whereby the theretofore unliquidated obligation was made fixed and certain. (3) The time for payment was extended. (4) The prior transactions of the parties were merged into the written contract which itself constitutes presumptive evidence of a consideration. (5) The unconditional obligation was altered into an agreement to pay which was made contingent upon the existence of a particular fund. (6) Plaintiff by the acceptance of the note waived the right of process by attachment, judgment lien, or execution."

[5] It is well settled that if an agreement rests upon a good or valid consideration the jury may not inquire into the adequacy of the consideration. In *Rusconi v. California Fruit Exchange*, 100 Cal.App. 750, 281 P. 84, it is said: "When a good or valid consideration for an agreement exists, the law will not weigh the quantum thereof. *Whelan v. Swain*, 132 Cal. 389, 64 P. 560; *Fairchild v. Cartwright*, 39 Cal. App. 118, 121, 178 P. 333. In the absence of fraud, the inadequacy of consideration may not be considered as a means of upsetting a contract. 6 Cal.Jur. 189, § 128; *Smith v. Bangham*, 156 Cal. 359, 104 P. 689, 28 L.R.A.(N.S.) 522." In the case at bar the only semblance of evidence on the subject of fraud touches the question of the alleged alteration of the instrument, and the defendants' contention in this regard has been resolved by the jury against them.

A case bearing similarity to the case before us is that of *Sheldon v. Blackman*, 188 Wis. 4, 205 N.W. 486, 489. In that case the action against the administrator, based upon a written instrument partly in the form of a promissory note, called for payment of \$30,000 "at my death," fol-

lowed by a statement that the consideration of the note was for services rendered over a period of years. The administrator resisted the claim on the ground that "at best the deceased owed the claimant only the reasonable value of her services," and that the instrument was testamentary in character, though not properly executed. The court rejected an offer of proof of the reasonable value of the services and in sustaining a judgment in plaintiff's favor said: "To hold that this agreement, deliberately made, should be set aside or impaired, would be a denial of the right of parties to make their own contracts. There is abundant authority for the rule that, when the value of services is indefinite or indeterminate, or largely a matter of opinion, the courts will not substitute their judgments for that of the contracting parties. [Citing authorities.] If the note was delivered to and accepted by the claimant (and as later appears, we hold that it was), she could not be heard to claim that more than the amount specified was due her, and we consider that the representatives of the deceased have no better right to question the adequacy of the consideration. It is our conclusion that parol evidence was inadmissible to show that the consideration was different from that agreed upon."

In *Yarwood v. Trusts & Guarantee Company*, 94 App.Div. 47, 87 N.Y.S. 947, 949, a claim was presented against the estate of a decedent who had executed a note for \$10,000 in favor of Jennie and George Crawford, the consideration being that a few days' services were performed by plaintiffs in the nature of nursing and making decedent comfortable while he was suffering from frozen feet and hands. A verdict was entered for plaintiffs which was sustained on appeal, the court saying: "It may be stated at once that, as claimed by appellant, simple gratitude, as a mere sentiment resting upon no material basis in the way of valuable benefits received, would not be a sufficient consideration for the enforcement of the obligation in suit. Upon the other hand, it is equally true that the sufficiency of valuable services as a legal and valid consideration for the obligation in question would not be destroyed or impaired by the fact that the obligor felt and declared a sense of gratitude which amounted to an appreciation of the services which had been performed for him, and which was not at all intended to

supplant or exclude a recognition of a legal obligation to pay for the latter. * * * It is well settled that courts will not overturn an obligation of this kind because they may think that the promisor has paid too liberal a price for what he received. It is not necessary that the consideration of a note shall be equal in pecuniary value to the face of the obligation given. If no part of the consideration was wanting at the time, and no part of it subsequently failed, although inadequate in amount, the note is a valid obligation."

[6, 7] Under the implied findings of the jury it must be held that Mrs. Herbert and Col. Lankershim, at the time of the execution of the instrument, agreed upon the manner and the amount of payment and that they reduced this agreement to writing. The execution and delivery of the instrument to plaintiff, together with her acceptance of it, brought about an extinguishment of the pre-existing obligation, whatever it may have been, which became merged in the debt created by the instrument. By accepting the instrument, plaintiff impliedly agreed to forbear the obligation until after the death of Col. Lankershim. It is well settled that forbearance alone may constitute a sufficient consideration.

[8] There is ample authority for sustaining the verdict on the theory of an account stated. The rules concerning this subject are well collected in *Gardner v. Watson*, 170 Cal. 570, 150 P. 994, 995, where it is said: "It must appear (says this court in *Baird v. Crank*, 98 Cal. [293] 297, 33 P. [63] 65) that at the time of the accounting certain claims existed, of and concerning which an account was stated, that a balance was then struck and agreed upon, and that defendant expressly admitted that a certain sum was then due from him as a debt.' To like effect is *Coffee v. Williams*, 103 Cal. [550] 556, 37 P. [504] 506, where it is said: 'An account stated is a document—a writing—which exhibits the state of account between parties and the balance owing from one to the other; and when assented to, either expressly or impliedly, it becomes a new contract. An action upon it is not founded upon the original items, but upon the balance agreed to by the parties. And the general rule is that when the stated account is admitted, it can be avoided only by averment and proof of fraud, mistake,' etc. The action upon an account stated is not upon the

original dealings and transactions of the parties. Inquiry may not be had into those matters at all. It is upon the new contract by and under which the parties have adjusted their differences and reached an agreement. *Hendy v. March*, 75 Cal. [566] 568, 17 P. 702. It is not at all necessary that there should be mutual or cross-accounts or demands between the parties. The acknowledgment of a debt, though it consists of but a single item, may form the basis of such a stated account. *Weigel v. Hartman Steel Co.*, 51 N.J. Law [446] 450, 20 A. 67; *Neyland v. Neyland*, 19 Tex. [423] 427; *Rutledge & Farrar v. Moore*, 9 Mo. 537. * * * Moreover, the writing constituting an account stated need not aver, or at all contain, the grounds and reasons for the conclusion and declaration expressed. It is a complete account stated if it contains a signed and written acknowledgment of a present, unqualified indebtedness or liability with a promise to pay a named sum. * * * And *Chitty (Chitty on Con.* [11th Ed.] p. 962) declares that: 'It must appear that at the time of the accounting, certain claims existed, of and concerning which an account was stated, that a balance was then struck and agreed upon, and that the defendant expressly admitted that a certain sum was then due from him as a debt.' Moreover, it is well settled that the compromise of a claim or demand, even of a claim or demand of doubtful validity or value, is a good consideration for an account stated, and the defendant will not be heard to answer when action is brought upon the account stated that the claim or demand was unjust or invalid. * * * It is open to a defendant, as has been pointed out, to repel the legal effect of the account stated by pleading and proof of its procurement through fraud, duress, mistake, or other grounds cognizable in equity for the avoidance of an instrument. But it is not open to a defendant to attempt to defeat the legal effect of such a contract by showing a lack of consideration in any other way. Thus, it is not open to a defendant in such a case merely to show that the account stated was based upon a disputed claim of the plaintiff's, which claim subsequently proved to be invalid. Nor would it be open to a defendant to show that the amount justly due was very much less than the amount named in the account stated. All such evidence going to total or partial lack of consideration is forever debarred by the

convention and agreement of the parties, for this is of the very essence of an account stated."

[9] In the case before us there is substantial evidence to sustain the implied finding of the jury that plaintiff had an unliquidated claim against Col. Lankershim and that on October 10, 1927, the amount mentioned in the note and the terms stated therein were mutually agreed upon.

[10, 11] Complaint is made of the ruling of the trial court refusing the proffered evidence of alleged experts on the subject of the reasonable value of the services rendered by Mrs. Herbert. These services were such as are within the common knowledge of the citizenry. In addition to the labor actually performed, the services involved kindness, patience, loyalty, and devotion to duty. Plaintiff's counsel frankly admits that the sum allowed by the jury is greater than would ordinarily be paid for the labor performed if the circumstances were such that the employer went into the open market to secure labor at the average wage. At the same time counsel points out that the sum of \$500, the amount claimed by defendants to be specified in the instrument, is ridiculously low. The circumstances of this case are far from ordinary. The employment of some one by an aged, wealthy man, in a weakened physical condition, to perform the type of services rendered by plaintiff is exceedingly rare, if indeed a parallel case can be found. It would be presumptuous for any witness to claim to be an expert in a situation such as the one before us. It is the theory of the defendants that the evidence of the value of the services should be received to enable the jury to pass upon the likelihood that the instrument in question was for the full sum of \$500,000, as claimed by plaintiff, or for the sum of \$500, as claimed by defendants. All of the facts of the services, their nature and extent, were before the jury and they were in a position to determine the value of the services in so far as it bears upon the point just mentioned, and could do so from their own judgment and knowledge on the subject. Expert testimony was not necessary. *Nylund v. Madsen*, 94 Cal.App. 441, 271 P. 374, and cases there cited. The admissibility of expert testimony, as well as the qualifications of the witness, rests very largely within the discretion of the court.

No abuse of discretion is shown here. *Hastings v. The Steamer Uncle Sam*, 10 Cal. 341; *Rudat v. Carithers*, 137 Cal.App. 92, 30 P.(2d) 435; *Hutter v. Hommel*, 213 Cal. 677, 3 P.(2d) 554.

[12] Complaint is also made of the failure of the trial court to give certain instructions on the subject of the consideration. The foregoing discussion is to some extent applicable to defendants' contention on this point. Defendants particularly complain that the court erred in failing to specifically instruct the jury that plaintiff could recover, if at all, no more than the reasonable value of her services, and that the court erred in failing to specifically instruct the jury that if the instrument was intended in part as a gift or in part as a testamentary disposition it was to that extent unenforceable. The court did in fact instruct the jury fully and properly on all the points involved. The jury was given instructions, among others, that they should determine whether the sum promised was intended and agreed to be in payment for services or was intended as a gift or as a testamentary disposition; that the verdict must be for defendants if the instrument was intended as a gift or if it was intended as a testamentary disposition; that the jury should determine if the instrument was given for a valuable consideration; that if a material alteration was made in the instrument without the consent of Col. Lankershim the verdict should be for the defendants. The jury was also given the following instruction at the request of defendants: "If you find that the document herein sued upon was actually delivered by J. B. Lankershim to the plaintiff, it is for you to determine, under the issues here presented, whether that document was delivered by said Lankershim in payment for services said to have been rendered to him by plaintiff from January 4th, 1924, to October 10th, 1927, or whether it was delivered to her as a gift, or whether it was delivered as a testamentary disposition, and in determining such questions you may consider what services it has been here proved that plaintiff performed for said Lankershim between the said dates; whether those services were of the class and were performed under conditions for which an express agreement or an implied promise on the part of said Lankershim to pay for them was made, or whether such services were of such character and so

performed that no intent of payment therefor existed in the minds of either of the parties. In considering these questions you may take into consideration the nature and extent of the alleged services as proved, and the amount of \$500,000.00 expressed in said document, in reaching a conclusion as to whether the document for and promise to pay that amount was given in payment for services here proved to have been rendered by plaintiff to said Lankershim, or was given by him as a gift, or was given by him by way of testamentary disposition. All other facts and circumstances shown by the testimony may be considered by you in this connection."

[13] Defendants were not entitled to instructions on the points involved more favorable than those actually given. The issue of partial invalidity of the consideration, if indeed it could be considered as a proper issue, was not presented by any of the defenses pleaded. The court could not properly instruct the jury that they could apportion the contract or pass upon the adequacy of a valid consideration.

[14] In the third of defendants' contentions above set forth they complain of the rulings of the trial court excluding certain statements made by Mrs. Herbert which included remarks disparaging to Col. Lankershim. Some of these remarks were shown to have been made after the date of the instrument and it was not affirmatively shown that any of the remarks were made before the date of the instrument. The remarks were not material to any of the issues presented by the pleadings. At best they could only show the mental attitude and frame of mind of the plaintiff at the time they were spoken. They do not come within the classification of admissions against interest.

In their fourth contention defendants complain of certain rulings of the trial court in which it is claimed that the expert witnesses were unduly limited in their testimony. The record discloses that the experts testified at great length, fully discussed the facts and fully presented to the jury the reasons for their opinions. The defendants were not prejudiced by any of the numerous rulings of the court on this subject.

[15] In their final contention the defendants seek to show that the trial court was guilty of misconduct in certain comments made in the jury's presence. Late

in the trial the court, upon motion of plaintiff, appointed an expert of the court's selection to give his opinion on certain issues. In making this appointment the court made extended remarks in the presence of the jury explaining this action, stating, among other things: "I have determined to grant the motion of the plaintiff for a chemical analysis of this document, although I realize that that ruling at this time interferes with the orderly conduct of the case. My principal reason for the granting it is that it is an examination of a different kind and type than has been made before, but I particularly want to impress upon you that from the granting of this motion you are not to infer that I have any belief in the sufficiency or insufficiency of the testimony of Dr. Bendikson. That is an examination of a kind which was described to you and the weight and sufficiency of his testimony and of his examination is a matter for you to determine * * * and I feel that it is necessary and wise for the jury to have all of the evidence which can possibly be had which bears upon the subject, particularly from an unprejudiced source." We do not consider it appropriate to here set out in full the lengthy statement of the court. We find nothing prejudicial to the rights of defendants in the court's remarks. Counsel for defendants made no objection at the time and did not request the court to instruct the jury to disregard the statement or any part of it. At a later session, in the absence of the jury, counsel called the court's attention to the remarks which they considered prejudicial and the court then stated: "Well, I will be glad to make some comment on that, but I do not see that the remarks could be construed the way you seem to think. I was not contrasting or intending to contrast the witnesses produced by one side with the other against the testimony of the expert appointed by the court." No further reference to the matter appears in the record. In the general instructions the court stated to the jury: "I have not expressed nor intended to express, nor have I intimated or intended to intimate any opinion as to what witnesses are or are not worthy of credence, what facts are or are not worthy of credence, what facts are or are not established or what inferences are to be drawn from the evidence adduced. If any expression of mine has seemed to in-

dicade an opinion relating to any of these matters such expression must be entirely disregarded by you." Even if it be conceded that defendants are in a position to present the point now, it is manifest that they have suffered no prejudice by the action of the court.

The foregoing disposes of the main contentions of the defendants and of all of the contentions which merit extended discussion. In the very extended briefs filed, a large number of points are argued, most of which have been covered in this opinion. Of the contentions of defendants not herein specifically disposed of, it is sufficient to say that they are without merit. The court will, as in this case, devote all the time necessary for the proper treatment of every case before it, no more and no less, whether the action involves the usual and ordinary petition of a poor man for his wages or the unusual and extraordinary expenditures of a man of great wealth.

The judgment and order appealed from are affirmed.

We concur: CRAIL, P. J.; GOULD, Justice pro tem.



11 Cal.App.2d 56

**PACIFIC STATES SAVINGS & LOAN CO.
v. HOLLYWOOD KNICKERBOCKER, Inc.,
et al. (McGREGOR et al., Interveners).**

Civ. 10000.

District Court of Appeal, First District,
Division 2, California.

Dec. 27, 1935.

1. Mortgages ⇐407

Right of bondholder to foreclose deed of trust on default can be limited by provisions in trust agreement.

2. Mortgages ⇐417

Holders of 25 per cent. of defaulted bonds could not foreclose trust deed giving right to foreclose to majority of bondholders, where 36 per cent. of bondholders had instructed trustee not to foreclose (Civ.Code, §§ 1636, 1644).

3. Contracts ◊153

The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable; each clause helping to interpret the other.

Appeal from Superior Court, Los Angeles; Harry F. Sewell, Judge.

Action by the Pacific States Savings & Loan Company against Hollywood Knickerbocker, Incorporated, and others, in which Frank D. McGregor and others intervened. From a judgment in favor of the defendants, the plaintiff appeals.

Affirmed.

John L. Mace, of Los Angeles, for appellant.

Gibson, Dunn & Crutcher, of Los Angeles (H. F. Prince and Frederic H. Sturdy, both of Los Angeles, of counsel), for respondents Frank D. McGregor, John W. Chapple, Earl W. Huntley, Clark Hallam, and William D. Courtright.

Freston & Files, of Los Angeles, for respondent Bank of America Nat. Trust & Savings Ass'n.

STURTEVANT, Justice.

Hollywood Knickerbocker, Inc., a corporation, on July 1, 1929, executed its first closed mortgage 6½ per cent. sinking fund gold bonds in the sum of \$750,000 to the Bank of America. That bank has since changed its name to Bank of America National Trust & Savings Association. Seven hundred of the bonds were of the denomination of \$1,000 each, and one hundred of the bonds were of the denomination of \$500 each. To each bond there were attached thirty interest coupons. To secure the payment of the bonds Hollywood Knickerbocker, Inc., executed to the Bank of America a trust deed. Thereafter this plaintiff became the owner and holder of a number of said bonds aggregating \$204,000. The intervening defendants thereafter became the owners of bonds in the aggregate sum of \$426,500. That is, the plaintiff became the owner of more than 25 per cent. of said bonds and the interveners became the owners of 36 per cent. of the outstanding bonds. Defaults in the payment of interest on all of said bonds were made on July 1, 1932, and January 1, 1932. Defaults in the payment of taxes and other defaults also occurred. On July 29, 1932, the plaintiff gave

notice in writing to the trustee and made a demand upon it that it declare the principal of said bonds to be due. Pursuant to said demand, on July 30, 1932, the trustee did so declare. Later the plaintiff demanded that the trustee pursuant to the power of sale conferred upon it exercise the power of sale, but the trustee failed and refused to do so. On the 22d day of November, 1932, the plaintiff demanded that the trustee commence a suit to foreclose, but the trustee neglected and refused to do so. Its reason for nonaction rested on the fact that on the 27th day of August, 1932, the interveners served on the trustee a demand that the trustee should cease and desist from any further proceedings for the exercise of the power of sale, foreclosure of said bonds, or sale of said property.

The plaintiff thereafter commenced this action to obtain a decree in foreclosure. Its complaint was very full and complete. Bank of America National Trust & Savings Association, as trustee, was made one of the parties defendant. It appeared and filed an answer which, among other things, showed the conflicting demands made upon it. The Hollywood Knickerbocker, Inc., was made a defendant and appeared and filed an answer denying the allegations of the complaint. After obtaining permission so to do the interveners appeared and filed an answer in which they denied many of the allegations of the complaint and in which they set forth certain affirmative defenses. A trial was had before the trial court sitting without a jury. Evidence on all of the issues made by the pleadings was introduced. Thereafter the trial court made findings in favor of the defendants and from the judgment entered thereon the plaintiff has appealed. The findings so made by the trial court were to the general effect that the plaintiff was not entitled to maintain the action because of certain covenants contained in the bonds and the deed of trust executed to secure the payment of the bonds. All of the bonds recited they would be paid on July 1, 1944, together with interest at 6½ per cent. per annum payable on the first days of January and July in each year. Other provisions contained in the bonds material to a consideration of this case include the following:

"For a description of the properties mortgaged, the nature and extent of the security, the rights of the holders of the bonds, and the terms and conditions upon which the

bonds are issued and secured, reference is made to said mortgage or deed of trust, to all the provisions of which the holder hereof, by accepting this bond, assents.

"* * * In case an event of default, as defined in said mortgage or deed of trust, shall occur, the principal of this bond, if it be then outstanding, may be declared and become due and payable, as provided in said mortgage or deed of trust."

Provisions of the trust deed material to the questions presented to us are as follows:

"Article IX. * * * Section 3. If one or more of the events of default shall happen, the Trustee may, and upon the written request of the holders of twenty-five per cent (25%) in amount of the bonds secured hereby and then outstanding, shall, by notice in writing delivered to the Company, declare the principal of all bonds secured hereby then outstanding to be due and payable immediately, and upon any such declaration the same shall become and be immediately due and payable, anything in this indenture or in said bonds contained to the contrary notwithstanding. * * *

"Section 4. If one or more of the events of default shall happen, the Trustee in its discretion may, and upon the written request of the holders of twenty-five per cent (25%) in amount of the bonds secured hereby and then outstanding, shall proceed to protect or enforce its right or rights of the bondholders under this indenture by a suit in equity or action at law, either for the specific performance of any covenant or agreement contained herein, or in aid of the execution of any power herein granted, or for the foreclosure of this indenture, or for the enforcement of any other appropriate legal or equitable remedy as the Trustee shall deem most effectual in support of any of its rights or duties hereunder; and upon instituting such proceedings or in order to take possession as hereinbefore provided, the Trustee shall be entitled to the appointment of a receiver of the trust estate and to the sale of the trust estate as an entirety, if the Court in its discretion shall so order. * * *

"Article X. * * * Section 2. No holder of any bond or coupon secured hereby shall have any right to institute any suit, action or proceeding at law or in equity for the foreclosure of this indenture or for the execution of any trust or power hereof or for the appointment of a receiver or for any other remedy under or upon this indenture, unless such holder previously shall have

given to the Trustee written notice of an event of default; and unless also the holders of twenty-five per cent (25%) in amount of the bonds secured hereby then outstanding shall have made written request upon the Trustee and shall have furnished the Trustee reasonable indemnity against all costs, attorney's fees and expenses, and shall have afforded to it a reasonable opportunity either to proceed to exercise the powers hereinbefore granted, or to institute such action, suit or proceedings in its own name; and such notification and request hereby are declared in every such case, at the option of the Trustee, to be conditions precedent to the execution of the powers and trusts of this indenture, and to any action or cause of action for foreclosure, or for the appointment of a receiver, or for any other remedy hereunder; it being understood, intended and hereby provided that no one or more holders of bonds or coupons secured hereby shall have any right in any manner whatever by his or their action to affect, disturb, or prejudice the lien of this indenture, or to enforce any right hereunder, except in the manner herein provided, and that all proceedings hereunder shall be instituted, had and maintained in the manner herein provided, for the equal benefit of all holders of such outstanding bonds and coupons. * * *

"Article XI. * * * Section 16. (a) In the event that the Trustee, upon the happening of an event of default, is served with two or more written requests each signed by the holders of twenty-five per cent (25%) in amount or more of the outstanding bonds, which shall request that the Trustee shall do different things, the Trustee shall follow the direction contained in the written request signed by the holder or holders of the largest principal amount of the bonds. (b) In the event that the Trustee, upon the happening of an event of default, shall have taken some action pursuant to its duties hereunder, whether upon its own discretion or upon the request of the holders of twenty-five per cent (25%) in amount of the bonds secured hereby, it shall be controlled in the matter of continuance or discontinuance of such action by the written request or direction of a majority in amount of the bonds secured hereby, (c) except, however, that such control shall not be exercised to stay or suspend a foreclosure suit instituted by the Trustee, nor to prevent such foreclosure from being filed, nor to waive or stay any proceedings to be taken by the Trustee in case of an event of default unless the

principal of all bonds secured hereby, which have matured according to their terms, has been paid." (Parentheses ours.)

[1-3] In its opening brief the plaintiff states that the sole question in the case at bar is what construction is to be placed upon the terms of the trust indenture. With that statement defendants agree. "In the absence of any provision to the contrary, default may be taken advantage of by the holder of a single bond or coupon. (Citing authorities.)" *California Safe Deposit & Trust Co. v. Sierra Valleys R. Co.*, 158 Cal. 690, 694, 112 P. 274, 277, Ann.Cas. 1912A, 729. But there are many valid provisions that can be inserted in the trust agreement which will limit the rights of the bondholders in such matters and which, in the absence of a charge of fraud, will have that effect. That such is the rule and for some of those provisions, see *Rodman v. Richfield Oil Co. of California et al.* (C.C.A.) 66 F. (2d) 244, and *Munch v. Central West Public Service Co.*, 128 Neb. 645, 259 N.W. 736, and cases there cited. In the indenture of trust before us some provisions limiting the rights of the bondholders were inserted. We have hereinabove set forth those provisions which are to be construed. The construction deemed necessary involves the provisions of section 16, article XI, supra. Division (a) as marked by us speaks of "different things." The plaintiff asserts that it demanded that the trustee should foreclose and that the interveners demanded that the trustee should stay his hand—should do nothing, and therefore the trustee was not served with notices to do "different things." The point is without merit. Manifestly in such matters as here involved non-action is "thing" as material as affirmative action. Moreover, it was one of the identical things, if not the identical thing, about which the parties were contracting. Both the bond and the indenture of trust contained provisions accelerating the date of payment of the principal. Pointing to those provisions the plaintiff makes two different contentions. It asserts that such provisions are self-sufficient and that section 16, article XI, neither adds to nor subtracts from the plaintiff's rights. In the next place it contends that so much of section 16, article XI, as we have marked division (c), should be read as follows: "* * * except, however, that such control shall not be exercised to stay or suspend a foreclosure suit in-

stituted by the trustee, nor to prevent such foreclosure from being filed nor to waive or stay any proceedings to be taken by the trustee in case of an event of default unless the principal of all bonds secured hereby which have matured according to the specific pay date written thereon or by acceleration of payment (sec. 4, art. IX) has been paid." As all bonds contained the same pay date, and as the acceleration of the pay date operated on every bond, the construction contended for works an absurdity. If in any given contingency all bonds have been paid, there will be no occasion for the commencement of foreclosure proceedings. If the instrument is given such a construction, no force or effect is given to divisions (b) and (c) which we have marked and which are the gravamen of the instrument. The word "maturity" is used many times in the indenture of trust. In every place we have noticed it was used as meaning July 1, 1944. In the last edition of Webster's Unabridged Dictionary one of the ordinary meanings of the word is stated as "termination of the period a note or other obligation has to run." Such ordinary meaning should be adopted (Civ.Code, § 1644) as the plaintiff contends we are bound to construe the indenture of trust within its four corners. From a casual inspection the document is an attempt to place in the hands of a majority of the bondholders the power to control and direct the policy which will best protect and serve the interests of all of the bondholders. That being the clear intention of the parties, the contract should be so construed. Civ.Code, § 1636. There is also that other cardinal rule that the whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable; each clause helping to interpret the other. That rule we think is peculiarly applicable in the instant case. The plaintiff cites and relies on *Burrill v. Robert Marsh & Co.*, 138 Cal.App. 101, 31 P.(2d) 823, and *San Francisco Theological Seminary v. Monterey County Gas & Electric Co.*, 179 Cal. 166, 175 P. 693. Neither case is opposed to anything we have said regarding the particular facts in this case.

We find no error in the record.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

11 Cal.App.2d 98

**NORDIN v. BANK OF AMERICA NAT.
TRUST & SAVINGS ASS'N.**

Civ. 10453.

District Court of Appeal, Second District,
Division 1, California.

Jan. 3, 1936.

Rehearing Denied Jan. 23, 1936.

Hearing Denied by Supreme Court
March 3, 1936.

1. Trial ☞36

In action against bank which had assumed liabilities of another bank against which plaintiff had obtained judgment, complainant *held* not required to introduce the judgment where it was admitted by defendant (Code Civ.Proc. § 1962, subd. 6).

2. Evidence ☞43(3)

In action against bank which had assumed liabilities of another bank against which plaintiff had obtained judgment, trial court could judicially notice judgment which was not set out in full in complaint.

3. Pleading ☞349

Where complaint against bank which had assumed liabilities of another bank against which plaintiff had obtained judgment alleged entry of judgment and assumption of liabilities by defendant and defendant's answer admitted the unpaid judgment and assumption of liabilities, *prima facie* case was made for plaintiff which, in absence of contrary evidence, supports judgment for plaintiff (Code Civ.Proc. § 1962, subd. 6; § 1963, subd. 17; § 1851).

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by C. O. Nordin against the Bank of America National Trust & Savings Association. From an adverse judgment, defendant appeals.

Affirmed.

Louis Ferrari, of San Francisco, and Edmund Nelson and G. L. Berrey, both of Los Angeles, for appellant.

Horton & Horton, Joseph K. Horton, and Holbrook, Taylor, Tarr & Horton, all of Los Angeles, for respondent.

ROTH, Justice pro tem.

On November 8, 1927, respondent, as plaintiff, filed action against Eagle Rock State Bank, hereinafter referred to as "bank," predicated upon the refusal of the bank to account to respondent for \$7,000, which it was alleged was due from bank to respondent. The action proceeded to trial

and judgment was entered against respondent. An appeal was taken therefrom, whereupon the judgment was reversed, and the lower court directed to enter judgment for respondent. *Nordin v. Eagle Rock State Bank*, 139 Cal.App. 584, 34 P. (2d) 490. During the pendency of said action by respondent against bank, said bank sold by mesne transfers its business and assets to appellant, as a consequence of which appellant accepted and assumed all deposit liabilities and all other liabilities of bank, a written agreement of sale and transfer and assumption evidencing such arrangement. When the judgment of the trial court was reversed and judgment entered in favor of respondent, respondent filed an amended and supplemental complaint against appellant, alleging the entry of judgment in his favor and the assumption of liability by appellant, to which appellant filed an answer. The answer denied certain allegations of the complaint, but admitted the assumption of liabilities on its part, as pleaded by respondent in his supplemental complaint, and while admitting the judgment against bank, pleaded therein, denied that bank was indebted to respondent. Upon trial of the issues raised by the supplemental complaint and answer thereto, respondent rested upon the admissions in the pleadings. Appellant also rested. Both requested judgment, and the trial court entered judgment for respondent upon his supplemental complaint, from which judgment this appeal is taken.

Appellant's point seems to be that " * * * the plaintiff has rested without making out a *prima facie* case, even supposing that he might have done so with the aid of the judgment. The judgment itself is not set out in the complaint, but only plaintiff's construction of that judgment." Stated in another way, appellant asserts that "Plaintiff has sued in this action alleging that the predecessor bank became indebted for money had and received as a deposit. While there is no denial of the existence of a judgment in favor of plaintiff and against the Eagle Rock Bank, it is denied that the judgment was for money had and received as a deposit."

[1-3] If respondent had sued on a promissory note executed by bank, and appellant, after having assumed the liabilities of bank, were sued on said note, and appellant admitted the execution thereof and its nonpayment, as it admitted the judgment, the finality and the nonpayment thereof in the instant case, respondent

would be justified in resting upon the admissions in the pleadings as a prima facie case made out in his behalf. Any claim that the bank was not indebted in accordance with the note would be a matter of defense. We fail to see how the situation is any different as to a judgment which is admitted. In addition to some denials, which we deem immaterial, appellant pleaded a variety of affirmative defenses, but offered no evidence either on the denials or on the affirmative defenses. Respondent was not under any obligation to introduce the judgment, because it was admitted. Code Civ.Proc. § 1962, subd. 6; Sacramento & San Joaquin Drainage Dist. v. Superior Court, 196 Cal. 414, 238 P. 687; Hibernia Savings & Loan Soc. v. Boyd, 155 Cal. 193, 100 P. 239. The trial court will take judicial notice of the judgment. Roberts v. Roberts, 81 Cal.App. 499, 253 P. 1112; City of Los Angeles v. Abbott, 217 Cal. 184, 17 P.(2d) 993. The unpaid judgment, together with the admission that appellant had assumed the liabilities of bank, made out a good prima facie case, and, in the absence of any evidence to the contrary, fully supports the judgment in favor of respondent against appellant. Code Civ.Proc., § 1962, subd. 6; section 1963, subd. 17; section 1851; Harvey v. Ward, 49 Cal. 124; Ellsworth v. Bradford, 186 Cal. 316, 199 P. 335.

The judgment is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.



10 Cal.App.2d 654

ZEARING v. JOHNSON, Assessor.

Civ. 10449.

District Court of Appeal, Second District,
Division 1, California.

Dec. 17, 1935.

1. Army and navy Ⓒ22

"Honorable discharge" from army is formal and final judgment based by government upon military record of member of its armed forces, and declaration that such person had left service in a status of honor.

[Ed. Note.—For other definitions of "Honorable Discharge," see Words & Phrases.]

2. Taxation Ⓒ219

Taxpayer, who had been ordered by his local draft board during war to enter military service and had reported to mobilization camp where he was discharged from draft because of physical unfitness, held not to have received an "honorable discharge" within constitutional provision exempting property of veterans to value of \$1,000 from taxation (Const. art. 13, § 1¼, amended in 1932).

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Wallace H. Zearing for a writ of mandate against James Hervey Johnson, Assessor of San Diego County. From an adverse judgment, plaintiff appeals.

Affirmed.

Clarence F. Terry, of San Diego, John W. Holler, of Los Angeles, and Fred A. Steiner, of San Diego, for appellant.

Thomas Whelan, Dist. Atty., and Carroll H. Smith, Deputy Dist. Atty., both of San Diego, for respondent.

ROTH, Justice pro tem.

Appellant Zearing, as plaintiff, filed a petition for a writ of mandate against respondent Johnson in his capacity as assessor of San Diego county, state of California. It appears from the petition for the writ that appellant is a resident, property owner, and taxpayer of San Diego county, and sought to obtain a veteran's exemption for the year 1933, pursuant to section 1¼ of article 13 of the Constitution of the state of California. A general demurrer to the petition was sustained without leave to amend, and from the judgment entered thereon this appeal is taken. The formal and substantive sufficiency of all allegations save one are not questioned. The allegation which creates the question which must be decided on this appeal is as follows: "That petitioner served in the United States Army between August 30, 1918, and September 8, 1918; that your petitioner received an honorable discharge therefrom in the form of a 'discharge from draft' copy of which said discharge is attached hereto and marked Exhibit 'A' * * *; that said honorable discharge has been filed in the office of the County Assessor of San Diego County, California."

It appears from said allegation and Exhibit A, that on August 30, 1918, appellant who was then a resident of the state of Indiana, was ordered into military service by his local draft board, and he reported to Camp Dodge, Iowa, pursuant to such order; that he was discharged from Camp Dodge on September 8, 1918, because of physical unfitness. The discharge, as set out in Exhibit A, reads in part as follows:

"Discharge from Draft

"To All Whom it May Concern:

#3686037

"This is to certify, That Wallace H. Zearing, a recruit, 64 Co. 163 Depot Brigade is hereby discharged from military service of the United States by reason of Physical deficiency as per 3d Ind. Dated Sept. 8/18 on form 1010 P. M. G. O., giving as reason for discharge defective hearing, Otitis Media suppurative Chronic left hearing. R. 5/20 L. 5/20; Group 'D.' Said Wallace H. Zearing was inducted into the service from the jurisdiction of the local board from Madison, Jefferson Co., Adjutant General, State of Indiana, on the Thirtieth of August, 1918. While this certificate discharges the person named herein from his *present obligation to serve in the army*, it does not operate as a permanent bar to his subsequent entrance into the military service. * * * (Italics ours.)

Appellant contends that this discharge is an honorable discharge within the meaning of the constitutional provision referred to, which is as follows: "§ 1¼. *United States army, navy, marine and revenue service.* The property to the amount of one thousand dollars of every resident of this state who has served in the army, navy, marine corps or revenue marine service of the United States in time of war, and received an honorable discharge therefrom or who has been released from active duty because of disability resulting from such service in time of peace or under other honorable conditions, or lacking such amount of property in his own name, so much of the property of the wife of any such person as shall be necessary to equal said amount; and the property to the amount of one thousand dollars of the widow resident in this state, or if there be no such widow, of the widowed mother resident in this state, of every person who has so served and has died either during his term of service or after receiving an honorable discharge from said service, or who has been released from active duty

because of disability resulting from such service, in time of peace or under other honorable conditions, and the property to the amount of one thousand dollars of pensioned widows, fathers, and mothers, resident in this state, of soldiers, sailors and marines who served in the army, navy, or marine corps or revenue marine service of the United States shall be exempt from taxation; *provided*, this exemption shall not apply to any person named herein owning property of the value of five thousand dollars or more, or where the wife of such soldier or sailor owns property of the value of five thousand dollars or more. No exemption shall be made under the provisions of this act of the property of a person who is not legal resident of the state; *provided, however*, all real property owned by the Ladies of the Grand Army of the Republic and all property owned by the California Soldiers Widows Home Association shall be exempt from taxation." It appears from said constitutional provision that in order for appellant to apply for a veteran's exemption pursuant thereto he must be a "resident * * * who has served in the army * * * in time of war, and received an honorable discharge therefrom, * * *" or "who has been released from active duty under other honorable conditions."

[1,2] It appears from the face of the discharge from draft and the allegations of the petition that petitioner was merely subject to military law and had an obligation to serve in the army from which he was relieved for proper reasons. It does not appear that he ever served in the army or was ever a part of the army. A person may be subject to military law without being a member of the armed forces of the United States. *Bannister v. Soldiers' Bonus Board*, 43 R.I. 346, 112 A. 422, 13 A.L.R. 589. An honorable discharge is a formal and final judgment based by the government upon the military record of a member of its armed forces, and a declaration that such person had left the service in a status of honor. *United States v. Kelly*, 15 Wall. 34, 21 L.Ed. 106. There is no doubt that appellant was released from *the obligation to perform active duty* under honorable conditions, but in our opinion, this is not a release from active duty. The Attorney General of this state has ruled that a discharge from draft, such as the one in the instant case, is not an honorable discharge within the meaning of the constitutional provision (A.G.O.

7656, July 31, 1931), and we are of the same opinion. We concur in that part of the opinion of the Attorney General referred to, in which the Attorney General states: "From all of the foregoing it would seem to clearly appear that the physical examination, selecting, etc., by the Local Board, were tentative, conditional or preliminary in character, and only ripened into an actual service following physical examination and acceptance by the military authorities after arrival at mobilization camp. If not so accepted a 'Discharge from Draft' was given, signifying the refusal of the military authorities to accept the individual named therein for military service."

The judgment is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.



11 Cal.App.2d 70

IRELAND v. RILEY, Controller, et al.
Civ. 5550.

District Court of Appeal, Third District,
California.

Dec. 28, 1935.

Hearing Denied by Supreme Court
Feb. 26, 1936.

1. States ⇨67

Purpose of Legislature in creating department of finance was to conserve financial interests of state and to prevent as far as possible improvident acts by any department thereof, and to give to state such powers as would enable department of finance to control expenditures of state money by any department of state (Pol.Code, §§ 654, 675a).

2. States ⇨94

Words "issuance, securing or purchase," within Alcoholic Beverage Control Act providing that board of equalization shall have full control of issuance, securing, or purchase, and of sale of stamps, and shall keep record of all stamps sold, held to relate to subject-matter of obtaining stamps by dealers in intoxicating liquors, and not intended to repeal by implication any power of state department of finance to supervise contracts for purchase of liquor stamps (Pol. Code, §§ 654, 675a; St. 1935, c. 330, § 33).

3. Statutes ⇨158

Repeals by implication are not favored.

4. States ⇨94

State board of equalization held without power to enter into contract for printing and purchasing of liquor excise stamps without first obtaining approval of state department of finance (Pol.Code, §§ 654, 675a; St. 1935, c. 330, § 33).

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by L. A. Ireland against Ray L. Riley, as Controller of the State of California, and others. From a judgment for defendants, plaintiff appeals.

Reversed and remanded, with instructions.

Hearing denied by Supreme Court; WASTE, C. J., and SHENK and THOMPSON, JJ., dissent.

Heller, Ehrman, White & McAuliffe, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

Action to enjoin the defendant State Controller from drawing a warrant in payment of the price of certain stamps alleged to have been illegally contracted for by the State Board of Equalization. The defendants had judgment, and the plaintiff appeals.

The question presented for determination is as follows: Has the State Board of Equalization, under section 33 of chapter 330 of the Laws of 1935, power to enter into a valid contract for the printing and purchasing of liquor excise stamps, without first obtaining the approval of the state department of finance, as provided for in section 675a of the Political Code?

On August 15, 1935, the bureau of purchases, at the request of the State Board of Equalization, called for bids for the printing of one hundred fifty million excise stamps, to be used in taxing the sale of distilled liquor under the provisions of the Alcoholic Beverage Control Act of 1935. The bids were to be based upon performance of the work, either by the decalomania or lithographic process. The Kolograph Corporation of Los Angeles, Cal., submitted a bid for \$51,000 for printing the stamps by the decalomania process. The Union Lithograph Company of San Francisco, Cal., submitted a bid in the sum of \$27,000 for printing the stamps by the lithographic process. The American De-

calcomania Company of Chicago, Ill., submitted a bid in the sum of \$107,250. The board accepted the bid of the Chicago company, and referred the contract to the state department of finance for approval. This department notified the board of its disapproval of the proposed contract. Notwithstanding such disapproval, the Board of Equalization authorized the American Decalcomania Company of Chicago to commence printing the stamps. No formal contract has as yet been entered into. The facts stipulated at the trial were to the effect that the department of finance would not, nor would any officer thereof, approve a contract with the American Decalcomania Company of Chicago, for printing the stamps.

This action is based upon the ground that any contract with the American Decalcomania Company of Chicago would be invalid unless approved by the department of finance, as provided for in section 675a of the Political Code, and this action seeks to prevent the application of any of the moneys of the state toward payment upon such alleged invalid contract.

Section 654 of the Political Code reads: "A department of the government of the state of California to be known as the department of finance is hereby created. The department shall have general powers of supervision over all matters concerning the financial and business policies of the state and shall whenever it deems it necessary, or at the instance of the governor, institute or cause the institution of such investigations and proceedings as may be deemed proper to conserve the rights and interests of the state."

[1] The unmistakable purpose of the Legislature in adopting this section of the Code is to conserve the financial interests of the state, and to prevent, as far as possible, any improvident acts by any of the departments thereof; to give to the state such powers as would enable the department of finance to control the expenditures of state money by any of the several departments of the state. The general powers extend to the supervision of all the financial and business policies of the state, which necessarily include supervision of the expenditure of moneys belonging to the state. In pursuance of this policy and to render the intent of the Legislature effective, in 1927 (St. 1927, p. 455), the Legislature adopted section 675a, *supra*. That section has to deal with departmental con-

tracts, and provides that all contracts entered into by any state officer, board or commission, department or bureau, etc., for the purchase of supplies, must, before any contract is valid, receive the approval of the department of finance, and that such contract does not become effective until such approval is given. The section further provides that no state officer, board, commission, department, or bureau shall purchase supplies and materials, or either, in the open market, unless permission has been given therefor. The section further gives powers to the department of finance not necessary to be specifically mentioned herein.

Section 33 of the Alcoholic Beverage Control Act, adopted by the Legislature in 1935, so far as pertinent here, reads as follows: "Such stamps shall be sold by the board only to persons holding valid distilled spirits manufacturer's licenses, rectifier's licenses, distilled spirits and wine importer's licenses or distilled spirits wholesaler's licenses issued under this act or the State Liquor Control Act; provided, that until July 1, 1935, the board shall sell a sufficient number of such stamps, to stamp stocks of distilled spirits on hand, to persons holding valid on or off-sale licenses for liquor other than beer and wine, issued under the State Liquor Control Act; provided further, that the board may thereafter, in its discretion, sell such stamps to such holders of on or off-sale distilled spirits licenses as it may determine. On and after July 1, 1935, all distilled spirits delivered by any manufacturer, rectifier, importer or wholesaler of distilled spirits to any person holding an on or off-sale distilled spirits license issued under this act or an on-sale license for liquor other than beer and wine issued under the State Liquor Control Act, must be accompanied by a sufficient number of stamps purchased from the board, to stamp the packages containing such distilled spirits. Every manufacturer, rectifier, importer or wholesaler of distilled spirits who delivers distilled spirits in violation of this section shall be guilty of a misdemeanor. Such stamps shall be of such size, type, and character as the board shall determine; provided, that all such stamps must be of a character, design, and process which will give the state the maximum amount of protection against counterfeiting. The board shall have full charge and control of the issuance, securing, or purchase and of the sale of all such stamps and shall keep a record of all stamps sold

At the time such stamps are attached to the packages of distilled spirits, they shall immediately be canceled by indelibly writing or stamping thereon the number of the licensee attaching the stamp and the date of cancellation."

On the theory that the Legislature intended by the use of the word "purchase" in the fourth paragraph of section 33, *supra*, it is contended by the respondents and held by the trial court to relieve the Board of Equalization from the provisions of section 675a, *supra*, and that the use of the word "purchase" in said paragraph necessitates holding a repeal by implication of the power of the department of finance to supervise contracts for the purchase of liquor stamps, and of the necessity of an approval of any contract by the department of finance to render effective the action of the State Board of Equalization.

Does the wording of section 33, *supra*, necessitate the holding that any of the provisions of section 675a, *supra*, are repealed by implication? In the answer to this question consideration must first be given to the purposes controlling the adoption of the sections of the Code having to do with the department of finance, and also the adoption of chapter 330 by the Legislature in 1935. The fact that the sections of the Political Code having to do with the department of finance and the Alcoholic Beverage Control Act are dealing with distinct and separate subject-matters must be constantly kept in mind. The title of the act, preceding the adoption of the sections of the Code creating the department of finance, reads: "An act to add a new article to chapter 3 of Title 1 of Part 3 of the Political Code, to be numbered 'Article XVIII', embracing Sections 654 to 685, both inclusive, relating to the Department of Finance." (St. 1927, p. 449.) The title to the Alcoholic Beverage Control Act reads: "An act to license, regulate and control the manufacture, transportation, sale, purchase, possession and disposition of alcoholic beverages; to levy an excise tax on the sale of alcoholic beverages; to provide for the licensing of the manufacture, distribution and sale of alcoholic beverages; to prescribe penalties for the violation of this act; to make an appropriation for the enforcement of this act; to take effect immediately." (St. 1935, c. 330.)

The first act just mentioned has to do with the financial affairs of the state, with

the entering into contracts by the several departments of the state, and the expenditure of the moneys belonging to the state, all of which, for the purpose of conserving the public and financial interests of the state, must pass through, and receive the approval of the department of finance. The purpose of the Alcoholic Control Act is to give to the State Board of Equalization jurisdiction of the procuring of intoxicating liquors from the time it leaves the distillery until it reaches the ultimate consumer. It has nothing to do with the entering into contracts. The subject of contracts is not even mentioned.

[2] By providing for the use of stamps the Legislature has undoubtedly sought to enable the State Board of Equalization to outline a procedure which would enable the State Board to prevent the importation, sale, or distribution of illicit or unlicensed liquors, evading payment of the license taxes imposed by the act. The particular language involved under section 33, *supra*, is as follows: "The Board shall have full charge and control of the issuance, securing or purchase, and of the sale of all such stamps, and shall keep a record of all stamps sold." A careful reading of this sentence exhibits the fact that the words "issuing, securing or purchase" are used in connection with the obtaining of stamps by those proposing to engage in a business necessitating the use thereof; in other words, the State Board of Equalization has power to provide for the issuance and securing, and the purchase, by liquor dealers of every class, of the necessary stamps. By the use of the word "purchase," the Legislature has given to the State Board of Equalization an additional instrumentality by which it may provide the form to be used by any one dealing in intoxicating liquors, showing that such person is duly licensed and is entitled and required to become a purchaser of stamps. This includes the manner of liquor dealers securing stamps, all to be in accordance with the procedure adopted by the board for the issuance thereof. A record is then to be kept of all stamps sold. There would be no meaning, really, to the words "record of all stamps sold" if it did not include a keeping of the record of all of the names of the purchasers of stamps, which gives to the board, in following up the name of the purchaser, the number of stamps sold to him, and the different packages of liquor handled by the purchaser, a ready means of determining whether

there has been or is any evasion of the payment of any taxes imposed by the Alcoholic Beverage Control Act. To us, this unquestionably is the intent and purpose of section 33, *supra*, and does not necessitate any holding of the repeal by implication of any of the powers of the state department of finance.

Again, the Alcoholic Beverage Act contains a long list of acts and amendments of acts specifically repealed, which of course limits the expressed intent of the Legislature. Had the Legislature intended to exempt contracts by the State Board of Equalization in relation to contracts, the adding of the words "in entering into contracts" for stamps, the Board of Equalization is exempt from the provisions of section 675a, *supra*.

Again, section 33, *supra*, is specific in its intent to control, prescribe for, limit, and also *compel* liquor dealers to purchase stamps from the Board of Equalization. With that intent standing out clearly in the section it is not unreasonable to hold that the Legislature did not have in mind the repealing of any of the general powers vested in the state department of finance.

[3] The authorities are clear that repeals by implication are not favored. We quote here from 39 C.J. p. 905, § 510, which sets forth the rule approved by all the authorities, as follows: "The repeal of statutes by implication is not favored. The courts are slow to hold that one statute has repealed another by implication, and they will not make such an adjudication if they can avoid doing so consistently, or on any reasonable hypothesis, or if they can arrive at another result by any construction which is fair and reasonable. Also, the courts will not enlarge the meaning of one act in order to hold that it repeals another by implication, nor will they adopt an interpretation leading to an adjudication of repeal by implication unless it is inevitable, and a very clear and definite reason therefor can be assigned. Furthermore, the courts will not adjudge a statute to have been repealed by implication unless a legislative intent to repeal or supersede the statute plainly and clearly appears. The implication must be clear, necessary and irresistible. The foregoing rules are particularly applicable where the statute claimed to have been repealed has for a long time been rigidly adhered to and construed as being in existence, as well as where it has been given

a settled meaning by adjudications of the court of last resort, or where subsequent legislation shows that the legislature deemed it still in existence. Also, the rules are especially applicable where a repeal would lead to absurd consequences, or where the statute is an important one relating to a governmental matter, and a repeal would be destructive and ruinous of the public welfare, impair a settled prerogative of the government, or leave no law whatever on a subject concerning which it is necessary that there be a positive law of some sort."

We also quote section 515 of the same volume, which sets forth the rule to be followed when the subject and purpose of the acts are different, as follows: "The general rule that a statute prevails over, and impliedly repeals a prior inconsistent one, applies where both statutes relate to the same subject. While, except in a few jurisdictions, two statutes are not deemed repugnant to each other, unless they relate to the same subject, it is not sufficient to establish an implied repeal by inconsistency or repugnancy that the subsequent law covers some, or even all, of the cases provided for by the prior statute, since it may be merely affirmative, cumulative or auxiliary. Also, one statute is not impliedly repealed by another on the ground of inconsistency or repugnancy unless the two statutes have the same object or purpose."

In the case of *Niceley v. County of Madera*, 111 Cal.App. 731, 296 P. 306, 309, this court had occasion to consider the subject of repeal by implication, and there said: "As stated in 23 California Jurisprudence, page 697: 'In order that one statute may repeal another by implication, it seems clear that both must deal with the same subject matter. An act is not repealed by a subsequent act relating to another matter, nor is a section repealed by a subsequent section if the subjects of the two sections are distinct and separate and in nowise in conflict with each other.'" We can also apply the language there used to the circumstances here presented. We there further said: "We think the foregoing analysis shows that the two sections are distinct and deal with different subjects. * * * The law relative to the repeal of statutes by implication is clearly set forth in 23 California Jurisprudence, page 691 et seq., and shows clearly that one section of the code will not be repealed by a subse-

quent section making no mention of the prior section, unless there is an irreconcilable conflict."

By interpreting section 33, supra, as we have herein, we hold that it reasonably appears that there is no irreconcilable conflict, and actually no conflict whatever between section 33, supra, and section 675a, supra, when the purpose and intent of the Legislature in each instance is carefully analyzed and considered. As was said in the case of *Lillywhite v. Superior Court*, 80 Cal.App. 533, 251 P. 945, 946, 949: "Such a repeal, if it has been made, must have been by inference. Repeals by inference are repugnant to established rules of statutory construction. Only when the intention to repeal by inference is clear will a court be justified in holding that an enactment was meant to repeal a formerly existing one." And as further said in *Re Brewer's Estate*, 156 Cal. 89, 103 P. 486, 488: "Repeals by implication are not favored. They will be held to have taken place only where there is an irreconcilable conflict between the two acts, so that it is manifest that the Legislature did not intend both to be effective."

The language of the court in *County of Inyo v. Hess*, 53 Cal.App. 415, 200 P. 373, 376, in speaking of repeals by implication not being favored, we find the following: "This is particularly true where the effect of such repeal is to impair a settled prerogative of the government, as, in the instant case, the state's control of its highways." The settled prerogative of the government by the establishment of the department of finance, and giving it control and supervision over the acts of the different departments is just as we have stated, to prevent the entering into of any improvident contracts or the wasteful expenditure of the moneys belonging to the state.

We do not need to enter into a discussion of the use of the word "or" and point out that in many instances the intention is to refer to the same act or subject-matter. This, however, we think appears when we set forth the words "issuance, securing or purchase." These words, we think, relate to the one subject-matter, as we have stated, of obtaining stamps by dealers in intoxicating liquors.

[4] Other authorities might be cited supporting what we have heretofore set forth, but what we have stated we think is a reasonable construction to be placed upon the

words used by the Legislature in adopting section 33, supra, and absolutely repels the idea of repeal by implication, and that such construction permits each act to be given effect without any limitation upon the powers of the department of finance, as provided for in the different sections of the Political Code.

It follows from what we have said that the judgment should be reversed, and the cause remanded to the trial court, with instructions to enter judgment in accordance with the prayer of the plaintiff's complaint.

And it is so ordered.

We concur: PULLEN, P. J.; THOMPSON, J.



10 Cal.App.2d 674

McCAUGHNA v. BILHORN et al.

Civ. 1929.

District Court of Appeal, Fourth District,
California.

Dec. 17, 1935.

Hearing Denied by Supreme Court
Feb. 13, 1936.

1. Conversion ⇨15(2)

Where it clearly appears from will that testatrix intended that realty be sold during administration and proceeds be given to heir and bequest does not fail, equitable conversion of land into money occurs and will bequeaths personalty and does not devise realty (Probate Code, § 124).

2. Conversion ⇨15(1)

If by express language, or by reasonable construction of all its terms, will shows intention that original form of property shall be changed, conversion of property occurs (Probate Code, § 124).

3. Conversion ⇨15(1)

Sole purpose of equitable conversion of property devised by will is to effectuate testator's intention; hence doctrine cannot be invoked when testator's intention fails or cannot be accomplished (Probate Code, § 124).

4. Conversion ⇨15(3)

Where testamentary disposition fails, property devised retains its original character, and goes to heir or next of kin as realty or personalty (Probate Code, § 124).

5. Conversion ⇨15(3)

Where testator orders his realty sold, in absence of contrary intention, conversion

of realty into personalty will be deemed to have been directed for purposes of will, and hence, if any of such purposes fail so that personalty does not pass under will, personalty will be considered realty and given to heir (Probate Code, § 124).

6. Conversion ⇨15(3)

Where testatrix residing in Illinois devised realty in California to husband by holographic will and instructed husband to sell realty and pay proceeds to designated beneficiaries and will was invalid in Illinois but valid in California, will was construed as devising realty so as to effectuate clear intention of testatrix to permit beneficiaries to share in estate and not as effecting an equitable conversion of realty into personalty (Probate Code, § 124).

7. Courts ⇨125

Superior court is not a statutory tribunal when sitting in probate or equity, and its authority over such matters is derived from Constitution (Const. art. 6, §§ 1, 5).

8. Wills ⇨698

Superior court sitting in equity had jurisdiction of action for declaration of rights under will, especially where superior court sitting in probate could not settle entire controversy among parties (Code Civ.Proc. §§ 1060-1062; Const. art. 6, §§ 1, 5).

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by George B. McCaughna against Peter P. Bilhorn, individually and as executor of the estate of Nellie M. Bilhorn, deceased, and another, for a construction of the will, wherein defendants filed cross-actions. From a judgment for plaintiff, the executor appeals.

Affirmed.

Sherman & Sherman, of Los Angeles, for appellants.

Patterson & Montgomery and W. S. Scully, all of Los Angeles, for respondent.

MARKS, Justice.

This is an action for declaratory relief in interpreting the language of a will, and upon a rejected claim against the estate of Nellie M. Bilhorn, deceased. The plaintiff had judgment and the executor has appealed.

Peter P. and Nellie M. Bilhorn were husband and wife. Plaintiff is the brother of Nellie. Mr. and Mrs. Bilhorn were residents of Chicago, Ill., up to the time

of the death of the latter on May 25, 1932.

On November 2, 1907, Mrs. Bilhorn executed her will before two subscribing witnesses. This will appointed Peter P. Bilhorn as executor and left him all of the property of the testatrix. On May 19, 1932, Mrs. Bilhorn executed an holographic will which appointed her husband executor, left him all her personal property and certain described real property in California. It also contained the following: "I Nellie M. Bilhorn do hereby will and bequeath to my husband * * * and request that he sell the Ranch on Western Avenue Los Angeles at the earliest convenience and give to each of my brothers Geo B and John D McCaughna the price of 40 acres. The amount of 40 acres given to my Brother Geo B McCaughna shall include the contract of \$15,000 given him by me to be paid when place is sold. * * *"

The will of November 2, 1907, was admitted to probate in Cook county, Ill., and Peter P. Bilhorn was appointed executor. The holographic will was not entitled to probate there because it was not witnessed. Plaintiff offered the holographic will for probate in Los Angeles county. Peter P. Bilhorn filed a petition in the same proceeding seeking admission to probate of the will of November 2, 1907, as a foreign will, and filed a contest of the holographic will. The probate court admitted both wills to probate; the holographic will "in so far as its terms are inconsistent with the attested will dated November 2, 1907," and that will "in so far as its terms are consistent with the terms of the said holographic will," and issued letters testamentary to Peter P. Bilhorn who qualified and entered upon the performance of his duties as executor. This order has become final and is not now before us, and no question is raised as to its correctness.

Plaintiff and his wife filed a contingent claim against the estate for \$15,000, under a contract dated April 24, 1928. In the claim it was expressly stated that the claimants did not waive the right to take under the holographic will. They also waived the claim upon the sole condition that final distribution be had in accordance with the terms of the holographic will. The claim was rejected by the executor, and this action followed. Prior to the institution of the action, Mrs. McCaughna

assigned her interest in the debt and claim to plaintiff.

The contract was between Peter P. Bilhorn and Nellie M. Bilhorn as first parties, and George B. McCaughna and Mary E. McCaughna as second parties. It recited that the first parties were the owners of land in Los Angeles county (the same land mentioned in the holographic will); that it had been occupied by the second parties since September 1, 1912; that the second parties, with the consent of the first parties, had erected a dwelling and garage on the premises in 1912 and another dwelling in 1922 under an agreement that these buildings would be removed on request of the first parties; that the second parties proceed to move the buildings within four months; that the first parties will pay to the second parties \$15,000 in full payment of all claims and demands, "payment to be made from moneys received from said sale." The other provisions of the contract are not material here.

The trial court rendered judgment in favor of plaintiff. The judgment contains the following: "That George McCaughna, the plaintiff have and recover of and from Peter P. Bilhorn, Executor of the Estate of Nellie M. Bilhorn, deceased, the sum of Fifteen Thousand Dollars (\$15,000.00) with interest thereon at the rate of seven per cent (7%) per annum from and after May 25, 1932, * * *. It is further adjudged and decreed by way of declaratory relief that the devise to the plaintiff, George B. McCaughna, under the holographic will of the testatrix, Nellie M. Bilhorn, dated May 19, 1932, and admitted to probate in case number 129,698 in the Superior Court of the State of California, in and for the County of Los Angeles, reading as follows: 'and request that he (the executor) sell the Ranch on Western Avenue Los Angeles at the earliest convenience and give to each of my brothers Geo. B. and John D. McCaughna, the price of 40 acres', is a devise of real property and not a devise of personalty. That no equitable conversion of the said property so devised to the plaintiff arises or is effected under the terms of the said holographic will of May 19, 1932; that the property described in said will as the 'Ranch property on Western Avenue, Los Angeles' is in fact real property, legally described as follows: (Description). That the plaintiff is entitled to take and receive

in due course of administration of said Estate of Nellie M. Bilhorn in the probate proceeding Number 129,698, in the State of California in and for the County of Los Angeles, the said property devised to him under said holographic will of May 19, 1932; that said property so devised to the plaintiff became vested in him upon the death of the testatrix, Nellie M. Bilhorn, subject to the administration of her Estate in California. That in the event the plaintiff shall elect to take the devise under said will he shall waive his claim for money judgment herein given in accordance with the provision of said will."

The executor presents three grounds for a reversal of the judgment: (1) That there was an equitable conversion of the 40 acres of land to be sold for plaintiff whereby the courts must construe the holographic will as bequeathing personal property and not devising real estate; (2) that the probate side of the superior court had exclusive jurisdiction of a proceeding to construe the will and determine the proper distribution of the estate under its terms; (3) that there was no consideration for the contract whereby deceased promised to pay plaintiff \$15,000.

Section 124 of the Probate Code (formerly section 1338 of the Civil Code) provides as follows: "When a will directs the conversion of real property into money, such property and all its proceeds must be deemed personal property from the time of the testator's death." This section is merely declaratory of a like rule in equity long recognized in English-speaking countries. *Estep v. Armstrong*, 91 Cal. 659, 27 P. 1091; *Estate of Loyd*, 175 Cal. 699, 167 P. 157.

[1,2] It is well settled that where it clearly appears from a will that the testatrix intended that real property be sold during administration and the proceeds of the sale be given to an heir and the bequest does not fail, an equitable conversion of the land into money occurs and the will bequeaths personal property and does not devise real estate. In *Estate of Pforr*, 144 Cal. 121, 77 P. 825, 827, the Supreme Court said: "The provision for the sale of the property and the distribution of its proceeds among the six beneficiaries operated as an equitable conversion of the real estate into personalty. Civ.Code, § 1338. This result is not overcome by reason of the testator having used the

word 'desire,' instead of 'direct,' in authorizing the sale. The words 'I desire' that my real estate shall be sold are the equivalent of the words 'I will' that it be sold. Appeal of City of Philadelphia, 112 Pa. 470, 4 A. 4. While the desire of a testator for the disposal of his estate is a mere request when addressed to his devisee, it is to be construed as a command when addressed to his executor. Estate of Marti, 132 Cal. 666, 61 P. 964, 64 P. 1071.

"Whether such conversion is effected depends upon the intention of the testator, as gathered from the entire provisions of his will. If it is apparent from its terms that it was his will that the estate be sold and the proceeds given to his beneficiaries, an equitable conversion results, even if the direction for the sale is not imperative. Dodge v. Pond, 23 N.Y. 69. 'The question of conversion is a question of intention, and the real question is, did the testator intend his land should be converted into money, at all events, before distribution?' Wurts' Ex'rs v. Page, 19 N.J.Eq. 365, 375. Pomeroy, Eq.Jur. § 1161, says: 'In fact, the whole result depends upon the intention. If, by express language, or by a reasonable construction of all its terms, the instrument shows an intention that the original form of the property shall be changed, then a conversion necessarily takes place.'" See, In re Estate of Walkerly, 108 Cal. 627, 41 P. 772, 49 Am.St. Rep. 97; Fatjo v. Swasey, 111 Cal. 628, 44 P. 225; Bank of Ukiah v. Rice, 143 Cal. 265, 76 P. 1020, 101 Am.St.Rep. 118; Estate of Loyd, supra.

[3,4] While the doctrine of equitable conversion is well established, its limitations are also well settled. The rule is stated in 6 R.C.L. 1071, as follows: "While the doctrine of equitable conversion is well settled on principle and reason, and is recognized in numerous cases, the sphere or limitation of its application is equally well established, and should be observed. A limitation as well settled on reason and authority as the doctrine itself is the principle that, since the sole purpose of the doctrine in the case of a will is to effectuate the intention of a testator, it cannot be invoked when his intention fails or is incapable of accomplishment by reason of illegality, lapse, or other cause. The reason of the rule then ceasing, the rule itself no longer obtains. * * * Therefore, where a testamentary disposition or any part thereof fails, the

property devised retains its original character, and goes to the heir or next of kin as real estate or personalty, as the case may be. And nothing short of a clear intention, to be collected from the will, that land shall be sold and converted into money before division, whether the particular purpose fails or not, will be sufficient in equity to change the character of the property."

[5] In McGlynn v. McGlynn, 101 N. J.Eq. 66, 137 A. 434, 436, it was said: "While it was the testator's intention that all his real estate should be sold and converted, nevertheless, as to so much of the trust in perpetuity for the members of the testator's family, held to be invalid, the conversion failed pro tanto, and only so much of the proceeds of the sale of the real estate, applicable to the trust, as may be required to maintain the annuity, and for that limited purpose only, is to be treated as personal property, and upon the termination of the annuity it will resume its original character of real property and pass to the heirs at law. The conversion was solely for the purpose of carrying out the testamentary scheme, and with respect to matters in which the scheme failed the conversion failed. The principle is well established in this state in Roy v. Monroe, 47 N.J.Eq. 356, 20 A. 481, followed in Canfield v. Canfield, 62 N.J.Eq. 578, 50 A. 471, the essence of which is set forth in this headnote:

"Where a testator orders his land to be sold, the conversion will, unless a contrary intention distinctly appears, be deemed to have been directed merely for the purposes of the will, and consequently, if any of those purposes fail, so that the money does not pass under the will, it will, in equity, be considered land and be given to the heir."

The Court of Appeals of New York applied the same rule in Read v. Williams, 125 N.Y. 560, 26 N.E. 730, 732, 21 Am.St. Rep. 748, where it was said: "The gift failing, the purpose of the conversion ceased, and the direction to sell the real estate was no longer inoperative. The conversion of course, was not directed for the purpose of distribution of the estate as money among the next of kin. The testatrix never intended that they should take it in any form. The case falls within the general principle declared in many cases, that a power of sale in a will, however peremptory in form, if it can be seen

that it was inserted in aid of a particular purpose of the testator, or to accomplish his general scheme of distribution, does not ipso facto operate as a conversion where the scheme or purpose fails by reason of illegality, lapse, or other cause. In that case the property retains its original character, and it goes to the heir or next of kin as real estate or personalty, as the case may be."

The following cases adopt the same rule: *Fifield v. Van Wyck's Ex'r*, 94 Va. 557, 27 S.E. 446, 64 Am.St.Rep. 745; *In re Hopkins*, 1 Ch. 35, 13 British R.C. 881; *Estate of Burden*, 107 Misc. 416, 177 N.Y. S. 748; *In re Van Zandt's Estate*, 142 Misc. 663, 255 N.Y.S. 359. See, also, *Inghram v. Chandler*, 179 Iowa, 304, 161 N.W. 434, L.R.A. 1917D, 713; *Crerar v. Williams*, 145 Ill. 625, 34 N.E. 467, 21 L. R.A. 454.

We have not been cited to, nor have we found, any California case in which the question we are considering has been directly decided. It was discussed with approval in *Estate of Gracey*, 200 Cal. 482, 253 P. 921. The Supreme Court was of the opinion that as the testamentary document considered in that case did not contain a command that the real property involved be sold, the absence of such command in itself furnished sufficient ground for refusing to apply the doctrine of equitable conversion.

It seems evident from a reading of the holographic will that deceased intended that the 180 acres be sold for the purpose of giving the value of 40 acres or two-ninths of the sale price (to include the \$15,000 contract obligation) to plaintiff, the value of 40 acres, or two-ninths of the sale price of John D. McCaughna, another brother, and the balance to Peter P. Bilhorn, the husband. It is clear that the sale of the land was authorized for the sole purpose of carrying into effect the two gifts to the two brothers as made in the holographic will and of carrying out the purposes of that document.

Counsel seem to concede that the law of California will govern a devise of real estate situated here; that the law of Illinois, the domicile of deceased, will govern bequests of personal property no matter where situated; that if the holographic will be construed as containing a devise of real estate to plaintiff, the land or an undivided interest in the 180 acres will be distributed to him under the terms of the

holographic will which is valid in California; that if this will be construed as effecting an equitable conversion of the interest in the land into personal property, it will be distributed to the husband by the courts of Illinois under the terms of the witnessed will of 1907, the holographic will not having been legally executed according to Illinois law and being void there. For the purpose of this opinion we will assume that these premises and conclusions are correct.

[6] If we adopted the theory of an equitable conversion of the land into money we would defeat the clear intention of the testatrix as expressed in her holographic will, deprive both her brothers of the shares in her estate which she clearly intended them to receive, and give to her husband a considerable inheritance which she intended to go to others. Under these circumstances, the doctrine of equitable conversion should not be held to apply to this case. Thus we can carry out the intention of the testatrix, and give full force and effect to her holographic will instead of defeating her purpose and rewriting her will for her. For the reasons just given, and under the authorities last cited, the trial court was correct in its conclusion that the holographic will devised to plaintiff an interest in real property, and that no equitable conversion occurred.

Plaintiff is entitled to a two-ninths interest in the 180 acres of land, or a two-ninths of the net selling price should it be sold during the course of administration, subject of course to any deduction for taxes, debts, expenses of administration, and like charges if by necessity any of them be imposed thereon.

The question of the jurisdiction of the equity as distinguished from the probate side of the superior court to entertain this action for a construction of the terms of a will is a new one in California. It is conceded that such construction may be had in probate. Appellant urges that this jurisdiction must be held to be exclusive.

Section 1060 of the Code of Civil Procedure provides in part as follows: "Any person interested under a * * * will * * * or who desires a declaration of his rights or duties with respect to another, or in respect to, in, over, or upon property, * * * may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring

an action in the superior court for a declaration of his rights and duties in the premises, including a determination of any question of construction or validity arising under such instrument or contract. He may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of such rights or duties, whether or not further relief is or could be claimed at the time. The declaration may be either affirmative or negative in form and effect, and such declaration shall have the force of a final judgment."

The general scope of the proceeding for declaratory relief, the sufficiency of pleadings, the form of judgment, and other such matters may be learned by a study of the following cases: *Blakeslee v. Wilson*, 190 Cal. 479, 213 P. 495; *City of San Diego v. Cuyamaca Water Co.*, 209 Cal. 105, 287 P. 475; *James v. Hall*, 88 Cal.App. 528, 264 P. 516; *Lane Mortgage Co. v. Crenshaw*, 93 Cal. App. 411, 269 P. 672; *Oldham v. Moodie*, 94 Cal.App. 88, 270 P. 688; *Andrews v. City of Piedmont*, 100 Cal. App. 700, 281 P. 78; *Stenzel v. Kronick*, 102 Cal.App. 507, 283 P. 93; *Transport Oil Co. v. Bush*, 114 Cal.App. 152, 1 P.(2d) 1060, and *Welfare Inv. Co. v. Stowell*, 132 Cal.App. 275, 22 P.(2d) 529. As the Legislature has provided that an action for declaratory relief may be brought by any person interested under a will, and as a real controversy has arisen between plaintiff and appellant as to plaintiff's rights under a will, we can see no reason why the superior court sitting in equity should not assume jurisdiction over such controversy if exclusive jurisdiction be not vested in the superior court sitting in probate; it having taken jurisdiction of the administration of the estate.

[7] Section 1 of article 6 of the Constitution provides for the existence of superior courts in the state, and section 5 of the same article provides their jurisdiction. There is no distinct probate court in this state. In *re Burton*, 93 Cal. 459, 29 P. 36. The superior court finds its authority over probate matters in the provisions of the Constitution. It is not a statutory tribunal when sitting in probate. *Heydenfeldt v. Superior Court*, 117 Cal. 348, 49 P. 210. The same is true of the superior court when sitting in equity. When so engaged, the court derives its authority from the Constitution. While this is true, the Legislature may create new

rights or recognize new occasions when cases in equity may arise. *Spreckels v. Hawaiian, etc., Co.*, 117 Cal. 377, 49 P. 353. In many jurisdictions parties have been given declaratory relief under general equity powers without special statutory authority. As section 1060 of the Code of Civil Procedure does not attempt to change the jurisdiction of the superior courts, but merely creates a statutory remedy where one did not exist before by authority of express law, we can see no reason why the jurisdiction over suits for the declaration of rights under a will may not be given to the superior courts when sitting in equity as well as to the same courts, when sitting in probate. This is especially true in view of section 1062 of the Code of Civil Procedure which provides: "The remedies provided by this chapter are cumulative, and shall not be construed as restricting any remedy, provisional or otherwise, provided by law for the benefit of any party to such action, and no judgment under this chapter shall preclude any party from obtaining additional relief based upon the same facts."

There need be no conflict in authority between the two sides of the superior courts when declaring rights and duties under wills if the power be prudently exercised by the judges of those courts when sitting in equity. Where the declaration of the rights and duties under a will is the only matter before the court, the judges sitting in equity might with great propriety leave the settlement of the controversy to the probate side of the court. *Metsker v. Metsker*, 320 Ill. 547, 151 N.E. 539. This power is given them by section 1061 of the Code of Civil Procedure which provides: "The court may refuse to exercise the power granted by this chapter in any case where its declaration or determination is not necessary or proper at the time under all the circumstances." If such a course is intelligently followed, the probate side of the courts need not be embarrassed by decisions from the equity side.

[8] In the instant case the superior court sitting in probate could not settle the entire controversy among the parties. Plaintiff had presented his claim against the estate and it had been rejected. He had to bring his action on the claim in the civil side of the court or be foreclosed from recovery by the statute of limitations. An action on the claim alone might have

been construed as an election to take under the contract and not under the will. He could not take under both, and he was uncertain of his rights under the will. If he proceeded in the probate court to have his rights determined under the will, it might very well happen that before a final decision there his right of action on the claim might have been barred. Under these circumstances it was proper for plaintiff to bring this action and for the superior court not sitting in probate to take jurisdiction of it and fully determine the controversy.

Appellant urges that the evidence shows that no consideration was given for the contract whereby deceased and her husband promised to pay plaintiff and his wife \$15,000. We have studied the record and have found evidence supporting the finding that the contract was supported by a consideration. This being so, we cannot disturb the judgment on that score.

Appellant complains of the ruling of the trial judge in admitting in evidence a contract bearing on its face pencil marks which appellant maintains constituted an unexplained material alteration of the instrument. When the objection was made the trial judge had the document before him. He remarked that the pencil marks appeared to be largely erased without mutilating the typewriting. An examination of a photograph of the instrument sustains this conclusion. The matter was one within the sound discretion of the trial judge.

The trial court found, in its finding No. 11 that the real property in question here was the separate property of deceased. Appellant complains of this as it might affect his rights on distribution. This finding is entirely unnecessary here. The appraised value of decedent's property in California was fixed at about \$210,000. It was stipulated that the 180 acres of land were worth \$1,000 per acre. This would make the land devised to each brother worth \$40,000. If the finding that the property was separate could in any way affect appellant's rights, it may be stricken from the record without impairing the judgment.

Finding No. 11 is ordered stricken from the findings of fact and conclusions of law. Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

BRINDAMOUR et al. v. MURRAY et al.
(PORTER, Intervener). *
Civ. 10060.

District Court of Appeal, Second District,
Division 2, California.
Dec. 13, 1935.

Rehearing Denied Jan. 1, 1936.

Hearing Granted by Supreme Court
Feb. 10, 1936.

Automobiles ☞187

City held not liable for damages sustained by third persons in collision with automobile belonging to city, which was driven by police captain who was not on duty and was not acting in scope of his employment (Civ.Code, § 1714½).

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by George Brindamour and another against Thomas Murray and the City of Los Angeles, a municipal corporation, in which Minnetta B. Porter intervened. From a judgment against Thomas Murray and the City of Los Angeles, Thomas Murray and the City of Los Angeles appeal.

Judgment reversed as to the City of Los Angeles, and affirmed as to Thomas Murray.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Albert E. Wheatcroft, Deputy City Atty., all of Los Angeles, for appellants.

Henry Davidian, of Los Angeles, for respondents.

CRAIL, Presiding Justice.

This is an appeal from a judgment for damages sustained by plaintiffs as the result of an automobile collision. The defendant Murray was a captain in the police department of the city of Los Angeles and was driving a car which belonged to the city. His hours of work on the day of the accident were from 8 o'clock in the morning to 5 o'clock in the evening. He left the police station at 5 p. m. with the city's car, drove to his home where he met his wife, and they came downtown, visited with a friend for a while, and then had dinner at a restaurant on Broadway. The accident happened at 11:20 p. m.

It is the contention of the defendant city that it is not liable unless its car at the time of the collision was being driven by its employee acting within the scope of his employment. On the other hand, plaintiffs

contend that the city would be liable for the negligence of the driver of a car owned by the city if such driver were in fact an officer, agent, or employee of the city, irrespective of whether or not he was operating the car within the scope of his authority. The city of Los Angeles contends that to place such a construction upon section 1714½ of the Civil Code would necessitate holding such section unconstitutional and therefore void for the reason that it would impose liability merely by virtue of ownership of the vehicle regardless of whether its use was authorized.

The plaintiffs' cause of action in this case is measured by the provisions of section 1714½ of the Civil Code, which reads, in so far as it is pertinent hereto, as follows: "Hereafter, * * * every * * * municipal corporation, * * * owning any motor vehicle shall be responsible to every person who sustains any damage by reason of death, or injury to person or property as the result of the negligent operation of any said motor vehicle by an officer, agent, or employee or as the result of the negligent operation of any other motor vehicle by any officer, agent or employee when acting within the scope of his office, agency or employment."

This section of the Code has already been construed in the case of *Woodman v. Hemet Union High School*, etc., 136 Cal.App. 544, at page 551, 29 P.(2d) 257, 261, where the court said: "Section 1714½ of the Civil Code provides a liability on the part of a school district owning a motor vehicle for damages by reason of death or injury to person or property resulting from the negligent operation of such motor vehicle by its officer, agent, or employee when acting within the scope of his office, agency or employment. This section would seem to restrict actions brought under it to those cases where the injury was caused by a motor vehicle * * * negligently operated by an * * * employee of the district * * * acting within the scope of his office, agency or employment." We are satisfied that under a fair and reasonable construction of said section the city would not be liable under the circumstances of this case unless its employee was acting within the scope of his employment. There is an absence of evidence in the record that its employee was so acting.

The judgment is reversed as to the city of Los Angeles, and affirmed as to the defendant Murray.

We concur: WOOD, J.; McCOMB, Justice pro tem.



MEGOWAN v. CITY OF LOS ANGELES.

ONSTAD v. SAME. *

Civ. 10576, 10577.

District Court of Appeal, Second District,
Division 2, California.

Dec. 13, 1935.

Hearing Granted by Supreme Court
Feb. 10, 1936.

Automobiles ☞245(30)

Whether municipal automobile responsible for collision was being operated by municipality's employee within scope of his employment and for a municipal purpose held for trier of facts (Civ.Code, § 1714½).

Appeals from Superior Court, Los Angeles County; Frank Lamberson, Judge.

Actions by Irwin F. Megowan, and by Andrew L. Onstad, against the City of Los Angeles, a municipal corporation. From judgments for the plaintiffs, the defendant appeals.

Affirmed.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Albert E. Wheatcroft, Deputy City Atty., all of Los Angeles, for appellant.

Guy Richards Crump, of Los Angeles, and Morton E. Feiler (Roy W. Colegate, of Los Angeles, of counsel), for respondents.

CRAIL, Presiding Justice.

These are appeals by the defendant city of Los Angeles from two judgments rendered in favor of plaintiffs in cases under section 1714½ of the Civil Code for damages for personal injuries and property damage received in an automobile accident. The collision occurred between an automobile owned by the city and driven by defendant Meador and the automobile of

plaintiff Megowan. Judgment went against both defendants, but only the city has appealed. The cases are similar in nature to the case of *Brindamour v. City of Los Angeles* (Cal.App.) 52 P.(2d) 1031, this day decided by us, except that in addition to the matters alleged and proved in that case, the plaintiffs in these cases alleged and offered to prove that the automobile of the city which caused the collision was being operated by the city's employee within the scope of his employment.

The appellant says: "The only points raised on appeal are whether the driver of appellant's automobile was engaged at the time of the accident in an act in line with his employment and whether the automobile was being used for a municipal purpose." These are both questions of fact to be determined by the fact finder and they do not come before this court for review except upon the contention that there is an absence of any substantial evidence to sustain the findings of the trial court with regard thereto. We have read the briefs and the record, and we find that there is some substantial evidence to sustain the findings. It would serve no useful purpose to set out the evidence upon which we rely for this conclusion. *Koeberle v. Hotchkiss* (Cal. App.) 48 P.(2d) 104.

Judgments affirmed.

We concur: WOOD, J.; McCOMB,
Justice pro tem.

CAL.REP.51-52 P.2d-43





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